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The International Legal Protection of Submarine Cultural Heritage of the Mediterranean Sea in the Framework of the 2001 UNESCO Convention

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1. The *ratio* for protecting underwater cultural heritage at the international level is to be inscribed in a broader legal system for cultural heritage in the interest of humankind

(a)The construction of a system

To speak of the international protection of underwater cultural heritage today necessarily means to tackle with the text of the Convention on the protection of such heritage, concluded in Paris on 2 November 2001 by adoption by the UNESCO General Conference[1]. Such text in fact, though not yet in force (pending the necessary twenty ratifications), not only represents a compendium of long-debated solutions, but can also be regarded as a new brick in the completion of an ideal international legal system for the protection of cultural heritage in general.

At the universal level, the basic scheme of the international conventional system for cultural property protection is to be found in five UNESCO conventions. Three of them have already been in force for a long time and have recently been reviewed or completed in order to be ensured better protection results. In 1995 a UNIDROIT Convention has been concluded in Rome to complete the basic general discipline of UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris 1970), in 1999, in The Hague, the Second Additional Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 1954) has been adopted, and currently a general revision of the text of the Operational Guidelines implementing the UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (Paris, 1972) is being completed. The last two, more recent, UNESCO Conventions are, as already said, on underwater cultural heritage (Paris, 2001) and on Intangible Cultural Heritage (Paris, 2003). UNESCO is currently working at a Draft Convention on Cultural Diversity.

(b) International protection is not just a double of the national one

This list of agreements is in itself extremely interesting, for it undoubtedly testifies of the precise commitment of the International Community, enhanced in the last years, to ensure protection to all relevant aspects of cultural heritage, and hence it unveils an important hint to the existence of an underlying qualified international interest to the protection.

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[1] Convention on the Protection of the Underwater Cultural Heritage (UNESCO, Paris, 2 November 2001). The text of the Convention and other relevant international documents are reproduced in Garabello and Scovazzi (eds), "The Protection of the Underwater Cultural Heritage. Before and after the 2001 UNESCO Convention", Leiden, 2003; to this text is here made reference for in-depth considerations about the negotiating process of the Convention and an extensive bibliography on these subjects.

It could be argued that in some cases the recourse to international legal instruments is simply necessary, because the jurisdiction of each State is insufficient in itself to ensure effective protection (for instance as regards the international circulation of movable properties or the protection in the event of armed conflict) or, more generally, that the international level of protection is simply a "double" of the national one, to which it just adds in terms of cooperation. Nevertheless, in-depth analysis of international practice leads to less minimalist conclusions, with important consequences not only on the conceptual level, for the affirmation of an inherent international interest to the protection of cultural heritage in all its different forms, but also with practical implications, about the development of specific protection regimes, in particular with reference to the regime for underwater cultural heritage. And not surprisingly so, for all legal regimes are sophisticated machines that answer to a simple question along the lines dictated by a precise *ratio*, which means that rules can be properly applied only in consideration of their *ratio*, directly deriving from the underlying interest to be protected. All the more so for international legal regimes.

It is true, though, that the international interest to protection of cultural heritage is self-contained in its *ratio* but not exclusive as for the objects to be protected, because in most cases they are also protected at national level, by the territorial State in which they are located or by the State of citizenship of the owner of the property, as a consequence of the fact that there is also a State interest to the protection, which usually has been recognised before the existence of the international interest was highlighted. This accounts for the important link that cultural expressions have with the contest by which they are produced and/or in which they are present. What is not true is the presupposition that national and international protection of cultural heritage should necessarily have the same *ratio*.

(c) It is a question of different perspectives and potentials between the two levels

In fact, the interests underlying the protection – and therefore their *ratio* – cannot be completely identical, given the different perspective, points of reference and potential of the two juridical levels. This is why, for instance, if on the one hand national legislations about exportation of cultural properties – usually developed a long time before the conclusion of 1970 UNESCO Convention - could be regarded as "protectionist", because their main objective is not to let the properties get out of national territory (such a kind of national protection is sometimes deemed to be ancient and not so far sighted, though in the end completely licit, accepted also in the framework of trade conventions), on the other hand it is certainly not so for the international multilateral conventions on the transfer of movable cultural properties. The 1970 UNESCO Convention, in particular, expressly refers to the

responsibility (and not to the right) of State Parties to control the export/import of cultural properties in order to combat illicit transfers and favour their restitution/return to the State of origin, thus implying a shared responsibility for the safeguarding of the heritage for the protection of a superior and common interest (and not just for the interest of each State to get possession of "its belongings").

Another good example can be found in the international regime for protection of cultural heritage during armed conflicts. Not only the statement of principles in the preambular part of the agreements, but also – and more so – the regulations themselves demonstrate that the reason for the conclusion of the agreements are not just to be connected to the insufficiency of national legislation about protection in situations where more than one State is involved, but primarily to the international interest of protection of cultural heritage from serious risks of damage or destruction, independently of its "belonging" to one or the other of the conflicting Parties and of its "proprietor's" attitude.

Though derived from the national interests already manifested in connection to most categories of cultural properties and expressions, protection of cultural heritage at the international level has thus its own meaning, which has been explained with relation to the concept of common interests of mankind, generally protected via *erga omnes* obligations – or *erga omnes Partes,* in case only conventional norms can be applied. It is not for this paper to go in depth into these considerations, but they are indispensable to comprehend that on this fundamental *ratio* of all the international multilateral systems for the protection of cultural heritage are developed, and the Underwater Cultural Heritage Convention does not constitute an exception.

(d) The 2001 Paris Convention protects a common interest

It descends from these premises that, since it is the interest of mankind as a whole which is at stake, the primary question is not about who owns what – such problems can and must be solved independently of the different – and priority – problem about protection from threats of destruction, damage, loss to public access. This is why the international protection of movable cultural properties is designed not just to let every State get back its own national properties, but first of all to ensure that all States cooperate in order to contrast illicit transfers, because they put at serious risk the conservation and public access to cultural values, and to leave cultural properties in their appropriate setting, where their significance is properly expressed. Even more so as for cultural properties which usually are to be found outside of the territory of States, on which "ownership" cannot be easily assessed, as is the case for underwater cultural heritage. The international protection is aimed to guarantee its

safeguarding to the benefit of all humankind, irrespectively of any assumption about "State ownership", let alone the eventual assessment of individual private property.

Only if read in the light of this *ratio*, the 2001 Paris Convention can really be understood, in particular with reference to the meaning of the State jurisdiction over activities directed at the underwater cultural heritage in the exclusive economic zone and/or on the continental shelf and to the problems related to the supposed relevance of *salvage law* and *law of finds* in connection with the protection of cultural heritage. Following the same *ratio*, it is clear that there is still use for regional agreements aimed at enhancing and specifically applying the general rules to particular contexts (such as closed or semi-enclosed basins), provided that they are not of obstacle to the application of the general Convention.

2. The specific problem of underwater cultural heritage: substantial lack of State jurisdiction for cultural heritage protection purposes in the exclusive economic zone and over the continental shelf

(a) UNCLOS and the balance between freedom and jurisdiction in the seas

As we have already seen, the system of international legal protection of the cultural heritage in the common interest of the whole international community is now virtually completed by UNESCO, which has stimulated the negotiation and conclusion, by its member States, of several international conventions. These international instruments have been conceived in order to solve different problems related to heritage protection; in particular the 2001 Paris Convention on underwater cultural heritage is peculiar because it has to solve the basic problem of a substantial lack of any jurisdiction – and consequently of regulation – on the underwater cultural properties beyond the limits of the territorial sea and, if established, of the archaeological zone.

This lack of jurisdiction derives from the regime of marine areas as settled in the United Nations Convention on the Law of the Sea (UNCLOS), concluded, after ten years of negotiation, in Montego Bay (Jamaica) in 1982. The Third United Nations Conference on the Law of the Sea, in which the text was drafted and negotiated, with respect to marine areas jurisdiction, reached a compromise solution between the opposite positions of marine States, mostly contrary to the broad extension of coastal States jurisdiction over the sea, and coastal States, mostly in favour of the recognition of such extensive jurisdictions. Because of this difficult composition of opposite interests, the regime provided for in UNCLOS has been

retained by States as a balanced solution not to be put into discussion in subsequent negotiations[2].

(b) Focus on the economic exploitation interests in UNCLOS

Now, such regime doesn't, if not incidentally, address the problem of underwater cultural heritage protection. In fact, it is mostly oriented at regulating the economic exploitation of marine resources, both living and mineral ones, through the establishment of exclusive – or at least primary – rights of coastal States on the resources located next to their territory. To the codification (with variations) of the continental shelf, already disciplined by one of the four Geneva Conventions of 1958, the UNCLOS added the possibility of extending a 200nautical miles exclusive economic zone, for both mining and fishing purposes.

