*Underwater Cultural Heritage and Submerged Objects: Conceptual Problems, Regulatory Difficulties. The Case Of Spain**

Miguel García García-Revillo**
Miguel J. Agudo Zamora***

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** Lecturer of International Public Law, University of Cordoba, Co-Chair of the Law of the Sea Interest Group of the American Society of International Law (ASIL LOSIG), Delegate for Communication and Organization of the *Association internationale du Droit de la mer* (assidmer.org).

*** Dean, University of Cordoba's School of Law and Economics; Full time adjunct Professor of Constitutional Law; Researcher Centre of Andalusian Studies.

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I. INTRODUCTION

The entry into force on 2 January 2008 of the 2001 Convention on the Protection of Underwater Cultural Heritage (hereinafter, 2001 Convention, UNESCO Convention or Convention on Underwater Cultural Heritage) was most certainly good news for the protection of this part of the legacy of past generations that is becoming increasingly better known. A great deal still remains to be done, however. The UNESCO Convention has a limited scope of application in terms of both *ratione materiae* and, in fact, *ratione personae*. In its absence, the international regime applicable to underwater cultural heritage, whose insufficient protection of such assets is to a large extent the reason the treaty was approved, can be found in a number of provisions dispersed among international treaties that regulate broader matters, of which protecting the underwater heritage is only part, often playing a very secondary role. In this respect, the difficulty in precisely defining what is subject to protection is a major obstacle affecting the applicability of both the 2001 Convention and the other international treaties cited, and the specific relationship between the provisions of one and the other, be they considered as successive treaties relating to the same subject or as overlapping or specially applied conventional provisions. On the other hand, in the measure that it is integrated by sunken objects, as opposed to natural resources – live or not – which are strictly the result of nature, the underwater heritage can, on occasion, be subject to regulation not only because of its cultural and/or historical value, significance or nature, but also for other reasons that worth attention by other international instruments or rules that overlap the abovementioned treaties. Finally, the abovementioned problems under international law multiply in many cases when attempts are made to link such law with the domestic law of States, particularly when the jurisdiction of such States over the matter has been partially transferred to a supranational organization on the one hand, and internally to lower level territorial bodies, on the other. In this regard, Spain, as a member of the European Union and, at the same time, a territorially decentralized State, with jurisdiction transferred to what it calls Autonomous Communities, can be a good example of such difficulties.

II. LIMITED SCOPE OF APPLICATION

Doubtless, the UNESCO Convention on the Underwater Heritage means a major step forward in protecting this part of the cultural legacy that was, up to a short

time ago, neglected and relatively unknown.[1] For the first time, an international treaty (in force) provides a specific definition of underwater heritage for the purpose of determining its scope of application. For the first time, to this end, there is a Convention that faces problems that affect this specific part of the cultural heritage, dealt with only superficially by the 1982 United Nations Convention on the Law of the Sea (UNCLOS), such as the determination of the applicable regime in accordance with the marine space in which the underwater heritage is located[2] or

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[1] The 2001 Convention and international protection of the underwater heritage have been dealt with by many authors, among which this paper has particularly taken into account the following: AZNAR GÓMEZ, M., *La protección internacional del patrimonio cultural subacuático, con especial referencia al caso de España*, (International protection of the underwater cultural heritage, with special reference to the case of Spain), Tirant lo Blanch, Valencia, 2004, 661 pp.; BOU FRANCH, V., *La flota imperial española y su protección como patrimonio cultural subacuático* (The Spanish imperial fleet and its protection as underwater cultural heritage), Minim agéncia edicions, Valencia, 2005, 658 pp.; CAMARDA, G. and SCOVAZZI, T. (eds.), *The Protection of the Underwater Cultural Heritage. Legal Aspects*, Giuffrè editore, 2002, 453 pp.; CARRERA HERNÁNDEZ, F. J., *Protección internacional del patrimonio cultural submarino* (International protection of the underwater cultural heritage), Ediciones Universidad de Salamanca, 2005, 164 pp.; GARABELLO, R., *La convenzione Unesco sulla protezione del patrimonio culturale subacqueo* (The Unesco Convention on Protection of the underwater cultural heritage), Giuffrè editore, Milano, 2004, 484 pp.; O'KEEFE, P. J. and NAFZIGER, A. R., "The Draft Convention on the Protection of the Underwater Cultural Heritage", *ODIL*, vol. 25 (4), 1994, pp. 391–418; STRATI, A., *Draft Convention on the Protection of Underwater Cultural Heritage. A Commentary*. UNESCO, April 1999; STRATI, A., "Protection of the Underwater Cultural Heritage: From the shortcomings of the UN Convention on the Law of the Sea to the compromises of the UNESCO Convention", en STRATI, A., GAVOUNELI, M., and SKOURTOS, N. (eds.), *Unresolved Issues and New Challenges to the Law of the Sea. Time Before and Time After*, Nijhoff, Leiden, Boston, 2006, pp. 21–62; JUSTE, J., "La protección internacional de los hallazgos marítimos de interés histórico y cultural" (International protection of maritime findings of historical and cultural interest), *Anuario de Derecho Marítimo*, vol. XX, pp. 63–99; DROMGOOLE, S., "2001 Convention on the Protection of the Underwater Cultural Heritage", *IJMCL*, vol. 18 (1), March 2003, pp. 59–107; SAVADOGO, L., "La Convention sur la protection du patrimoine culturel subaquatique" (The Convention on Protection of the underwater cultural heritage), *RGDIP*, Vol. 107 (2003–1), pp. 31–71; YTURRIAGA BARBERÁN, J. A., "Convención sobre la protección del patrimonio cultural subacuático" (Convention on the Protection of the underwater cultural heritage), in DRNAS, Z. (Coord.), *Estudios de Derecho internacional en homenaje al profesor Ernesto J. Rey Caro* (Studies on International Law in tribute to Professor Ernesto J. Rey Caro), Drnas-Lerner, eds., pp. 451–467; CASSAN, H., "Le patrimoine culturel subaquatique ou la dialectique de l'object et du lieu" (The underwater cultural heritage, or the dialectics of object and place), in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, pp. 127–147; MOMTAZ, D., "La Convention sur la protection du patrimoine culturel subaquatique" ("The Convention on the Protection of the underwater cultural heritage"), in NDIAYE, T. M., y WOLFRUM, R. (Eds.), *Law of the Sea, Environmental Law and Settlement of Disputes.* Liber Amicorum *Judge Thomas A. Mensah*, Martinus Nijhoff, Leiden, Boston, 2007, pp. 443–461.

[2] Arts. 7 to 12.

the relationship between the protection of such heritage and the immunity rights, recognized to State vessels,[3] and salvage rights,[4] fundamentally applicable to the merchant marine, and only dealt with somewhat confusedly by UNCLOS.[5] For the first time, an international treaty includes specific criteria and principles for acting in relation to such heritage, on the basis of its special features,[6] such as *in situ* preservation,[7] the use of non-destructive exploration techniques and methods with preference even over object recovery[8] and in all cases refraining from unnecessarily disturbing human remains and venerated sites,[9] banning such heritage from commercial exploitation[10] or irreversible dispersion.[11]

Nonetheless, despite its contributions, the Convention on the Underwater Heritage has a limited scope of application.