Other interests and common concerns are regulated by UNCLOS in a general way, without recognising a primary role to the so-called coastal States, and a good example can be found in the regime for protection of the marine environment. In fact, protection of the marine environment is primarily a responsibility of the coastal State insofar as it is directly linked to the conservation of marine living resources in its exclusive economic zone, but it is also responsibility of all States, and in particular of the flag State, the coastal State and the State of the port where the potentially polluting ship is looking for shelter.

Just as the protection of marine environment, the protection of underwater cultural heritage is also conceived in UNCLOS as a "common concern of mankind", this is why it is provided for a general obligation to protect objects of an archaeological and historical nature found at sea and to co-operate for this purpose[3]. The problem is that, once stated, this general obligation needs to be translated into an operational regime of protection, and such a regime – even just in its rough characteristics - is not provided for by UNCLOS.

(c) Fragmentary and specific heritage protection solutions for some marine areas

What is provided for, on the contrary, is a set of possible different solutions, each of them conceived in consideration of the special situation of each different marine area. As a consequence, no general regime can be inferred on base of these provisions and not all marine areas are covered by them. The resulting situation is hereby summed up, beginning from the coastline and going towards high seas.

As for underwater cultural heritage located within internal maritime waters and territorial sea (and archipelagic waters where appropriate), it is naturally subject – just as for

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[2] For a general review of the regime of marine spaces, in the overall consideration of international spaces, and also of the regime of world cultural and natural heritage, see Leanza, "Il diritto degli spazi internazionali", Torino, 1999.

[3] These general obligations are disposed by art. 303, para. 1 of the UNCLOS.

every other matter, and so implicitly - to the overall jurisdiction of the coastal State, which means that the level of protection of objects to be found in those areas uniquely depends on the coastal State legislation and control (though it could be affirmed that under the aforementioned general obligation States are obliged to enact adequate legislations). As for the contiguous zone, it is possible, if the coastal State so decides, to establish a 24-nautical miles archaeological zone where removal from the sea-bed of objects of an archaeological and historical nature can be regulated, and consequently prevented and sanctioned, by the coastal State. The last provision to be found in UNCLOS to our purposes is to be applied in the Area (seabed and ocean floor beyond the limits of national jurisdiction), which means that its application cannot begin nearer than 200 nautical miles from the baselines, near the coasts. For the Area, it is provided that all objects of an archaeological and historical nature thereby found 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 of origin of the object.

It is clear from this very synthetic presentation that, in spite of the provision of a general obligation for the protection of underwater cultural heritage in whichever marine area located, of whatever origin and irrespectively of who finds it, the different regimes outlined for some different marine areas in UNCLOS in respect of underwater cultural heritage protection are focussed more on the question "which State is entitled to retain possession of the cultural objects found at sea?" than on the general concern to ensure their protection in every case, for the benefit of all mankind.

(d) *Horror jurisdictionis* blocks any solution for the exclusive economic zone

From this false representation of the problem descends the lack of jurisdiction left by UNCLOS as for the protection of underwater cultural heritage in the exclusive economic zone and/or the continental shelf, that is from the end of the possible 24-mile archaeological zone (up to where it is a right – but also a duty, though impossible to enforce – of the coastal State to regulate and control activities directed at the heritage) to the beginning of the Area (where such a duty should be performed by the International Seabed Authority created by UNCLOS). Were the framework a different one, it would perhaps have been possible to get over the problem and fill up the gap through interpretation, though a very extensive one. This way has been explored, but with no positive results, through the reference to coastal State jurisdiction over scientific research in the exclusive economic zone. It was clearly stated during the negotiations that an interpretation to the effect to include research on and removal of underwater cultural heritage in the notion of marine scientific research was out of the question.

Also subsequent negotiations based on the idea that jurisdiction over activities directed at underwater cultural heritage was to be recognised to coastal States were to fail their goals, for the same reason which had condemned any interpretative solution to be developed in the framework of the coastal State jurisdictions recognised by UNCLOS. It has been called *horror jurisdictionis*[4], and consists in the fear that any alteration to the balanced position agreed in UNCLOS between "creeping jurisdictions" into the seas and freedom of the seas supporters would put everything again into discussion, to the detriment of freedom of the seas.

To some extent, the fear was justified because UNCLOS is almost entirely conceived in terms of regulating jurisdictions for coastal States aimed to ensure areas of exclusive or priority rights to economic resources, without excessively limiting freedom of navigation in such areas. Also the fragmentary regimes for protection of underwater cultural heritage established by the Montego Bay Convention, as we have seen, are in line with this basic idea of a distribution of areas to gain possession not of the area itself, but of the resources it contains (it goes without saying that the coastal State can regulate and control removal of cultural objects from the archaeological zone because it is assumed that such objects pertain to its sovereignty – unless otherwise proved-, just as, *a contrario*, cultural objects found in the Area – a neutral zone, out of every State jurisdiction by definition – are to be preserved for the benefit of all mankind, and such objects can be delivered to a particular State only in consideration of its specific cultural links to the object in question[5]).

(e) There is no reason for *horror jurisdictionis* regarding heritage protection

Nevertheless, such a conception, well-suited to manage each State's economic interests and definitely not so for the protection of common interests of the whole International Community, wasn't the only way left open by UNCLOS to solve the problem of safeguarding underwater cultural heritage. The hint to general cooperation needed to be developed into a full operational regime, where responsibilities - not rights – were to be shared by all States, in consideration of the common interest to the protection of the cultural heritage, wherever located and to whatever culture it belongs.

The first question, to be answered by "public" international law, thus was "How do we prevent unregulated looting of the seas, which very often not only causes the loss of the cultural property itself to all mankind – exception made for the looters and their commissioners – but also causes the destruction of a large amount of data and "minor"

[4] See Scovazzi, "A Contradictory and Counterproductive Regime", in Garabello and Scovazzi, op. cit., p. 6.
[5] See respectively art. 303.2 and art. 149 of UNCLOS.

objects, which are essential for the accurate reconstruction of a cultural site?" As we have seen, the problem is extremely serious for the marine area extended between the 24 and the 200 nautical miles from the coastline (or, more precisely, from the baselines traced in proximity of the coast), as in that area no control whatsoever can be exercised for the time being[6] – exception made, naturally, for the hypothetic control of the flag State over the activities of its ship (which is eventual, for it depends on such State having or not regulated the matter, and very difficult to be timely and effective for ships that are scattered all over the world).

It is possible, in the abstract, to answer to this question in many different ways, one of which – the easiest, one would say – is to give to the coastal State the responsibility of regulating and controlling the activities directed at the heritage in such area. Since it is not a question of "who owns what" and there is no right to be adjudicated, just a task to be performed in the common interest, such a responsibility entrusted to coastal States should cause no *horror jurisdictionis*, it should rather encounter the unwillingness of coastal States to accept an obligation of hard-working with nothing assured in reward (though, on the one hand, having saved an asset of great value for all humankind should be a sufficient reward and, on the other hand, they could very probably prove titles of cultural link to most of the objects found in proximity of their coasts).

Such a way has been proved impossible to follow, not only in the interpretation of UNCLOS, as we have already seen, but also - out of that framework, so conditioned by economic interests -, during the negotiation of the 2001 Paris Convention on the Protection of Underwater Cultural Heritage. The fear of coastal States' "creeping jurisdictions" has thus led to the provision, as we will see, of a complex cooperation regime, where the responsibility to control activities directed at the heritage can be shared by different States, to the positive effects of easing the pressure on coastal States and in the meantime of enhancing the efficacy of the control measures by the contributions coming from more than one State involved in the specific situation.

It is a kind of a paradox that while fears due to the imperative of contrasting the creeping jurisdiction of States on the sea, after having blocked for years every possible evolution, were leading to conceive a complex cooperation regime for the protection of underwater cultural heritage, in the meantime other economic interests were debated, that threatened to dilute and eventually put at risk the common interest which was the *ratio* for

[6] Not until the entry into force of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage.

conclusion of the 2001 Convention. This time the debate was about private, not public, economic interests, being focussed on the application of *salvage law* and *law of finds*. Such interests have been taken into certain consideration by the 2001 UNESCO Convention, though as innocuously as possible.