1. While the 2001 Convention seeks *ratione personae*[12] universality, the truth is that the pace of ratification since its approval does not offer very optimistic prospects. It has taken nearly eight years for the Convention on the Underwater Heritage to receive the 20 ratification or acceptance instruments needed for its entry into force. It is true that the 2001 Convention was approved by the plenary session of the UNESCO General Conference with a substantial number of votes in favour and very few votes against (87 to 4). However, the number of abstentions (15) added to the number of Member States not present at the time (82), and the probable absence in the short and medium term of some significant States, such as the United States of America,[13] are reasons to fear that the *ratione personae* scope of application and, therefore, the special scope of application of this important international treaty, at least in coming years, is in fact significantly weakened.[14] In this regard, the scant enthusiasm with which the United Nations General Assembly referred to the Convention on the Underwater Heritage in its Resolution 63/111,

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[3] Art. 13.
[4] Art. 4.
[5] Art. 303.3.
[6] See Cassan, cit., who classifies these principles as ethical, technical or ecological principles.
[7] Art. 2.5 and Annex, Rule 1.
[8] Annex, Rule 4.
[9] Annex, Rule 5.
[10] Art. 2.7 and Annex, Rule 2.
[11] Annex, Rule 2.
[12] Art. 26. The Convention is open to, *inter alia*, participation by Member States of the United Nations and the Statute of the International Court of Justice.
[13] The United States was not a member of UNESCO when the 2001 Convention was approved. This State's position, as both a maritime power and a State having a long coastline and abundant underwater heritage and which contributed to drafting said Convention as an observer, was contrary to the text that was ultimately adopted.
[14] The Convention, furthermore, allows States to exclude inland waters not of a maritime character (art. 28) as well to establish a reservation to exclude "specific parts of its territory, internal waters, archipelagic waters or territorial sea," from the application of the treaty, indicating "the reasons for such reservation" and under the obligation to promote conditions under which this Convention will apply to such areas, "to the extent practicable and as quickly as possible" (Art. 29 in relation with Art. 30).

of 2008,[15] where it merely notes its forthcoming entry into force (para. 8), in comparison with its attitude regarding a number of other treaties affecting the Law of the Sea, where it encourages or invites States that have not done so to ratify them to facilitate their entry into force, as in the case of the International Convention for the Control and Management of Ships' Ballast Water and Sediments, 2004 (para. 108), or to become parties, as with the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (para.76),[16] seems to suggest that beyond linguistic subtleties, the 2001 Convention is still quite far from having considerable, much less universal, backing.

2. On the other hand, in regard to its *ratione materiae* scope, under the 2001 Convention, "Underwater cultural heritage" means "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character" (Article 1.a). Additionally, the Convention expressly makes the following exclusion from the concept of underwater heritage: "pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage" nor "installations other than pipelines and cables, placed on the seabed and still in use" (Article 1.b and c).

Therefore, the Convention does not apply either to traces of human existence which, though now under water, were not partially or totally submerged, periodically or continuously, for at least 100 years, regardless of their cultural, archaeological or historical importance; be the said "traces" sites, structures, ships or other means of transport in their context, etc., nor to other traces of human existence of some significance, even if they have been totally or partially under water for one hundred years, when they can be qualified as cables or pipelines or are still in use. As an example of such cases we can cite the remains of the *Titanic*, sunk in 1912 and probably the most famous shipwreck in history, and the *Prince of Asturias*, sunk in 1916;[17] the warships and merchant ships sunk during the First and Second World Wars (1914–1918 and 1939–1945 respectively), such as the *Lusitania*, sunk in 1915,[18]

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[15] This Resolution was adopted by the General Assembly on 5 December 2008 by 155 votes in favour, 1 against and 5 abstentions.

[16] See also, along these same lines, paras. 56, 69 and 101 of the same Resolution.

[17] The Spanish-flag *Príncipe de Asturias* sunk after running aground off the coast of Ilhabela, in Brazil, costing 445 lives. (A precise reconstruction of events can be seen in www .naufragios.net, by Spanish expert Fernando J. García Echegoyen).

[18] The *RMS Lusitania*, under British flag, was torpedoed and sunk by a German U-Boat (the *U-20*) off the southern coast of Ireland. The 232-metre-long ship belonged to the British Cunard line and was similar in characteristics to the *Titanic* and the *Olympic*, of the rival White Star line. 1198 passengers died. It is debated still today whether the U-20 torpedoes were the sole cause of the sinking or if the fact that they impacted in an area where the ship was secretly carrying war materiel also contributed to the outcome

and the *Wilhelm Gustloff*, sunk in 1945;[19] the first underwater cables laid between the United Kingdom and France in 1850 and between Ireland and Newfoundland in 1958,[20] and certain centuries-old fishing structures in Polynesia that are still in use.[21] Obviously, all property, deposits or sites that may be submerged in the future as a result of rising water levels owing to climate change or other reasons would also fall outside the Convention, as they would have to be submerged for 100 years to fall under the scope of application of the Convention.[22]

III. LAW APPLICABLE IN CONJUNCTION WITH OR IN THE ABSENCE OF THE 2001 CONVENTION

In conjunction with or in the absence of the UNESCO Convention, the determination of the international law applicable to the underwater cultural heritage is spread throughout different international instruments whose scope of application and objectives differ considerably.

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(source: Wikipedia online encyclopaedia). In any case, the sinking of the *Lusitania* was one of the reasons that lead the United States (124 Americans lost their lives in it) to declare war on Germany in 1917.

[19] The *KdF Wilhelm Gustloff*, German, was torpedoed and sunk by a Soviet submarine (the *S-13*), near Gdansk, Poland. It was a 208-metre-long transatlantic carrying some 10 thousand people, from thousands that were crowding into the port of the then Dantzig, fleeing from Soviet forces. With some 9,000 dead, it recorded the all-time highest death toll for a ship-sinking (source: Wikipedia and webpage on the sinking, www.wilhelmgustloff .com).

[20] SAVADOGO, cit., p. 43 and note 51, quoting HIGGINS, A. P., "Submarine Cables and International Law", *BYBIL*, 1921–1922, pp. 27–36.

[21] According to Professor Mariano Aznar, who considers their exclusion from the scope of application of the UNESCO Convention a mistake, some fishing nets still in use by a number of different Polynesian peoples, deployed in shallow water currents that cross the atolls characteristic of such archipelagos, are still being tied to structures that have been used since time immemorial by their ancestors, who located them on the sea bed over one hundred years ago (AZNAR, cit., pp. 233 and 234).

[22] Fortunately, in this regard and to the extent of our knowledge, we cannot refer to the existence of any underwater cultural heritage resulting from climate change. Nonetheless, it is clear that the potential impact of rising sea levels on the cultural heritage is a matter of concern in different fields. See, in this regard, *Predicting and Managing the Effects of Climate Change on World Heritage*, a joint report from the World Heritage Centre, its Advisory Bodies, and a broad group of experts to the 30th session of the World Heritage Committee (Vilnius, 2006). This report discusses 127 World Heritage Sites that are threatened by climate change, 9 of which belong to the Cultural World Heritage category (as opposed to Natural World Heritage) and are considered specifically threatened by a rise in sea level. In this regard, it is feared that large hydraulic works such as the Thames Barrier, that protects the city of London and some of its cultural treasures such as Westminster Abbey, and the controversial Moses project to protect the city of Venice will, in the not too distant future, be called upon for much greater efforts than those used in connection with the current occasional rise in water levels or the effects of tides.

1. International Law in force

Applicable international law is confined, in principle, to a small number of international treaties (compare, for example, with provisions on environmental protection or fishing), most of which deal with matters other than specifically protecting this type of property, such as the Law of the Sea, the protection of cultural heritage in general, or the environment. There are only a few exceptions in this regard involving certain bilateral or multilateral treaties aimed at protecting specific wrecks.

1.1. Law of the Sea

First and foremost is the UNCLOS, whose Articles 303 and 149 are devoted to the protection of what it calls "archaeological and historical objects" found "at sea", or "in the zone," respectively. Under Article 303.1 and 2, "States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose"; to this respect, "in order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article." Furthermore, under Article 149: "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."

1.2. Conventions on the protection of the cultural heritage in general in which there is express or implicit inclusion of the underwater cultural heritage

None of the world conventions aimed at protecting the cultural heritage in general make express reference to the underwater heritage. Nonetheless, it can be considered to be implicitly included under the scope of application of the three major UNESCO treaties. First, the Convention for the Protection of Cultural Property in the Event of Armed Conflict signed in The Hague on 14 May 1954, and its 1954 and 1999 Protocols, as they protect movable or immovable property of great importance to the cultural heritage of every people in such situations, including, *inter alia*, archaeological sites and other objects of historical or archaeological interest (Art. 1), without specifying whether they must be on the surface or underwater, as long as they are within the territory (and therefore also within the territorial sea and internal waters) of the High Contracting Parties (Art. 4).[23] Secondly, the underwater cultural heritage, specifically the part of it subject to being imported, exported or traded, is also under the scope of protection of the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership*

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[23] The Convention entered into force on 7 August 1956 and currently has 122 States Parties. For its part, the 1954 Protocol has 97 States Parties, and the 1999 Protocol, also in force, has 50 States Parties.

of Cultural Property, done in Paris on 14 November 1970, to the extent that the objects specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science, are considered to be cultural property and to belong to one of the categories set forth by said treaty, which include, for example, objects of paleontological interest, property relating to history, including, among others, military history and events of national importance, products of archaeological excavations (including regular and clandestine) or archaeological discoveries, elements of archaeological sites which have been dismembered, antiquities more than one hundred years old, such as inscriptions, coins and engraved seals, documents and publications of special interest, and articles of furniture more than one hundred years old and old musical instruments (Art. 1). In this regard, to protect from illicit transfer, the Convention recognizes as part of each State's cultural heritage not only the cultural property found within its national territory, but also, among others, cultural property acquired by archaeological, ethnological or natural science missions with the consent of the competent authorities of the country of origin of such property (Art. 4).[24] And thirdly, every part of the underwater heritage included on the "World Heritage List," is also under the protection of the *Convention for the Protection of the World Cultural and Natural Heritage*, approved in Paris on 16 November 1972. To this respect, for States to be able to seek the inclusion of some of their properties in the List, the Convention considers "cultural heritage" to be only such monuments, groups of buildings and sites (including archaeological sites) "which are of outstanding universal value" (Art. 1) and situated on its territory (Art. 3), it being the responsibility of the International Council on Monuments and Sites (ICOMOS) to advise the World Heritage Committee, created by this international agreement, on the suitability of the property proposed by the State for inclusion on the List (Arts. 8 and following).[25]

In addition to the three worldwide international conventions cited above, on the regional level there is the *European Convention on the Protection of the Archaeological Heritage* revised in La Valetta, Malta, on 16 January 1992, which, while resolving some of the shortfalls of the London Convention of 6 May 1969 (*e.g.*, not taking into account the underwater heritage), establishes a solid system of protection, fundamentally supported by the internal law of the States Parties (Arts. 2 and following), of all vestiges, objects or any other trace of mankind's past located anywhere under the jurisdiction of the Parties, expressly including structures, constructions, moveable objects, developed sites and monuments of other kinds as well as their context, whether located on land or under water (Art. 1).[26]

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[24] The 1970 Convention entered into force on 24 April 1972 and currently has 116 States Parties.

[25] The Convention entered into force on 17 December 1975. It currently has 186 States Parties. No underwater heritage site has been included in the list to date. ICOMOS' concern over their protection is shown in, among others, the report "Underwater Cultural Heritage at Risk: Managing Natural and Human Impacts", in *Heritage at Risk (special edition)*, 2006.

[26] The Convention entered into force on 25 May 1995. It currently has 37 European States Parties. In addition to the 1992 Revised Convention, there is also the *European Conven-*

1.3. Environmental conventions in which reference is made to the underwater heritage

In regard to environmental protection, only regional treaties can be cited. More specifically, the *Protocol concerning Mediterranean Specially protected Areas* done in Geneva on 3 April 1982, created a system of to protect the Mediterranean marine environment through the establishment by the States Parties of areas in their territorial or internal waters (Art. 2), the so-called SPAs, for taking the necessary action to protect and, where appropriate, restore not only sites of biological or ecological value and other natural assets, but also "sites of particular importance because of their scientific, aesthetic, *historical, archaeological, cultural* or educational interest" (Art. 3). To achieve this goal, among other measures, it authorizes the Parties to regulate activities relating to the exploration or exploitation of the seabed or its subsoil, archaeological activities and the removal of any object that may be considered an archaeological object, as well as the trade, import or export of archaeological objects originating in the protected areas and subject to protection measures (Art. 7). However, the *Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean*, adopted in Barcelona on 10 June 1995, that replaced the 1982 Protocol in regard to relations among the Parties to both international treaties (Art. 12), practically cuts this body of rules off from protecting the underwater cultural heritage. It still states that the objective of the Specially Protected Areas (known as SPAMIs) is, *inter alia*, to safeguard sites of particular importance because of their scientific, aesthetic, cultural or educational interest" (Art. 4.d) and that the SPAMI List may include "sites which (…) are of special interest at the scientific, aesthetic, cultural or educational levels" (Art. 8.2); however, in what concerns to criteria for evaluating the interest of an area in regard to its "cultural representativeness," the high representative value would only exist "due to the existence of environmentally sound traditional activities integrated with nature which support the well-being of local populations" (Annex I, B), thereby omitting all reference to the archaeological interest of protected spaces, or archaeological objects therein.[27]

This was not the case, however, with the *Protocol concerning specially protected Areas and Wildlife under the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region*, adopted in Kingston, Jamaica, on 18 January 1990, which, after reproducing a scheme quite similar to that of the Mediterranean Protocol of 1982, which inspired it, has not been replaced by any other

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tion on Offences relating to Cultural Property, done at Delphi on 23 June 1985, not yet in force.