3. The 2001 UNESCO Convention on underwater cultural heritage settles common standards and establishes a system of shared responsibility to ensure protection of the heritage in the interest of all humankind

(a) Jurisdiction in the text and standard-setting in the Annex

It clearly results from these considerations why the 2001 Convention does not only settle an international compulsory standard for heritage protection – in the form of annexed Rules concerning activities directed at underwater cultural heritage –, but has also to find a way to share regulatory and control responsibilities among the States Parties in a manner which ensures consistency with the overall framework of the international law of the sea, codified in the 1982 United Nations Montego Bay Convention. In this aspect, it is very different from the other universal conventions about cultural heritage. Usually, they just aim to provide for a standard high-quality protection regulation, to be enforced by each State in its own jurisdiction, or sometimes they have to solve the opposite problem of a possible conflict of jurisdictions (as may be the case for the 1970 and 1995 Conventions on the restitution of movable cultural properties), not having to assert any kind of "new" State jurisdiction on activities up to then freely exercised. This – on the contrary - is the case for marine areas extending beyond the 24mile limit from the coast[7].

In fact, the text of the 2001 Paris Convention is totally devoted to the jurisdiction problem. The provisions which are to be found in the Annex, on the other hand, which have the same force of the Convention and form an integral part of it, are specifically devoted to set the technical standards for international protection, to which States will conform their internal regulations.

(b) The preference for *in situ* conservation

An important confirmation of the pre-eminence of the common interest to the best form of protection over any possible State or private interest in the objects to be found comes from the first Rule of the Annex, which states that *in situ* preservation must be the first option

[7] Exception made for the eventual existence of archipelagic waters.

to be considered. It is, naturally, just as most Rules of the Annex, a technical consideration about preservation of the heritage, not merely the result of a political choice, and it substantially means that not to do anything would in most cases represent the best way to protect underwater cultural heritage, since any activity directed at underwater objects alters the natural factors that have consented the present state of conservation[8]. Evidently, such a leading concept excludes the acquisition of underwater cultural objects to States or individuals to be an important issue for consideration by the Convention.

In fact, at the beginning of the negotiations it looked as if the Convention were simply to be the translation into an international mechanism of the technical rules for the protection of underwater cultural heritage already contained in a Charter that had been adopted by the International Council on Monuments and Sites (ICOMOS)[9], and the preference for *in situ* conservation directly comes from such technical document. We mustn't forget, though, that the *ratio* for protecting cultural heritage at the international level lies in its importance for humankind. So the goal of the Convention cannot simply be that of letting underwater objects stay still for the years to come; it is rather a question of balancing on the one hand the need to simply safeguard the objects as best as possible, in order to preserve them for future generations, and on the other hand the need to disclose to mankind the knowledge that through them is made accessible.

According to the Rules, as a consequence, activities directed at underwater cultural heritage can be authorized for the purpose of making a significant contribution to protection, or knowledge or enhancement of underwater cultural heritage, provided that such activities are conducted in a manner consistent with the protection of the heritage and that they do not adversely affect it more than is necessary for the objectives of the underlying project. Such activities must use non-destructive techniques and survey methods in preference to recovery of objects; only in case it is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, excavation or recovery is permitted, but in any case the methods and techniques used must be as non-destructive as possible and contribute to

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[8] Also licit activities that aren't directed at the heritage but might incidentally affect it are taken into consideration by the Convention. Art. 5 obliges each State Party to use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage. Such activities may be linked to the exploitation of natural resources, and it has happened that cultural objects are accidentally caught by the nets of fishermen amidst the living resources of the sea, nevertheless the main risk to the adequate protection of underwater cultural heritage is undoubtedly constituted by unregulated activities specifically directed at the recovery of the heritage.

[9] It is the so-called "Sophia Charter"; to these regards cfr. Gonzalez, "Negotiating the Convention on Underwater Cultural Heritage: Myths and Reality", in Garabello and Scovazzi (eds), *op. cit.*, p. 83.

the preservation of the remains. Activities directed at the heritage must also be strictly regulated to ensure proper recording of cultural, historical and archaeological information[10].

(c) The refusal of a commercial approach

These basic rules of conduct almost seem just too simple and logic to be necessary, but they represent the reaction to several events of non-regulated, totally spontaneous and terribly destructive recovery missions in the seas. In fact, in absence of any regulatory and control authority, activities directed at cultural heritage in the seas were essentially aimed at recovering, for commercial purposes, the most valuable – more in terms of cost-effectiveness than in terms of enhancement of knowledge – of the objects, usually causing the irreparable loss of great amounts of scientific data (and also destruction of "minor" objects) to be collected on the site.

In other words, experience teaches us that nothing can be assumed as *a priori*, non controversial. Since these rules of conduct are the precise consequence of a choice in favour of the common interest to preservation of the heritage (a choice which has been made by the International Community prior to the negotiation of the 2001 Paris Convention and in respect of all kinds of cultural heritage, underwater objects included), it is also a consequence of such a choice that solutions in favour of commercial gain are excluded. Such a consequence is also explicitly stated in the Rules, according to which the commercial exploitation of underwater cultural heritage for trade or speculation can usually be assimilated to its irretrievable dispersal and is fundamentally incompatible with its protection and proper management. This is the reason why "underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods", though the "deposition" of some objects, recovered in the course of a licit research project, is possible upon authorisation of the competent authorities[11].

(d) Salvage law and law of finds

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[10] These General Principles must be translated into operational rules of conduct through the development of specific Project Designs (to be submitted to the competent authorities) whose necessary characteristics are described in the Annex to the 2001 Convention. According to Rule 10, each project design shall include: (a) an evaluation of previous or preliminary studies; (b) the project statement and objectives; (c) the methodology to be used and the techniques to be employed; (d) the anticipated funding; (e) an expected timetable for completion of the project; (f) the composition of the team and the qualifications, responsibilities and experience of each team member; (g) plans for post-fieldwork analysis and other activities; (h) a conservation programme for artefacts and the site in close cooperation with the competent authorities; (i) a site management and maintenance policy for the whole duration of the project; (j) a documentation programme; (k) a safety policy; (l) an environmental policy; (m) arrangements for collaboration with museums and other institutions, in particular scientific institutions; (n) report preparation; (o) deposition of archives, including underwater cultural heritage removed; and (p) a programme for publication.

[11] See Rule 2 of the Annex. The refusal of commercial exploitation of underwater cultural heritage and the preference for its *in situ* preservation (and all other general principles of protection), fully explained in the Annex, are also summarily stated among the objectives and general principles of the Convention (art. 2, paras. 5 and 7).

This basic refusal of a commercial approach stated in the Annex has its counterpart, in the text of the Convention, in the almost total exclusion of the application of *law of salvage* or *law of finds* to activities relating to underwater cultural heritage. The role that can be played by such laws in connection with underwater archaeological and historical objects was already taken into consideration by UNCLOS Convention, in the same article that imposed the general obligation to protect such objects, but apparently to the opposite conclusion that the rights of identifiable owners, "the law of salvage and other rules of admiralty", together with laws and practices with respect to cultural exchanges, were to prevail in case of a conflict between the objective to protect the underwater cultural heritage, on the one hand, and the application of such laws, on the other[12].

To be true, it is not so universally settled what the expressions "salvage law and law of finds" should exactly mean. As for the "law of finds" it is specifically referred to in the 2001 Convention but not in UNCLOS, where the more general expression "other rules of admiralty" is used. In fact, the notion of "salvage" in many countries is only related to the attempts to save a ship or a property carried by it from imminent marine peril, on behalf of its owners. This notion of salvage - which in a few common law countries has been jurisprudentially developed to very extensive effects, to the consequence of opening underwater cultural heritage to a very dangerous "freedom of fishing" regime, but can in itself very difficultly be related to relics already lying under the sea - is functional to the interest of the International Community that persons and properties at sea be saved by anyone in the best position to do it, in case of imminent marine peril. As an incentive, the relevant system of laws can reward the private subject who operates the "salvage" action through the right to retain the objects whose owner is impossible to identify[13].

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[12] See art. 303.3 of UNCLOS.