[27] The 1982 Protocol entered into force on 23 March 1986 and the 1995 Protocol, on 12 December 1998. Since not all the States Parties to the former are Parties to the latter, the 1982 Protocol has not been totally replaced and continues in force (Art. 32.2 of the 1995 Protocol). In particular, Bosnia and Herzegovina, Greece, Israel, Lebanon, Libya and Morocco are Parties to the 1982 Protocol but not yet to the 1995 Protocol. (Source: Mediterranean Action Plan for the Barcelona Convention, en www.unep.org).

instrument that would prevent it from protecting the underwater heritage. Therefore, as with the 1982 Protocol, although for a spatially larger scope of application,[28] the 1990 Protocol on the Wider Caribbean maintains the possibility of establishing areas of special educational, historic, cultural and archaeological value as protected areas (called SPAWs, Specially Protected Areas and Wildlife) (Art. 4.2.d) and the possibility of adopting measures including, as necessary, regulating or banning any activity involving the exploration or exploitation of the seabed or its subsoil, and regulating any archaeological activity and the removal or damage of any object which may be considered an archaeological object (Art. 5.2).[29]

1.4. Bilateral and multilateral treaties that refer to specific wrecks[30]

In addition to the Conventions and Protocols referred to above, the underwater heritage has been subject to specific regulation under a small number of limited bilateral and multilateral treaties, either devoted to regulating relations in this area between the States Parties, or to establishing among such States the legal system applicable to a specific wreck. In this regard, we can cite, *inter alia*, the agreement regarding the wreck of the *RMS Titanic*, signed by the United Kingdom in 2003 and the United States in 2004, with expected participation by Canada and France,[31] the agreement between the Netherlands and Australia regarding the Old Dutch Shipwrecks belonging to the *East India Company*, done in The Hague on 6 November 1972;[32] the Agreement between the United Kingdom and South Africa, by Exchange of Notes in 1989, on the British military vessel *HMS Birkenhead*, that sunk on 26 February 1852 with 450 dead and a treasure of some 250.000 gold coins; the Agreement between the United States and France on 3 October 1989, on the *CSS Alabama*, a Confederate warship during the U.S. Civil War that was sunk by the *USS Kearsarge*, belonging to the Union, on 18 June 1864,

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[28] While the Protocol obligates States, when necessary, to establish protected areas in zones over which they exercise sovereignty, sovereign rights or jurisdiction (Art. 4), the truth is that protective measures are to be adopted "taking into account the characteristics of each protected area over which it exercises sovereignty, sovereign rights or jurisdiction, in conformity with its national laws and regulations and with international law" (Art. 5.1).

[29] The SPAW Protocol entered into force on 18 June 2000. It currently has 13 States Parties.

[30] On the different treaties referred to in this section, see, among others: STRATI, 2006, cit., p. 24; AZNAR, cit, pp. 187 and 200.

[31] On said treaty and its consequences, see: DROMGOOLE, Sarah, "The International Agreement for the protection of the *Titanic*", *ODIL*, Vol. 37, nº 1, 2006, pp. 1–31.

[32] While it does not refer specifically to the underwater heritage, it is also useful to refer here to the Treaty between Australia and Papua New Guinea on Sovereignty and Maritime Borders in the area between the two countries, including the area known as Torres Strait, and related matters, done in Sydney on 18 December 1978, whose Article 8 refers to the attribution of jurisdiction between the two States, over remains located on the continental shelf (GARABELLO, cit., p. 42).

7 miles off the coast of France;[33] the Agreement between the United Kingdom and Canada in August 1997, on the expedition of ships captained by Sir John Franklin, composed of the *HMS Erebus* and the *HMS Terror*, that left England in 1845 to link the Atlantic Ocean to the Pacific Ocean through the Northwest Passage and disappeared off the Canadian arctic coast, traces of which have never been found; the Agreement on *La Belle*, a French warship sunk in 1686 and located in Matagorda Bay in Texas, United States, celebrated by France and the United States of America on 31 March 2003; and the Agreement on the *HMS Spartan*, a British cruiser that was sunk by a German plane during the Battle of Anzio on 19 January 1944, celebrated by an Exchange of Notes of 6 November 1952 between Italy and the United Kingdom.

2. Customary Law

In contrast to the treaty law in force, where we can refer at least to 2001 Convention and Articles 303 and 149 of the UNCLOS, there does not currently seem to exist any valid customary law devoted specifically to protecting the underwater cultural heritage. This does not rule out, however, that, as with the international treaties set forth in the previous section, that points of contact may exist between the underwater cultural heritage and customary law applicable to other sectors, such as the Law of the Sea applicable to navigation and maritime spaces, to protecting the cultural heritage of States, or the regulation of some specific aspects of the protection of such heritage by other norms, such as customary law regarding the sovereign immunity of warships and rules on maritime salvage, these latter two cases being referred to later on.

3. Non-binding instruments

Apart from treaty or customary law, we also find it appropriate to mention here some non-binding instruments that have either paved the way towards the later adoption of binding instruments (or may in the future), or served as a starting point for developing practices that, in time, may become consolidated as customary law. In this regard, one of the most important instruments specifically devoted to the underwater cultural heritage in the European regional context are the *Recommendations 848 (1978) on the Underwater Cultural Heritage*, and *1486 (2000) on the Maritime and Fluvial Cultural Heritage* of the Parliamentary Assembly of the Council of Europe. Among other instruments devoted to protecting the cultural heritage in general, including the underwater cultural heritage in one form or another, are two UNESCO recommendations in which this is expressly

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[33] On this agreement, see SCOVAZZI, T., "La protezione del patrimonio culturale subacqueo, con particolare riguardo alle navi da guerra affondate", en CAMARDA y SCOVAZZI, cit., pp. 51 a 61.

contemplated, namely, the *Recommendation on International Principles Applicable to Archaeological Excavations*, of 5 December 1956, and the *Recommendation on the Protection of Movable Cultural Heritage*, of 1978. Also worthy of mention is the recent work by the International Maritime Organization (IMO) to adopt the 2005 *Revised Guidelines on Particularly Sensitive Sea Areas* (PSSAs), under which the PSSA designation can be given to an area of particular importance due to the presence of significant historic or archaeological sites.[34]

IV. OVERLAPPING PROBLEMS

1. Treaties including underwater cultural heritage within their explicit or implicit scope of application

While sharing the objective of preserving the legacy of past generations, each of the instruments set forth in the previous section pursues different concrete goals and is set in a specific historic time, causing them to use different terminology and, depending on their goals and their scope of application, different definitions of what is subject to protection. Therefore, as we have seen, if we look at the treaty law currently in force, the 2001 Convention seeks to protect the *underwater cultural heritage*, which in turn is defined as "*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* (…)". On the contrary, UNCLOS protects, without defining them, the *archaeological and/or historical objects*, but omits any mention of their cultural nature.

Furthermore, regarding the UNESCO treaties, the Hague Convention of 14 May 1954 aims to protect *cultural property* in the event of armed conflict by its application to property of great importance to the *cultural heritage* of every people, including *archaeological sites* and other *objects of historical or archaeological interest*. Along similar but not altogether identical lines, the goal of the Paris Convention of 14 November 1970 is also to protect *cultural property*, in this case against import, export, and illicit transfer of ownership. Nonetheless, protection is extended to the objects expressly designated by the States as of importance to archaeology, history, art (…) and belonging to the categories listed by the treaty, which include objects of paleontological interest, property *relating to history* (including *military history*) and *antiquities more than 100 years old*. Finally, departing from the criteria of its predecessors, the Paris Convention of 16 November 1972 seeks to protect what it refers to as the world *cultural* and natural *heritage*, considering for purposes of inclusion in the World Heritage List that only monuments, groups of buildings and sites (including archaeological sites) of *outstanding universal value* from the point of view of the World Heritage Committee constitute *cultural heritage*.

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[34] IMO, *Res*. A.982, of 1 December 2005, Annex 4.4.14.