[13] The debate about the real significance of "salvage law" and "law of finds" is quite complex, being necessarily based on specific judicial decisions of domestic courts of the interested common law countries, which usually are motivated by particular conditions and circumstances. A very interesting exposition and analysis of some cases is to be found in Scovazzi, "The Application of "Salvage Law and other Rules of Admiralty" to the Underwater Cultural Heritage: Some Relevant Cases", in Garabello and Scovazzi (eds), *op. cit.*, p. 19. It is interesting to be recalled, by the Author, that the Archaeological Institute of America, in spite of USA being one of the common law States applying a very extensive notion of salvage law, has used very strong words against the application of such law to underwater cultural heritage, in a document issued during the long drafting processes which lead to the negotiation of the 2001 Convention. It says: "In recent decades treasure salvage has been added as an element of marine salvage under admiralty law. From an archaeological perspective, salvage law is a wholly inappropriate legal regime for treating underwater cultural heritage. Salvage law regards objects primarily as property with commercial value and rewards its recovery, regardless of its importance and value as cultural heritage. It encourages private-sector commercial recovery efforts, and is incapable of ensuring the adequate protection of underwater cultural heritage for the benefit of mankind as a whole (...) Treasure hunting, or private sector commercial recovery, has never been able to convincingly demonstrate that it can operate in a way that satisfies the archaeological and preservation interests. Commercial recovery frequently results in the destruction of underwater cultural resources as systematic archaeological recording, excavation and conservation are

This approach in itself, thus, is neither in line, nor in conflict with the protection of cultural heritage. In fact, it has nothing to do with cultural heritage, and such mutual exclusiveness has also been recognised by the International Convention on Salvage, adopted in 1989, where it is generally provided that any State Party may reserve the right not to apply the same Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed[14]. It could be inferred that the clause of UNCLOS referring to salvage law does not prefigure at all a possible conflict between the different objectives of heritage protection and salvage, but it rather states the mutually exclusive application of the two different systems of rules. This would clearly be consistent with the affirmation of the common interest for the protection of the heritage. It is also possible, on the other hand, to interpret the UNCLOS clause about salvage to the effect that the general obligation of protection of cultural heritage, as not yet specified in a proper international protection regime, cannot prevail on the well-established practices of salvage. In any case, this supposed preminence of salvage law would not extend to "other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature", which UNCLOS affirms that must not be prejudiced[15].

The 2001 Convention, to this regard, makes a precise choice against the application of salvage law and law of finds (though not imposing an absolute ban, because a minority of States was not prepared to accept such a solution) in line, as we have seen, with the choice of the refusal of a commercial approach for the activities directed at the underwater cultural heritage. In fact the *formula* adopted in the text of the Convention seems to leave a very narrow space for application of salvage law and law of finds, since it states that any activity relating to underwater cultural heritage to which the Convention applies shall not be subject to the law of salvage or law of finds, unless it is in full conformity with the Convention and ensures that any recovery of the underwater cultural heritage achieves its maximum protection, and consequently is formally authorized by the competent authorities[16].

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sacrificed in the interest of expedient recovery of marketable property. Even commercial projects that are regulated by State authorities have an abysmal record in terms of professional standards of performance, preservation and dissemination of information. The aims, methods and practices of treasure hunters are fundamentally at odds with those of archaeologists and preservationists" ("The Archaeological Institute of America (AIA) Comments on the UNESCO/UN Division on Ocean Affairs and the Law of the Sea Draft Convention on the Protection of the Underwater Cultural Heritage", reproduced in Prott and Srong (eds), "Background Materials on the Protection of the Underwater Cultural Heritage", Paris, 1999, p. 176).

[14] To this effect, see art. 30, para. 1(a) of the International Convention on Salvage, 1989.

[15] See art. 303.4.

[16] See art. 4 of the 2001 UNESCO Convention. The presence in the text of this article has been advocated and supported, during the final phase of the negotiation, also by the Comité Maritime International, whose President sent a letter to the Director-general of UNESCO in which it was stated: "We support the intent of art. 4, which

(e) The "jurisdiction issue"

The recurrent term "competent authorities" leads us back to the other fundamental issue to be solved by the Convention: in which State/States are these "competent authorities" to be found? Who is in charge of authorising the activities directed at underwater cultural heritage upon submission of specific project designs, in compliance with the common standards established in the Annex? And, also before that, who can and must timely take all measures that prove to be necessary to prevent any immediate danger to the underwater cultural heritage, especially from looting? Which essentially means: since the protection of the heritage is a "common interest", and so potentially the responsibility of all States, how do we know which State/States has/have to be in charge of every specific situation, to regulate and control it for the benefit of all humankind?

To be precise, it is a false "jurisdiction issue". States are not to be recognised a specific title of jurisdiction over the activities directed at underwater cultural heritage, different and augmented in respect to those jurisdictional rights already provided for in international law. This is very clearly stated in the provisions regarding protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf - as we have seen, these are precisely the marine areas where no regulating authority could be individuated on the base of international law of the sea, for which the "jurisdiction issue" was at stake. More than one State is asked by the Convention to cooperate in the protection of heritage in those marine areas, but each of them is acting "on behalf of the States Parties as a whole and not in its own interest. 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 the United Nations Convention on the Law of the Sea"[17]. In other words, each of them is exercising its public power not *in nome proprio* but in the name of the International

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deals with the relationship of the law of salvage to the Draft Convention. The CMI is firmly of the opinion that the law of salvage is not incompatible with the goals of the Draft Convention. In our view, there is no reason why the law of salvage should be deemed a threat to the protection and preservation of underwater cultural heritage. The law of salvage has long had international recognition and is explicitly recognized in Article 303 of the Law of the Sea Convention. Although we support Article 4, we are concerned that Article 4(a) is ambiguous as to what entity may be deemed "the competent authority" and that Article 4 could be applied to restrict legitimate salvage operations which are otherwise in conformity with international law. (…)" (the text of the letter is reproduced in Comité Maritime International, Yearbook, 2001, p. 620 and also in Garabello and Scovazzi (eds), *op. cit.*, p. 19.

[17] See art. 10.6 of the 2001 UNESCO Convention. On the contrary, and as a consequence of these considerations about "proper" and "improper" jurisdiction, in the same marine areas the coastal State in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has *the right* to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea (see art. 10.2 of the Convention).

Community as a whole, to whom the interest to heritage protection belongs – though naturally the Convention can safely refer only to the States Parties.

Now, as we have seen, a proper jurisdiction is already provided for in international law – and also in UNCLOS – to the coastal State as regards its internal waters (and archipelagic waters, where the geographical conditions so require), territorial sea and archaeological zone (if established). In all these marine areas the States Parties are simply to apply the common standards of protection provided for in the 2001 Convention while exercising their own jurisdiction. In fact, they are acting in the exercise of their sovereignty and therefore to their sovereignty pertains every cultural object to be found in those areas, though, with a view to cooperating on the best methods of protection, they are obliged (not so strictly, they "should") to inform the flag State Party to the Convention and, if applicable, other States with a verifiable link, with respect to the discovery of an identifiable State vessel or aircraft within their archipelagic waters and territorial sea.

This provision is what is left of a more radical – and disruptive – tentative of excluding altogether State vessel relics, of whatever epoch, from the application of the Convention, in consideration of the public function they were to perform. This would almost have annulled the scope of application of the Convention, since most underwater cultural heritage consists in (or is contained in) what could be assumed to have been a "State vessel", though in truth the modern conception of State could very difficultly be applied to certain very ancient relics, or a definite successor State in contemporary world could very difficultly be identified with reference to most not so ancient but anyway hundreds of years-old relics. As a matter of fact, the most recent State vessels – and therefore the ones which really could be vested of strategic importance and so entail immunity questions – are anyway not included in the definition of "underwater cultural heritage" provided for in the Convention, because it refers only to objects which have been partially or totally under water, periodically or continuously, for at least 100 years[18].

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[18] The definition of "underwater cultural heritage is to be found in art. 1.1(a) of the UNESCO 2001 Convention, which refers to "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." The question of sovereign immunity with reference to the ship that happens to discover the underwater cultural heritage is, instead, dealt with in art. 13 of the Convention, under which "Warships and other government ships and military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their

The responsibility to action that must be exercised outside any proper "jurisdiction" is then vested, in the exclusive economic zone and on the continental shelf, on all States Parties, and not a word is said about the final destination of the objects that could be recovered in such areas (this is because, as it has already been remembered, the aim of the Convention is to protect the heritage for the benefit of the whole humankind, and not to decide to whom it should be adjudicated). Inevitably, though, the primary responsibility lies within the coastal State, which has the task to coordinate consultations on how best to protect the underwater cultural heritage, consultations to be conducted with all other States Parties which have declared an interest in being consulted, having been notified of the discovery on the base of a complex reporting and notification system[19]. Should the coastal State decline such a role, another "Coordinating State" would be appointed by the States Parties which have declared an interest. In the areas in question, it is the "Coordinating State" that implements measures of protection, issues all necessary authorizations, takes timely prevention measures and may conduct – or authorize – any necessary preliminary research, in accordance to the Rules of the Convention. A "Coordinating State" to implement the common standards of protection is also to be appointed for activities directed at underwater cultural heritage located in the Area[20].

As a "cover-all" clause and with reference to all marine areas, flag States are anyway obliged to take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with the Convention.

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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."

[19] Such a reporting and notification system is disciplined in art. 9 and art. 11 of the Convention, respectively for the exclusive economic zone/continental shelf and for the Area. It involves the Director-general of UNESCO and national authorities and procedures to be determined by States and declared at the moment of ratification. As for the Area the reporting system is quite linear, it goes from the vessel flying the flag of a State Party which discovers or intends to engage in activities directed at underwater cultural heritage to its flag State, then from the flag State to the Director-general of UNESCO and to the Secretary-general of the International Seabed Authority, and finally from the Director-general of UNESCO to all States Parties. The reporting and notification system for discoveries in the exclusive economic zone and on the continental shelf is more complex because it provides for two alternative courses of conduct which can be applied when the discovery or activity is to be performed in the exclusive economic zone or the continental shelf of another State Party, different from the flag State of the vessel or the national State of the individual making the discovery or performing the activity. In such a case: (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party; (ii) alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties. Anyway, the State Party shall notify the Director-general of UNESCO of discoveries or activities reported to it.

[20] As for activities directed at heritage located in the Area, the International Seabed Authority established by UNCLOS is also invited to participate in the consultations.

The solution adopted in the 2001 Convention for the application of the Rules in the exclusive economic zone and on the continental shelf - where no State authority could be established for the reasons we have seen - someway resembles the system of shared jurisdiction among coastal State, flag State and port State conceived in UNCLOS for environmental protection purposes, very probably involving the State/States of origin of the property instead of the port State. This shared responsibility compromise solution (between the original positions of States which favoured the coastal State jurisdiction also in the exclusive economic zone and on the continental shelf and of those which contrasted it) has consented to find a common base for the adoption of the text and emphasizes once more the common nature of the interest to be protected, just as was the case also for the similar system envisaged by UNCLOS for marine environmental protection.

4. The project of an enhanced ("added value") regional agreement for the Mediterranean Sea, consistently with the framework global Convention

(a) The relationship of the 2001 Convention with UNCLOS and other agreements

In addition to what has already been said in the previous pages, the 2001 UNESCO Convention for the protection of underwater cultural heritage also sets out obligations of States Parties to take measures to prevent the international circulation of underwater cultural heritage illicitly exported and/or recovered and measures providing for the seizure of underwater cultural heritage in their territories that has been recovered in a manner not in conformity with its Rules. It also provides for general obligations about cooperation and information-sharing, the raising of public awareness and cooperation in the provision of training in underwater archaeology, as well as a system for peaceful settlement of disputes which makes reference, *mutatis mutandis*, to the provisions relating to the settlement of disputes set out in Part XV of UNCLOS. In fact, its relationship with UNCLOS is very tight, for it is explicitly stated that nothing in the 2001 Convention shall prejudice the rights, jurisdiction and duties of States under international law, including UNCLOS[21].

Hopefully, ratifications will follow in reasonable time and entry into force of the UNESCO Convention will not be delayed[22]. In the meantime, nothing prevents the conclusion of more specific regional conventions; the 2001 Paris Convention itself specifically foresees

[21] See respectively artt. 14, 18, 19, 20, 21, 25 and 3 of the 2001 UNESCO Convention.
[22] According to its art. 27, the Convention shall enter into force three months after the date of the deposit of the twentieth instrument of ratification, acceptance, approval or accession.

this possibility, in compliance with the framework regulation it provides. In fact States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of cultural heritage. The Parties to such bilateral, regional or other multilateral agreements may also invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements[23].

(b) The Mediterranean Draft Agreement

The Mediterranean States have already begun to exchange views about a draft Convention for the Mediterranean basin, in order to establish even closer links between themselves, fully conscious of the special responsibility they share for the conservation of their common historical and cultural roots. The last part of this paper is dedicated to briefly introduce the general features of the proposed draft Mediterranean Agreement, which has already been presented to representatives of the governments of the countries bordering the Mediterranean during the International Congress on Mediterranean Co-operation for the Protection of Underwater Cultural Heritage (Syracuse, Italy, 3-5 April 2003) but is still only a tentative text, originally proposed by Italy, subject to any improvements and modifications[24].

The Italian proposal is based on the belief that the possibility to conclude regional agreements should be carefully considered by the States bordering enclosed or semi-enclosed seas which are characterized by a particular kind of underwater cultural heritage, such as the Mediterranean. This belief, supported by declarations of experts in the specific fields concerned[25], is perfectly in line not only with the 2001 Convention, but also with UNCLOS. UNCLOS, in fact, does provide for cooperation among States bordering closed or semi-enclosed seas in the implementation of the law of the sea obligations, included the general one about underwater cultural heritage protection[26].

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[23] See art. 6 of the 2001 UNESCO Convention.

[24] About the Draft Mediterranean Agreement see Scovazzi, "La protection du patrimoine culturel sous-marin de la Méditerranée", in "l'Observateur des Nations Unies", n. 16, 2004, p. 81.

[25] In a declaration adopted in Siracusa (Italy) on 10 March 2001, the participants to an academic conference stressed that "the Mediterranean basin is characterized by the traces of ancient civilizations which flourished along its shores and, having developed the first seafaring techniques, established close relationships with each other" and that "the Mediterranean cultural heritage is unique in that it embodies the common historical and cultural roots of many civilizations". They consequently invited the Mediterranean countries to "study the possibility of adopting a regional convention that enhances cooperation in the investigation and protection of the Mediterranean submarine cultural heritage and sets forth the relevant rights and obligations".

[26] Art. 123 of UNCLOS explicitly speaks of coordination efforts in the fields of management, conservation, exploration and exploitation of living marine resources, of preservation of the marine environment and of the conduct of scientific research, but it also refers to the exercise of all rights and performance of all obligations deriving from UNCLOS, so also the general obligation of protection of the underwater cultural heritage provided for in art. 303 must be deemed to be included.

The Mediterranean Draft presupposes that the Parties to the future Mediterranean Agreement either are Parties to the 2001 Convention or anyway accept to apply its substantive principles. The drafting techniques of the Italian proposal for a Mediterranean Agreement were consequently based on the assumption that there was no need to repeat the relevant provisions of the 2001 Convention. In fact, all the substantive provisions of the 2001 Convention, including those contained in the Annex, are to bind the Parties to the Agreement, unless they are derogated by specific provisions of the latter.

(c) New solutions for salvage law and State vessels

Such derogations cannot be to the effect of excluding some of the obligations of the 2001 Convention, or of diluting its universal character; on the contrary, they are conceived to ensure an even better protection of underwater cultural heritage. In other words, we could say that they aim at bringing an "added value" to the Convention as for the relations among the States Parties to the Agreement in the regulation and conduct of activities relating to the Mediterranean underwater cultural heritage[27]. Such a special regional regime is designed to be open for accession not only by any State bordering the Mediterranean Sea, but also by any State having a verifiable link with the Mediterranean underwater cultural heritage - as already suggested in the 2001 Convention -, and by any State which intends to engage in activities directed at the Mediterranean underwater cultural heritage[28].

Two are the principal issues already tackled with by the 2001 Convention, in respect of which the Mediterranean Draft proposes a solution which is aimed to ensure a better protection of underwater cultural heritage. The first one is about the application of salvage law and law of finds. We have seen that in the 2001 Convention its application is substantially excluded, exception made for the cases where the concurrence of all necessary circumstances

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[27] The geographical coverage of the Draft Agreement is based on the description already used in the Convention for the Protection of the Marine Environment and the Coastal region of the Mediterranean (Barcelona, 1976, as amended in 1995), and a safeguard clause is designed not to prejudice the rights, the present and future claims or legal views of any State relating to the law of the sea, following the same formulation already used in art. 2, para. 2, of the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, concluded in Barcelona in 1995.

[28] In order to stress the special responsibility of Mediterranean States, two alternative variants are envisaged and open to debate as for the discipline of access to the Mediterranean cultural heritage. Under the most incisive of the two variants (based on art. 8, para. 4, of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea – UNCLOS - of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, signed in New York on 4 August 1995), only those States which are Parties to the Agreement, or which agree to cooperate with the Parties in applying the measures established by the Agreement should have the right to engage in activities relating to the Mediterranean underwater cultural heritage. The alternative text, on the other hand (which is based on art. 28, para. 2, of the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, concluded in Barcelona in 1995), gives to the States Parties the responsibility to adopt appropriate measures, consistent with international law, to ensure that no one engages on any activity contrary to the principles or purposes of the 2001 Convention and the Mediterranean Agreement.

guarantees that no adverse effect to the protection of the heritage will be produced. In the Mediterranean Draft a total exclusion of the application of the law of salvage and the law of finds is envisaged as for activities relating to the Mediterranean underwater heritage.