On the other hand, among regional international agreements, the revised Valetta Convention of 16 January 1992 seeks to protect what is referred to as the *archaeological heritage*, which it describes, but does not define, as being made up of *all vestiges and objects and any other traces of mankind from past epochs*. Also in the context of regional European agreements, the Geneva Protocol of 3 April 1982, on Mediterranean Specially Protected Areas (SPAs), allows for the designation as such of, among others, *sites of particular importance because of their historical, archaeological and cultural interest* and to regulate within such SPAs the removal of any object considered an *archaeological object*. And lastly, for the special scope of the Wider Caribbean, the Kingston Protocol of 18 January 1990 also allows for the designation, in this case as SPAWs, of areas of special historical, cultural or archaeological interest, among others, and also the regulation within such areas of activities such as the removal of or damage to any object which could be considered an *archaeological object*.

Such textual and, above all, conceptual diversity, aimed at achieving a shared purpose (protection of the legacy of past generations), as seen in the treaties referred to in the preceding paragraphs, results in areas of coincidence and difference, whose delimitation can be difficult to establish. This causes problems not only in determining the relationship between these treaties in the abstract, but also in specifying the law applicable to particular relations among the States that may be States Parties under one treaty and not under another. Such difficulty is unquestionably magnified by the fact that the definitions and scopes of application of the treaties are set forth in open-ended and in many instances indeterminate terms, such as 'culture', 'historical', 'property', 'heritage', 'character' (historical, archaeological or cultural), 'importance', 'interest', 'value', etc. In this regard, as Strati reminds us: "There is no generally acceptable definition of the meaning of cultural heritage despite its frequent appearance in UN and UNESCO conventions and recommendations. Each instrument has employed a different definition drafted for its specific purposes."[35] This is clearly reflected in the matter under consideration. As Forrest observed: "The terms 'underwater', 'culture', and 'heritage' are individually susceptible to different interpretations that are made no easier by amalgamation. In particular, the term 'culture' is an all-embracing term that applies to every aspect of contemporary society. While the term 'heritage' denotes that which is received from predecessors, it does little to narrow the scope of the term 'cultural heritage'. All that we are is an expression of the culture that we inherited, and which we may manipulate and pass on to future generations. Thus, the term cultural heritage is not susceptible to exacting interpretation."[36] Additionally, no lesser difficulties are posed by terms such as 'character', 'value', 'interest' and 'importance,' especially in a decentralised, scarcely institutionalised legal system such as International Law, where each State can find its own fit.

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[35] STRATI, 1999, cit., p. 2.

[36] FORREST, C. J. S., "Defining 'underwater cultural heritage' ", *The International Journal of Nautical Archaeology* (2002) 31.1, pp. 3–11 (p. 3).

It is evident that the problems cited have been transferred into the UNCLOS and the 2001 Convention. Starting with the latter, as Forrest said: "Determining exactly what constitutes the 'underwater cultural heritage' for the purposes of the Convention was a difficult and controversial process, and the resulting definition has owed much to previous attempts to resolve similar issues regarding terrestrial cultural heritage."[37] In this regard, in the text leading into the definitions of the Convention on the Underwater Heritage, reference is made to a large number of the instruments, binding and non-binding, to which we have referred, particularly *Recommendation 848* of 1978 of the Parliamentary Assembly of the Council of Europe, as the first instrument to independently use the concept of underwater cultural heritage; the 1982 UNCLOS; the *Draft 1985 European Convention on the Protection of the Underwater Cultural Heritage*, also prepared by the Council of Europe and influenced by the definition of the aforementioned Recommendation 848; the International Law Association's *Draft Convention* approved at its meeting in Buenos Aires in 1994,[38] influenced by Recommendation 848, and which in turn was used as a basis for drafting the 2001 Convention and the *International Charter for the Protection and Management of Underwater Cultural Heritage*, adopted by the ICOMOS in Sofia in 1996, that ended up being included with minimal modification as an Annex to the text of the Convention on the Underwater Heritage.[39]

In fact, one way or another, the definition provided by the international treaty now in force is not only a corollary to the content of previous instruments, but also, to a large extent, an improvement upon them. Nonetheless, despite the technical improvements it unquestionably includes, its greater objectivity and the fact that it is a convention specifically devoted to protecting this particular part of the legacy of past generations (as was the case with the instruments that preceded it) the definition contained in the Convention on Underwater Heritage is not without problems. For example, the use of the word 'character' together with the adjectives 'cultural, historical or archaeological', can be understood by some to mean that this rules out the criteria of 'significance', the word proposed by States such as the United States and the United Kingdom, and also by those who, conversely, consider that the use of the expression 'cultural, historical or archaeological character' means acceptance that it is not enough for the traces of human existence to have to underwater for at least 100 years, a fully objective criteria, but that they must also be of some significance.[40]

Furthermore, the interpretation of what 'historical or archaeological character' could mean, without including cultural character, is also subject to discussion on interpretation in the context of Articles 303 and 149 of UNCLOS, the treaty with which the 2001 Convention must coexist. So, while in the opinion of Oxman, Arend and Strati, being "archaeological" or "historical" implies that the object is

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[37] FORREST, cit., p. 1.
[38] CARRERA, cit., p. 26 and note 23.
[39] AZNAR, cit., p. 219; CARRERA, cit., pp 26, 27 and 83; FORREST, cit., p. 8.
[40] See FORREST, cit., pp. 9 and 10, GARABELLO, cit., p. 91, and STRATI, 2006, cit., pp. 41 and 42.

old to some extent,[41] in the no less authoritative opinion of judge Treves who, like Oxman, also participated in the III United Nations Conference on the Law of the Sea, any interpretation of the expression "objects having a historical or archaeological character" that introduces elements of precision not taken from the 1982 Convention is arbitrary as well as resorting to concepts derived from archaeological science is not valid. Therefore, as an example, in the opinion of the judge of the International Tribunal for the Law of the Sea, there is no question that ships sunk during the Second World War can be considered to have historical character.[42] The questions of interpretation that arose from these UNCLOS provisions specifically lead to the use of the 100-year criteria in the 2001 Convention.

It is evident, therefore, that despite the enhancements introduced and the greater linguistic specificity in the treaties cited above, their own interpretational limitations are obstacles in the complex lines that determine the relationship not only of the two treaties to each other but also with other instruments cited above.

2. Convergence of different legal regimes on the same subject

While the problems referred to above are important, even greater ones result from subjecting the objects making up the underwater heritage to regulation for reasons other than their archaeological, historical or cultural character, under legal regimes that are different from the one made up by the treaties dealt with in the previous section. We refer here, in particular, to cases in which the object considered (or that could be considered) as underwater heritage owing to its archaeological, historical or cultural interest or character, is subject to regulation also owing to other qualities it possesses, such as its military character, commercial value, hazardousness or the environmental implications of exploration and, where appropriate, removal, among others.

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[41] In Strati's opinion, cit., 1995, p. 180, at least 100 years; in Arend's opinion, old enough for salvage rules not to be applicable; in Oxman's opinion, Article 149, at the negotiation of which he was present, referred to objects at least several hundred years old (STRATI, A., *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea.* Publications on Ocean Development, 23. London, 1995; AREND, A. C., "Archaeological and historical objects: Implications of UNCLOS III", *Virginia Journal of International Law*, 22, 1982, pp. 777–803; OXMAN, B. H., "The Third United Nations Conference on the Law of the Sea: the Ninth Session", *AJIL*, 75, 1981, pp. 211–256, quoted by Forrest, cit., p. 7).

[42] TREVES, T., "Stato costiero e arqueologia sottomarina", *RDI*, nº 76, 1993, p. 709. The text and the quote are from BOU FRANCH, V., cit., p. 85 and note 107. Professor Bou in this work (pp. 82 and following) specifically rebuts Strati's and other authors' argument that the 100 year criteria was supported by the practice of many States through national legislation, citing both domestic laws, such as those of Spain, and international instruments such as the 1970 Paris Convention or the European Convention on Offences relating to Cultural Property (Delphi, 23 June 1985) that differ. Furthermore, Forrest recalls, "since an early draft of Article 149 included reference to a term of 50 years, the presumption is that the drafters intended the articles to apply to objects of a relatively recent origin" (FORREST, cit., p. 7).

This is the case first, for example, of the warships sunk in different eras in the history of mankind. Almost all can be considered objects of historical character under UNCLOS Article 303, to the extent that the shipwreck whether by accident or in combat would always be an event of relevance in the history of its country. Furthermore, if it was under water for over 100 years, it would also fall under the scope of application of the 2001 Convention. Also, if it is a military ship, it could also be protected by the right to immunity,[43] which converges on the same object for reasons and interests very different from those of its historical or cultural character. Furthermore, as a State vessel, a warship is owned by its flag state, and such state can quite legitimately claim it as its legal owner, wherever it may be. Finally, the possibility also exists that in some States maritime salvage rights may be applicable, as we will see below.

This latter body of law, salvage law, is the one that may cause the measures applicable to sunken merchant ships to similarly overlap because, in addition to being legally significant on account of ownership, such ships may also have a status based on their cultural or historical character.[44] In this regard, bearing in mind the content and participation in the *International Convention on Salvage* concluded in London on 28 April 1989 under the auspices of the IMO, we can find ourselves with a number of different legal salvage regimes applicable to sunken ships that also have a historical or cultural character. Under Article 30.1 of said Convention, the States can "reserve the right not to apply the provisions of this Convention (…) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is located on the sea-bed."[45] Therefore, if the property lacks cultural character, for the 57 States Parties to the 1989 London Convention at the end of 2008, the applicable international salvage regime would generally be, in their relations with each other, as set forth in said treaty (which,

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[43] Recognition of the sovereign immunity of sunken warships is not free of controversy. In addition to the general works on the 2001 Convention cited at the beginning, see in this regard,: PINGEL, I., "L'immunité des navires de guerre", in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, pp. 521–529. In particular, among the doctrinal positions that clearly favour such immunity are: ROACH, J. A., "Sunken Warships and Military Aircraft, en http://www.history.navy .mil/branches/org12-7j.htm. Also, among the positions opposing recognition of immunity for such ships, albeit partially, see: BEDERMAN, D. J., Rethinking the Legal Status of Sunken Warships", *ODIL*, vol. 31 (1–2), 2000, pp. 97–125; MOMTAZ, cit., pp. 457–460.

[44] This could be the case of ships such as the *Titanic*, the *Lusitania*, the *Wilhelm Gustloff*, or the *Principe de Asturias*. Regarding application of the right of salvage, see: NAFZIGER, J. A. R., "Historic Salvage Law Revisited", *ODIL*, vol. 31 (1–2) 2000, pp. 81–96.

[45] For the purposes of the Convention, "salvage operation means any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever," "vessel means any slip or craft, or any structure capable of navigation" and "property means any property not permanently and intentionally attached to the shoreline and includes freight at risk" (Art. 1. a, b and c). Although not expressly included in the definition, it seems inferred from the text of the Convention that a vessel is property (See, for example, Art. 13.1 .a and .e. 2 and 3).

for example, permits increase, decrease or even loss of reward, depending on the environmental consequences of salvage) (Art. 14). Nonetheless, in cases of maritime property having a cultural character with prehistoric, archaeological or historical interest, that is located on the seabed, 22 States do not apply the 1989 Convention because they have taken the reservation provided under Article 30.1.d, while the 35 remaining states would. Therefore, independent of the international legal regime applicable to the underwater property owing to its historical or cultural character or value, and assuming that the aforementioned 22 States would not apply any salvage right over the property,[46] 35 States would apply the international salvage regime established under the aforementioned 1989 Convention, and the now 130 other States that are not parties to the London Convention would either apply it or not in accordance with their internal law, or the international law on salvage established under international customary law, or by other international treaties. The States parties to the 1989 London Convention may, by declaration, extend its application to also include warships and other State-owned ships protected by sovereign immunity (Art. 4).[47]

On a different track, both warships and merchant ships, as well as other objects having a cultural, archaeological or historical nature, can also be subject to regulation by legal regimes other than the ones referred to above. Thus, for example, the weapons or explosives contained by a sunken ship or that fall from the air, come unquestionably under the purview of provisions relating to safety and also, in some cases, to environmental law.[48] The same can be true for certain ships or their cargoes, to the extent that, in addition to having a cultural, historical or archaeological character, they may pose a danger to the environment owing to the substances they contain or be leaking, or they may have become part of a natural environment by themselves having formed artificial reefs, or, they may pose a danger to navigation by being obstacles.[49]

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[46] Article 30, as we have seen, allows for maritime property of a cultural character to be excluded from the application of the 1989 Convention without stating at the same time that other agreement rules or customary provisions also referring to this type of operations cannot be applied to them.

[47] To date, Germany, Estonia, Holland and Poland have made notifications under Article 4 of the Convention.

[48] Many examples of objects of this type can be cited. See, in this regard, *Munitions at Sea*, *A Guide for Commercial Maritime Industries*, at http://www.history.navy.mil/library/online/munitionsatsea.htm. Furthermore, with regard to property dropped from the air, we can refer to, among others, that result from "broken arrow" accidents, which are historical by definition. The most serious of these to date took place in waters off the Spanish village of Palomares, when a U.S. B-52 bomber suffered an in-flight accident causing at least four nuclear bombs to fall off, three onto land and the fourth in the sea. It led to one of the most famous "swims" in Spanish history, protagonised by a minister of the Franco dictatorship. Two of the bombs are on exhibit at the National Atomic Museum in Albuquerque, New Mexico. It is stilled feared that a fifth bomb fell into the sea and has not yet been recovered. (Source: Wikipedia and Spanish media; NODO).

[49] As Laroche de Roussane observes, while International Law has remained silent on the issue of coastal State intervention regarding objects left on the seabed beyond their

In cases such as those stated above, problems of overlap by the applicable instruments regarding the objects cited are not alleviated at all by their being underwater cultural heritage objects. Because such objects may also be regulated by norms such as those referred to, other problems of overlap arise and are aggravated in this case by the existence of a new factor: potential conflict among the interests or legal assets being protected. What should have precedence, cultural character, safety, immunity, environmental protection, ownership or the memory of the victims? Cleary sometimes the answer to this question may be simple, but in other cases it can be quite difficult. The difficulty in determining the preferential interest or value makes it practically impossible to determine *a priori*, without reference to a specific case, which rule or international treaty to apply from among the different ones to which a State is bound. In this regard, praiseworthy efforts are being made under the different cited instruments to make their contents compatible with other bodies of law. However, probably owing to the difficulties referred to above, texts that regulate relations between one and another are often ambiguous and often lead to problems of interpretation or establish a circular path among the different legal norms wherein they refer to each other. In this regard, the texts of provisions contained in the UNCLOS and the 2001 Convention on the Underwater Cultural Heritage are sufficiently illustrative:[50]

> UNCLOS, Article 303, paragraphs 3 and 4:
> "3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature."
>
> 2001 Convention on the Underwater Cultural Heritage:
> Article 2.8:
> "Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft."