The other issue taken a second time into consideration by the Draft Mediterranean Agreement, which had endured lengthy discussions during the negotiations of the 2001 Convention, is that relating to the discovery of State vessels and aircraft. Under the solution adopted in the 2001 Convention, the coastal State is not so much obliged as encouraged (it "should") to inform the flag State Party to the Convention with respect to the discovery of identifiable State vessels and aircraft only if they are located in their archipelagic waters and territorial sea; no other operational consequence of such contact is envisaged. In the Mediterranean Draft Agreement it is proposed to strictly require the information to the flag State, to extend such an obligation of information also in respect to discoveries located in the internal waters, and to add an obligation to collaborate with the flag State in the recovery of such vessels or aircraft (should the recovery be deemed necessary), unless the vessels and aircraft have been expressly abandoned in accordance with the laws of that State[29].

(d) Specially Protected Areas, an International Museum and training programs

The other improvements proposed in the Mediterranean Draft Agreement relate to new initiatives to be promoted at a regional level. The first regards the establishment of a list of Specially Protected Areas of Mediterranean Cultural Importance, drawn up by the Parties in order to promote cooperation in the protection of the submarine cultural heritage. The idea of the list is inspired by the Specially Protected Areas Protocol of the Barcelona conventional system for the Mediterranean, and aims to enhance the protection of sites which can be of importance for conserving the remains of Mediterranean civilisations, or for containing wrecks of particular relevance, or for their special interest at the scientific, aesthetic or educational level[30].

Of great importance also for educational – and public awareness at large – purposes is the proposal, advanced in the Mediterranean Draft, to establish an International Museum of the Mediterranean underwater cultural heritage. The museum could have a twofold function: on the one hand it could be a perfect place where to preserve and display objects recovered in

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[29] See art. 7.3 of the 2001 Convention. The Mediterranean Draft Agreement also adds to these provisions the mention of military graves located in maritime waters. Such a mention is not included in the 2001 Convention, which more generally refers to the proper respect to be given to all human remains located in maritime waters (art. 2.9) and to avoidance of unnecessary disturbance of "human remains or venerated sites" (Rule 5 of the Annex).

[30] The Barcelona Mediterranean system is focussed on the protection of the Mediterranean basin from an environmental point of view, but is open to such a parallel evolution.

the Mediterranean (and, owing to its international nature, it could offer to States a safe haven and the appropriate enhancement for recovered objects of uncertain – or disputed – origin), on the other hand it could promote a network of national museums existing in the Mediterranean countries and elsewhere, in order to enhance the dissemination of information and strengthen public awareness about the Mediterranean underwater cultural heritage.

The last initiative proposed in the Draft is about the organisation of periodical training courses and activities related to the peculiar aspects of Mediterranean cultural heritage, with particular regard to ancient civilisations. This is another example of the operational application of a general obligation for cooperation in underwater archaeology which is already provided for in the 2001 Convention.

(e) The necessary synergy of international, regional and national efforts

In conclusion, the proposal for a Mediterranean agreement on the protection of underwater cultural heritage – and the Draft Mediterranean Agreement as it has been proposed by Italy in 2003 –, far from being a possible obstacle to the entry into force and application of the 2001 UNESCO Convention, is perfectly in line with its objectives. It is not just a fact that future regional agreements are specifically envisaged in the Convention, it is – to begin and conclude with it – a question linked to the *ratio* of the provisions.

The *ratio* of the 2001 UNESCO Convention lies in the common interest of humankind (to be managed by the International Community of States and International Organisations) to protection of the underwater cultural heritage (and of cultural heritage in general). It is true that such interest, at the international level, belongs to humankind as a whole, but it is also true that the location of the heritage is not so indifferent. If it is in the territorial sovereignty of States, we have to take into consideration that no international regime can really be effective without the cooperation of the territorial State, though practice demonstrates that "soft forms of coactive implementation" of the international obligations can be developed[31]. If the heritage has a strong regional connotation - in addition, and not to the detriment, to its universal relevance -, the geographical proximity of the regional States can be usefully put at

[31] A very interesting experience is offered by the UNESCO 1972 Convention for the Protection of World Cultural and Natural Heritage. In fact, though of interest for the whole International Community, the properties included in the World Heritage List remain under the territorial sovereignty of States, so every decision of the World Heritage Committee can only have direct effect if it concerns the establishment and updating of the World Heritage List, or the allocation of sums from the International Fund, but the Committee needs the co-operation of the interested State in order to influence the management of the properties on the territory. Aiming to obtain such co-operation, it has structured its dialogue with the interested State into pre-established consultative procedures, disciplined in the Operational Guidelines for the implementation of the Convention. Such a way of influencing the State's resolutions has been seen as an example of "soft form of coactive implementation" (cf. Francioni, "International "Soft Law": a Contemporary Assessment", in Lowe and Fitzmaurice (eds), "Fifty years of the International Court of Justice, Essays in honour of Sir Robert Jennings, 1996, p. 167).

the service of the common interest. In other words, we could say that the universal, regional and also national interests to the protection of cultural heritage, though differently shaped as a consequence of the different perspective, points of reference and potential of the three levels, can and must be integrated in a synergic effort, to the effect of developing in each case the most appropriate and effective regime of protection.

ABSTRACT

The International Legal Protection of Submarine Cultural Heritage of the Mediterranean Sea in the Framework of the 2001 UNESCO Convention

The system of international legal protection of the cultural heritage in the common interest of the whole international community is now virtually completed by UNESCO, which has stimulated the negotiation and conclusion, by its member States, of several international conventions. These international instruments have been conceived in order to solve different problems related to heritage protection; the 2001 Paris Convention on underwater cultural heritage is peculiar because it has to solve the basic problem of a substantial lack of national jurisdiction – and consequently of regulation – on the underwater cultural properties located beyond the limits of the territorial sea and, if established, of the archaeological zone.

This is the reason why the 2001 Convention does not only settle an international compulsory standard for heritage protection, but has also to find a way to share regulatory and control responsibilities among the States Parties in a manner which ensures consistency with the overall framework of the international law of the sea, codified in the 1982 United Nations Montego Bay Convention. The solutions adopted in the 2001 Convention for the exclusive economic zone and on the continental shelf someway resemble the system of shared jurisdiction among coastal State, flag State and port State conceived in the Montego Bay Convention for environmental protection purposes, involving the State of origin of the property instead of the port State.

This shared responsibility compromise solution has consented to find a common base for the adoption of the text. Hopefully, ratifications will follow in reasonable time. In the meantime, nothing prevents the conclusion of more specific regional conventions; the 2001 Paris Convention itself specifically foresees this possibility, in compliance with the framework regulation it provides. This is why the Mediterranean States have already begun to exchange views about a draft Convention for the Mediterranean basin, in order to establish even closer links between themselves, fully conscious of the special responsibility they share for the conservation of their common historical and cultural roots.

Workshop 11

Abstracts of papers

Véronique Charlety

Reinventing the Museum: The Marseilles Museum of European and Mediterranean Civilisations

The project to open a museum devoted to the cultural European and Mediterranean heritage in Marseille is a very innovative one. As many other museums in Western Europe, the Museum of Marseille try to extend its scientific and museographic field to Europe. The future museum will be integrated into a larger project as the major part of the City of the Mediterranean. Its main objective was to present the diversity of cultures in Europe and South European countries. A secondary aspect of this project was a strategic one : to garantee a medium position to the city of Marseille between Europe and the Mediterranean.

The Marseilles Museum of European and Mediterranean Civilisations can be considered both as a cultural project and a scientific one, as well as a urban and architectural project. The implementation of this complex project in terms of actors, statute and financing is planned for 2009 and has already mobilised various institutional actors (State, local authorities and other partners). Our contribution will focus on the complexity of relationships established between various actors and will lead us to examine further the new conception of managing cultural heritage in museum. By many ways, the Marseille Museum can be considered as a laboratory because of its original conception, its own dynamic and the legal tool used to implement a national museum in Marseille, thus transforming the management of national culture in France.

Alessandro Chechi

Alternative Solutions for the Protection of Cultural Heritage: The Resort to Codes of Practice and to Forms of Alternative Dispute Resolution

Since time immemorial the Mediterranean Sea has played a historical role as a link between cultures, religions and civilisations, bringing about an extraordinary amalgam which now marks the vast cultural heritage of this region. Significantly, several Mediterranean countries, such as Italy, Greece, Cyprus and Egypt, share the same destiny: the integrity of their cultural heritage is continuously jeopardized by the

illicit trade in cultural objects. Various attempts have been made to regulate the movement of antiquities. However, neither national restrictive legislations nor international initiatives, such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention, have proved to be adequate to ensure the protection of cultural heritage. The objective of this paper is to demonstrate that codes of ethics as well as alternative dispute resolution (ADR) methods can be used to protect national treasures, collections and monuments from detrimental activities such as theft and illicit exportation without impairing the smooth development of the art market. We shall argue that the resolution of disputes that involve artworks relying on mechanisms normally used for financial and commercial issues is not as anomalous as it might appear. The ADR techniques may facilitate the assessment of the tangled interests involved in art trade disputes, and together with codes of ethics, may curtail the black market while respecting the cultural policies of the Mediterranean countries.