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cont.
territorial sea, this does not mean that no action is possible, at least with regard to hazardous objects. (LAROCHE DE ROUSSANE, J.-P., "Intervention sur des objects dangereux posés au fond des mers", in *La mer et son Droit. Mélanges offerts à Laurent Lucchini et Jean Pierre Quéneudec*, Éditions A. Pedone, Paris, 2003, pp. 389–397.

[50] See in this regard, SCOVAZZI, T., "Un remède aux problèmes posés par l'application de la *salvage law* au patrimoine culturel subaquatique", in *La mer et son droit, Mélanges offerts à Laurent Lucchini et Jean-Pierre Quéneudec*, Paris, Pedone, 2003, pp. 565–574.

Article 3 – *Relationship between this Convention and the United Nations Convention on the Law of the Sea*:
"Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

Article 4 – *Relationship to law of salvage and law of finds*:
"Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection."

V. PARTICULARITIES OF STATES WITH A DECENTRALISED TERRITORIAL STRUCTURE AND MEMBERS OF INTERNATIONAL INTEGRATION ORGANIZATIONS

As we have seen in the previous sections, the difficulty in precisely defining the protected object makes it tough and sometimes practically impossible, to delimit the areas of overlap and separation among the treaties that protect the underwater cultural heritage in one way or another. Added to this difficulty in a fair amount of cases is the problem of determining which legal system is applicable when the object in question is regulated not only because of its cultural, archaeological or historical character, but also as a legal object under other norms, such as those pertaining to immunity, salvage, environmental protection, safety, property, and others. This situation, resulting in numerous problems of overlap, not only causes troubles in determining the relationship among treaties in the abstract, or among the States parties in them, but also gives rise to problems involving individual States when they transpose applicable international rules into their domestic law. In this regard, the difficulties arising from overlap that we have been discussing can generally affect any type of State. However, it would seem that States having transferred jurisdiction "upward" to international integration organizations or "downward" to lower-ranked territorial entities, such as federal states or autonomous communities, would be more vulnerable. A good example of this particular type of fragility could be the case of Spain, as a Member State of the European Union (EU) and as a State made up of autonomous regions.

1. Spain as a Member of the European Union

It is true that the Spanish State, like its partners in the European region, has not made major transfers to the European Union in the area of culture. For now, community competence in this area is under what are called complementary areas

of support, coordination and supplementation, where the role of the integrating organization is much weaker. This seems to be, furthermore, the path that will be followed in the future, since the classification of areas of competence under the Lisbon Treaty of 13 December 2007 (Art. 6 of the Treaty on Functioning (TFEU), now in force, keeps them at the same level. However, the European Community (and consequently its successor the EU) has assumed major powers in the area of environmental protection and transport (TEC Arts. 174 and following and 70 and following, respectively), on a shared basis, not including actions which, in the exercise of its exclusive customs union authority (Arts. 23 and ss. TEC) could affect the application of UNCLOS Article 303.2, where appropriate. The same distribution is observed in the TFEU that arose from the Lisbon Treaty (Arts. 4.e and g, and 3.a, respectively). In fact, it is precisely in exercise of its environmental powers, among others, that the European Community is a party, for example, to the Protocol Concerning Mediterranean Specially Protected Areas of 3 April 1982.[51] Furthermore, although well known, it is worth recalling that ultimately this regional integration organization is a party to the UNCLOS itself in the exercise of several competences.

Furthermore, it should not be overlooked that because of the regulatory dispersion that exists within the community scope a new track is now being taken to define a truly integrated maritime policy in which different areas, such as the one being dealt with here, could be included. In the Green Paper, *Towards a future Maritime Policy for the Union: A European vision for the oceans and seas*,[52] the European Commission proposes the creation of "an action programme" to be developed for EU activities "in support of synergies (…) with the extensive activities of the Council of Europe," and goes on to affirm that "Member States should be encouraged to sign the UNESCO Convention on the Protection of Underwater Cultural Heritage and the European Convention on the Protection of the Archaeological Heritage,"[53] although this initiative seems to have disappeared in the later Blue Book on *An Integrated Maritime Policy for the European Union*,[54] in which such an explicit reference does not appear.

2. Distribution of authority between the Spanish State and the Autonomous Communities to protect the underwater heritage

2.1. The distribution of authority in the Spanish State

The Autonomous State model built by the 1978 Constitution of Spain is not one of a unitary State, a federal State or a regional State. It is an open model and has elements from all of these, although it seems to be developing towards a federal State.

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[51] European Council Decision of 1 March 1984 (84/132/EEC), *DO*. L 68, 10.3.1984.
[52] Doc. COM (2006) 275 end, 7.6.2006, Vol. II, Annex, p. 52 [48].
[53] European Convention for the Protection of the Archaeological Heritage (revised) (Valetta, 16 January 1992).
[54] Doc. COM (2007) 575 end, 10.10.2007.

It seems to have taken from federalism the option of political self-government, from the unitary State the recognition of being one single Spanish nation, in Article 2, and from the regional State model the participation of the State in the formation of the basic rules of territorial autonomy, the Autonomy Statute, to the point of adopting it as the law of the State. In any event, the Autonomous State, being the decentralised State that it is, is characterised by a complex system of distribution of competences between the State and the Autonomous Communities.

Article 149.1 of the Spanish Constitution sets forth the list of areas that are the exclusive competence of the State. This is a heterogeneous precept in that it includes different types of laws: first, matters that are attributed wholly to the State inasmuch as they are matters of State sovereignty. This includes, for example, the regulation of the basic conditions guaranteeing the equality of all Spaniards in the exercise of their rights and in the fulfilment of their constitutional duties (149.1.1); nationality, immigration, emigration, status of aliens and right of asylum (149.1.2), international relations (149.1.3); defence and the Armed Forces (149.1.4) and Administration of Justice (149.1.5).

Next we find concurrent areas: areas where the Autonomous communities are expressly acknowledged to have some type of authority. In these areas they have administrative authority or the authority to implement basic State legislation. These include, for example, the bases and co-ordination of general planning of economic activity (Art. 149.1.13); basic legislation on environmental protection (Art. 149.1.23); basic legislation and the financial regime of the Social Security (Art. 149.1.17) and the bases of the legal system of the Public Administrations and common administrative procedure (Art. 149.1.18).

Finally, there are areas in which the State reserves for itself legislative authority over some aspects, in which, although not expressly stated, some areas that do not affect the part of the matter reserved for the State may correspond to the Autonomous Communities. This is the case of promotion and general co-ordination of scientific and technical research (Art. 149.1.15); protection of Spain's cultural and artistic heritage and national monuments (Art. 149.1.28); and public safety.

The Spanish Constitution also establishes other areas in which the Autonomous communities may assume jurisdiction by express inclusion in their Autonomy Statutes (Art. 148).

2.2. *The complexity of the distribution of jurisdiction between the State and the Autonomous Communities in relation to the protection of the underwater heritage in Spain*

It must be pointed out, as has been set forth, that when dealing with protection of the underwater heritage we find ourselves up against a recurring problem: the delimitation of the object to be protected and, therefore, the definition of the applicable legal system. Therefore, we may find we have different rules that, from different perspectives and without being exhaustive, may affect the protection of the underwater object, with a clear risk of overlap. And also, in the case of Spain and as we will set forth, there is a lack of a clear definition regarding the jurisdictions over this matter that are held by the State and the Autonomous Communities.