Francesco Francioni

The Legal Tools for the Conservation and Management of Cultural Heritage in International Law

[for technical reasons paper not available]

As submitted in September 2004

Cultural heritage is understood as the totality of products of human creativity, and the processes that inform them, which permit the symbolic identification of a community and its continuity in time beyond its near biological existence. In this sense, cultural heritage is closely linked to human dignity and to human rights. Nevertheless, international legal instruments do not explicitly recognize this link and the protection of cultural heritage has traditionally been perceived as a domain separate from human rights. In this paper, I will try to demonstrate that contemporary international law is evolving toward a convergence of these two bodies of international norms and toward a closer integration of the deeper identity value of cultural heritage with the international value of the respect of human rights. This convergence will be examined at three different levels. The first concerns the intersection between the creation, enjoyment and performance of cultural heritage with the exercise of specific human rights, such as the rights of minorities, religious communities and culturally distinct groups. The second level relates to the emerging concept of State and individual responsibility for intentional destruction and damage to cultural heritage, especially when such destruction is characterized by invidious discrimination or outright persecution. The third level is represented by the current focus on the international relevance of intangible cultural heritage and on cultural diversity as values to be preserved against the risk of standardization and homogenisation of cultural heritage as a consequence of the pervasive effects of globalization. The conclusions reached at these three different levels will be evaluated in light of the specific Mediterranean context in view of a possible declaration and plan of action.

Micaela Frulli

The Destruction of Cultural Property in the Former Yugoslavia: ICTY Case-Law and the Implementation of Individual Criminal Responsibility

Nowadays international law provides for the imposition of individual criminal liability for the destruction of cultural property and cultural heritage in times of armed conflict, both of international and internal character. In this respect, the most relevant provisions are contained in the Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict, which however

leaves with every State-Party the responsibility to adopt the necessary measures to establish as criminal offences under its domestic law the offences contained in the Protocol.

Other relevant provisions are included in the Statutes of international criminal tribunals, namely under Article 3, d) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) - that has already been applied several times and has been interpreted as applicable both to international and internal armed conflicts - and under Articles 8,2,b,ix and 8,2,e,iv of the International Criminal Court Statute, yet to be applied.

At present, ICTY case-law represents the most relevant practice concerning the implementation of individual criminal responsibility for acts against cultural property: the Tribunal has already delivered a number of judgements condemning those accused for acts against cultural property under the classification of war crimes. ICTY practice is also very interesting as an example of the possible evolution in the field of international criminalisation of acts against cultural heritage. Given the characteristics of the Yugoslav conflict, it is not surprising that the vast majority of cases involved acts against institutions dedicated to religion. However, there are also a few cases where the accused were charged and sentenced for the destruction of historic monuments internationally protected, such as the shelling of the Old Town of Dubrovnik.

What is even more significant is that - notwithstanding the lack of express provisions in the ICTY Statute - serious acts against institutions or buildings dedicated to religion or education have been charged as crimes against humanity (more specifically under the category of crimes of persecution). The destruction or damage to cultural property have also been used as pieces of evidence to prove the mental element (mens rea) of the most serious of the crimes under the jurisdiction of the ICTY: the crime of genocide.

This paper aims at analyzing in-depth relevant ICTY case-law in order to assess the "state of the art" in this field and to draw some useful lessons and/or some hints on the possible future evolutions in this field.

François Lafarge

Mediterranean Heritage. The Mediterranean Interest Criteria for Zones and Coasts Protection in the Barcelona Convention Framework

The aim of this paper is to investigate the notion of 'Mediterranean interest' which forms the basis of a 1995 Protocol Concerning Mediterranean Specially Protected Areas and Biodiversity. It is argued that to date, this Protocol is the only existing legal instrument providing protection of natural and cultural areas at a regional level and according to regional criteria. Consequently, it is the only multilateral instrument at the (Mediterranean) regional level, lying between the 1970 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention) and national legislations.

Konstantinos Lalenis

Conservation and Management of Built Heritage in Greece: Dilemmas and Perspectives on Institutions and Policies

As submitted in September 2004

In the course of the last two decades, there is an increasing interest in Greece for the management of built heritage. The regeneration of historic urban cores and traditional settlements as well as the

refurbishment and reuse of monuments, nowadays constitute tactics that are incorporated in the development strategy at all levels of governance. At the same time, continuous destruction of valuable parts of Greek built heritage has not seized. Inevitably, this poses serious questions about the adequacy of legal framework and implementation policies, which are supposed to confront with an unprincipled and unplanned development.

The legal tools available for conservation and management of built heritage are numerous, but uncoordinated. Most of them are included in presidential decrees and laws not always relevant to the conservation issue, originating from different administrative bodies, with different philosophy, and often contradictory. And their implementations usually become subjects for heated debates, since they usually present unpredicted and ambiguous social, economic and aesthetic outcomes.

The present article will provide an overview of the existing legal framework, regarding: a. criteria and processes of official characterization of a subject as constituting part of the built heritage, b. planning and architectural regulations, restrictions etc., and c. financial and administrative incentives for the protection of built heritage. References to specific implementations of related projects in Greece will be made, leading up to evaluation which will also test conformity to principles of sustainability of built environment. Dilemmas will be expressed concerning strategies of management of built heritage, such as "monumental" preservation, reuse, expansion in educational and creative participation, and conservation of objects or processes. Finally, transferability of the described institutions and policies will be examined on a Mediterranean level, based on common elements of cultural heritage, as well as current sociopolitical conditions.

Federico Lenzerini

Intangible Cultural Heritage in the Mediterranean: A New Challenge for International Cooperation

The recently adopted UNESCO Convention for the Safeguarding of Intangible Cultural Heritage raises new important challenges for the international community in the field of the protection of cultural heritage. The peculiarity of immaterial heritage, particularly its strict connection with the very identity of its creators and bearers, makes the old and well-experimented models used for the protection of tangible heritage generally inadequate in view of the proper preservation of the multi-fold manifestations included in the concept of intangible heritage. It will thus be necessary for States to identify new strategies of safeguarding, which should take into particular account the need of ensuring the involvement of the local communities concerned in the identification and management of intangible heritage. These strategies should be developed both at the national level and in the context of international cooperation that, in pursuance of the spirit and the text of the Convention, should be built up for ensuring an adequate and comprehensive safeguarding of intangible heritage. In this sense, the need for the development of efficient strategies of cooperation appears as particularly critical in the context of the Mediterranean area, where the geographic proximity of diverse cultural models fashioned by deeply different anthropological roots and historical influences shapes a global context characterized by a multi-faceted cultural richness that must be safeguarded by taking into special account its elements of difference, and by preventing the development of standardized models that would lead to the loss of cultural diversity which makes the Mediterranean area of special significance.

Federica Mucci

The International Legal Protection of Submarine Cultural Heritage of the Mediterranean Sea in the Framework of the 2001 UNESCO Convention

As submitted in September 2004

The system of international legal protection of the cultural heritage in the common interest of the whole international community is now virtually completed by UNESCO, which has stimulated the negotiation and conclusion, by its member States, of several international conventions. These international instruments have been conceived in order to solve different problems related to heritage protection; in particular the 2001 Paris Convention on underwater cultural heritage is peculiar because it has to solve the basic problem of a substantial lack of national jurisdiction - and consequently of regulation - on the underwater cultural properties beyond the limits of the territorial sea and, if established, of the archaeological contiguous zone.

This is the reason why the 2001 Convention does not only settle an international compulsory standard for heritage protection - in the form of annexed Rules concerning activities directed at underwater cultural heritage -, but has also to find a way to share regulatory and control responsibilities among the States Parties in a manner which ensures consistency with the overall framework of the international law of the sea, codified in the 1982 United Nations Montego Bay Convention. The solutions adopted in the 2001 Convention for the application of the Rules in the Exclusive Economic Zone and on the Continental Shelf someway resemble the system of shared jurisdiction among coastal State, flag State and port State conceived in the Montego Bay Convention for environmental protection purposes, involving the State of origin of the property instead of the port State.

This shared responsibility compromise solution (between the original positions of States which favoured the coastal State jurisdiction also in the Exclusive Economic Zone and on the Continental Shelf and of those which contrasted it) has consented to find a common base for the adoption of the text. Hopefully, ratifications will follow in reasonable time. In the meantime, nothing prevents the conclusion of more specific regional conventions; the 2001 Paris Convention itself specifically foresees this possibility, in compliance with the framework regulation it provides. This is why the Mediterranean States have already begun to exchange views about a draft Convention for the Mediterranean basin, in order to establish even closer links between themselves, fully conscious of the special responsibility they share for the conservation of their common historical and cultural roots.

The paper will analyse the basic issues of the UNESCO 2001 Convention, with particular reference to the shared jurisdiction solution, and it will introduce - and open to an eventual debate - the general features of the proposed draft Mediterranean Convention, which has already been presented during the International Congress on Mediterranean Co-operation for the Protection of Underwater Cultural Heritage (Syracuse, Italy, April 2003).

Evangelia Psychogiopoulou

Euro-Mediterranean Cultural Cooperation in the Field of Heritage Conservation and Management

Within the framework of the Euro-Mediterranean Partnership, launched in November 1995 with the aim of transforming the Mediterranean region into an area of peace, stability and shared prosperity, dialogue between cultures was identified as a key area for action. This paper examines the models of cultural cooperation established between the EU and its Mediterranean partners, both at bilateral and multilateral level, focusing, in particular, on the mechanisms and instruments introduced as regards cultural heritage preservation and management. Can it be argued that efficient tools have been

developed to secure sustainable cultural benefits in the area, supporting Mediterranean countries in their efforts to promote and preserve their cultural patrimonies? Euromed Heritage, the regional cooperation programme set up on the basis of the third chapter of the Barcelona declaration on Cultural, Social and Human Affairs, constitutes the first 'structured' attempt to grasp the cultural dimension of the Euro-Mediterranean Partnership while complementing bilateral activities with timid results undertaken for the same purpose. Operational since September 1998, the programme seeks to combine heritage preservation precepts with regional development constraints by encouraging the creation of wide-ranging platforms for the exchange of best practices and expertise. Taking into consideration its special features from priority identification to project implementation, an evaluation of the results obtained will be made in order to identify drawbacks and explore ways for a more coherent and consistent approach.

Elena Rodriguez-Pineau

The Protection of Cultural Property: Has the Time of Lex Originis *Arrived?*

As submitted in September 2004

This paper deals with the conflict rule that determines the law applicable to the protection of cultural goods. It is argued that the traditional lex rei sitae should be replaced by a more specific rule, namely the lex originis. However, such a reform should be undertaken with full consciousness of the difficulties involved in applying the new rule.

In the first part of the article, I describe the arguments already put forward in favour of such a solution, among which paramount is the claim that lex originis is a conflict rule much more appropriate to an adjourned system of private international law. I also make reference to several pieces of legislation (v. gr. the EC Directive 7/93 or the Unidroit Convention) which have already endorsed (more or less explicitly) such a rule. In the second part of the article, I approach the conflict rule in a critical fashion. There are two main reasons why the choice of lex origins remains problematic. First, the definition of the 'origin' of a cultural good is far from being easy to determine. The criteria to establish origin might indeed have to vary depending on the good we are talking about (the criteria are likely to be different when considering, for example, items found in excavations or pieces of art owned by the State or by private persons). Second, the scope of the rule might prove difficult to ascertain; should it cover all the questions related to cultural property protection such as the property of the good, the possibility of claiming restitution, or the likely indemnity to the third party who acquired it? It is to be doubted that the interests at stake in all these cases are the same, and consequently, the convenience of applying the lex originis across the board could be doubted. In the third part of the article, I consider these questions by making reference to the application of the said conflict rule in the legal orders of Southern Europe.

Shlomit Shraybom-Shivtiel

Arabic Language and the Tools for its Preservation: The Case of Iraq

As submitted in September 2004

The main value the Arab world make efforts to conserve is the traditional Arabic Language. From the very beginning of the nationalization process, Arab intellectuals has realized that Arabic is the first and foremost way to fulfill Arab aspirations for one unified nation. They have also realized, that the diglossia is the most difficult obstacle in nation building. Given a linguistic reality, where numerous dialects are spoken and every region has its own unique daily language, there is no place to speak about one unified nation speaking one common language. From the nineteenth century till to-day the Arabs have been

making great efforts to make traditional Arabic the common language of Arab peoples. On the one hand Language Academies in the Arab world have endeavoured to adapt the Arabic language to the needs of modern life but on the other hand they try to keep the language of the Koran from negative influences such as foreign words, new forms which do not conform to the rules of classical Arabic grammar etc. My lecture will deal with the tools and methods which the Arabic Language Academies use for inculcating the language upon the new generations and at the same time to preserve its holiness and to maintain its construction. I'll relate specially to the Iraqi Academy.

Lila (Evangelia) Skarveli

Arts and Crafts in Preservation of Cultural Heritage: Standardization, Labels and Legal Protection

As submitted in September 2004

Need and Importance of a Regulatory Framework.

The process of globalization of trade and internationalisation of markets has had both favourable and adverse repercussions for craft production. Favourable, because it has allowed craft products to be disseminated (made known) and sold on other markets; adverse, however, where peoples with stronger craft traditions but without adequate protection for their craft creations have been indiscriminately copied by other countries. The effect of this reproduction has been to dissociate the craft works from the traditions in which they originated with the attendant loss of the cultural identity that gave rise to them.

Cases are arising in which certain craft works typical of certain countries that are being well received on the market are being "mass-produced" in other countries, with other materials and other finishes which are weakening or destroying the "image" of the original product with the consequent drop in prices, disturbance of distribution channels and loss of national identity.

The existence of a regulatory framework for the protection of creative craft activity serves three main objectives:

- to stimulate creativity and thereby contribute to its development;
- to protect the investment necessary for production and distribution; and
- to develop the industries connected with craft products with the resultant beneficial effect on the creation of wealth and jobs.

The existence of specific regulatory frameworks for the protection of craft activity, while serving to stimulate creativity, makes it possible for creators:

- to earn pecuniary remuneration;
- to win respect for their products; and
- to gain recognition for their status as craftsmen (-women).

At the same time, these frameworks will be useful to entrepreneurs, guaranteeing their investment and thereby ensuring the progress of craft industries and in turn the wide dissemination of their products for the benefit of the community.

Ana Filipa Vrdoljak

Beyond the Divide: Protection of Intangible Heritage and the Asia Pacific

As submitted in September 2004

The initiative to formulate an international instrument for the protection of intangible heritage originated in Europe during the inter-war period. Eastern and Central European States spurred League of Nations' agencies to hold a conference in Prague in the hope of realising this goal. As with so many of the League's efforts in the area of cultural heritage protection, the Second World War curtailed this movement.

When this initiative was taken up by UNESCO, in the post-war period, the ensuing debates were marred by Cold War divisions.

By the late twentieth century, newly independent States particularly in the Asia Pacific and non-State groups like indigenous peoples challenged the conceptualisation of intangible heritage as 'folklore'; its disconnection from other elements of culture by Western States; and the ongoing privileging at the international level of the protection of tangible manifestations of cultures.

This paper retraces the historical evolution of efforts to protection intangible heritage in international law through to the 2003 UNESCO Convention on the Safeguarding of Intangible Heritage. It examines whether the divide between European and Asian perceptions of heritage and its protection is as broad as the original debate suggested. It also draws on the experience of Asia Pacific States in the protection intangible heritage at the national level to facilitate efforts in the Mediterranean region to address concepts and obligations arising under the new Convention.

Hamza Zeghlache

The Interpretation of the Tradition and the Making of Legal Tools of Conservation and Management of Cultural Heritage

This paper deals with the impact that the 19th century French colonial urban regulation (plan des artists) on the Medina (the old)of Tunis.

These regulations generated a radical alteration and obliteration of the integral features (city gates, city wall, ...) which were part of the traditional ideology and based on the homology in which ritual, space, action, person and objects come to be a single order of a totality. The units such as the ramparts and city gate which were parts of the integral unity, have been fragmented. Certain fragments still exist until today and can also be seen as representing an ossified, cold former age, they are bits of artefacts, caged in museums. Within this context, and in today independent Tunisia, the legal tools for its conservation derive from the idea that the Medina is being used as a"museum', for 'national' art. The tradition (...) is organized according to national and international conception of the "Traditional" and "Islamic though" that are taken to have informed it.

This paper investigates the new interpretation of the tradition and its impact in the making of the legal tools (such the abolition of the "HABBOUS" the sacred collective ownership) for the conservation and the management of cultural heritage, on the city of Tunis and a glance to the Sixteenth century Ottoman manuscript dealing written by Qotb El Din El Hanafi and entitled " Irlam be Irlam Beit Allah El Haram). This manuscript that has not been published yet deals with consolidation, repair, and restoration of the Holy Mosque in Mecca after being destroyed by a fire.This example shows that in the Islamic world there was a great concern on taking a good care on cultural heritage. This paper is also an investigation of the social and ideological correlates of the legal tools for conservation and management of cultural heritage and their political, social, and economic impact on the today's Tunisian society.