We will pause to deal succinctly with two of the differing perspectives from which the issue can be approached, noting that it can also be viewed from a military law standpoint in the case of warships, from a salvage law standpoint if merchant ships are involved, from navigation law standpoint and even (although this may seem a somewhat extravagant observation), in some cases the submerged ship may really be a cemetery, with all the consequences that this involves.

Let us pause, therefore, to state some thoughts on the matter from the cultural and environmental perspectives.

2.2.1. Underwater heritage as cultural heritage

First it must be stated that under Spanish law the underwater cultural heritage is part of the archaeological heritage. Article 40 of Law 16/85, on the Spanish Historical Heritage establishes that "real or movable property of historical character, subject to being studied by archaeological methods are part of the Spanish Historical Heritage, whether or not they have been removed and whether they are on the surface or in the sub-soil, the territorial sea or on the continental shelf."[55]

Therefore, as Álvarez González[56] indicates, the underwater cultural heritage can be considered to contain movable or real elements of an historic nature, that can be studied by archaeological methods, whether extracted or not, and which are found in the territorial sea or on the continental shelf. Furthermore, in contrast to the rest of the cultural heritage, the archaeological heritage, under Article 44.1 of Law 16/85,[57] can be considered to be part of the public domain. This *ope legis* declaration involves providing such elements with the high intensity protection and legal protection, that the Public Administration, that has title over such public domain, is called upon to exercise. Law 16/85 says nothing about this aspect and autonomous community laws have had to be the ones to attribute to themselves their title over the property making up the archaeological heritage.

This fact would lead us to consider that the property that constitutes the underwater cultural heritage is also in the public domain and subject to the same legal system as the rest of the archaeological heritage. Therefore, since the autonomous communities have jurisdiction over the archaeological public domain, they would

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[55] Article 41 differentiates between archaeological excavations and prospecting. Archaeological excavations are removals on the surface, the sub-soil or underwater performed in order to discover, and research any type of historical or paleontological remains, as well as the geological components related thereto. Prospecting is surface or underwater exploration, without removing the soil, aimed at studying, researching or examining data on any of the elements referred to in the previous paragraph.

[56] ALVAREZ GONZÁLEZ, E. M., "Disfuncionalidades de la protección jurídica del patrimonio cultural subacuático en España. Especial referencia al Caso Odyssey" ("Dysfunctionality in the legal protection of the underwater cultural heritage in Spain. Special reference to the Odyssey Case"), *Revista de Administración Pública nº 175 (Public Administration Journal no. 175), January–April* 2008, p. 349.

[57] Article 41 states that "property in the public domain are all objects and physical remains that possess value as Spanish Historical Heritage and discovered as a result of excavations, movement of soil or other works of any type or by chance."

have jurisdiction also over the underwater cultural heritage. This conclusion is not consistent, however, with what is stipulated in the aforementioned Article 40 of Law 16/85, since the underwater cultural heritage is in the territorial sea and on the continental shelf, being part, therefore, of the maritime territorial domain which, under Article 132.2 of the Constitution, falls under State authority since it is outside the territory pertaining to the autonomous communities.

As stated by the above mentioned author,[58] "the conclusion is therefore obvious: it should be recognised that the archaeological domain located in the territorial sea and on the continental shelf is under State jurisdiction, notwithstanding which the autonomous communities may exercise all authority over any elements that are recognised by the respective autonomy statutes and implemented under their own legislation on cultural heritage."

This jurisdiction, since it is in the area of common cultural heritage, not the heritage of the autonomous communities, as archaeological remains located in the territorial sea and on the continental shelf, would include the executive functions of State jurisdiction and management functions. Nonetheless, a large part of autonomous community laws regulating the cultural heritage pertaining to its territory establish a legal recognition of the archaeological public domain of the objects found in the waters, the territorial sea or the continental shelf. This is found in the laws of Cantabria, Galicia, Valencia, Murcia, the Balearic Islands and Andalusia.

As a recent example we can cite the following case that took place in Andalusia. On 27 April 2009, the Culture Department of the Government of Andalusia, through the Directorate General for Cultural Property, declared a total of 42 underwater areas defined in the continental and internal waters of Andalusia, the territorial sea and the continental shelf off the coast of the territory of Andalusia as Areas of Archaeological Jurisdiction. This declaration concerned the protection of the heritage in a number of underwater areas in which there were presumed to be archaeological remains of interest and where it was therefore considered necessary to adopt precautionary measures in other to prevent pillaging, among other threats.

This was the first time that the Autonomous Community of Andalusia had declared an underwater area to be an Area of Archaeological Jurisdiction, and was an important step in the defence, protection and preservation of the historical heritage. This measure not only seeks to prevent the pillaging the of underwater heritage, but also to protect areas of interest that contain important underwater keys to interpreting history, such as the underwater area of Roquetas-Aguadulce and that of Morro Genovés-Cala Higuera, in Almeria; the Island of Tarifa and the Bolonia Cove, in Cadiz; the area from Cerro Gordo Point to Sacratif Cape, in Granada; the Odiel and Guadiana Wetlands, in Huelva; the Fondeadero del Cristo and El Padrón, in Malaga; and the Gualquivir River, in Seville.

Furthermore, through this declaration, the Andalusian Administration, as set forth by Law 14/2007 on the Historical Heritage of Andalusia, must authorise all

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[58] Álvarez González, op. cit., p. 351.

actions carried out in these underwater areas, enabling it to inspect any work or actions that take place in these areas at any time.

In order to identify the Areas of Archaeological Jurisdiction in these 42 underwater areas, the Directorate General for Cultural Property used detailed information from preventive research programmes sponsored by the Andalusian Government's own Culture Department, including geophysical prospecting to identify and protect the underwater heritage, the Trafalgar project, the Baelo Claudia and Tarifa projects and projects on preventive preservation of the underwater archaeological heritage, such as Mapping the Anthropic Risk of the Andalusian Coast.

This example, therefore, gives rise to both some satisfaction regarding the purpose of the measure, and the finding of a legal inconsistency: the State possesses the jurisdiction to defend against underwater pillaging, but it is the autonomous governments that are in fact providing such protection.

We find, therefore, a conflict of legal authority, which was also shown in the Odyssey Marine Exploration interventions, and evidence the insufficiency of State legislation on the matter, especially when the Constitution itself confers on the State the jurisdiction to protect the cultural and artistic heritage and national monuments against despoliation (Art. 149.1.28).

Protection of the underwater cultural heritage in Spain, therefore, requires specific national and autonomous community legislation setting forth the matter as a concept, delimiting jurisdictions and the responsible bodies of both the State and the autonomous communities, and establishing the concrete applicable legal regime (granting of licenses, inspection, infractions and sanctions, etc.), as well as the necessary coordination and cooperation mechanisms among the public administrations.

2.2.2. The underwater object as subject to environmental protection

Protection of the underwater heritage may, in some cases, be directly related to protection of the marine environment, since the underwater object is often the habitat of specially protected wildlife. It is therefore useful to discuss the distribution of jurisdiction between the State and the autonomous communities for protecting the marine environment.

As we have stated in previous papers,[59] the Constitutional Court has gradually been establishing doctrine in regard to the environment, not directly, but in as a result of specific discussions relating either to the generic jurisdiction that is regularly exercised in the "normal" territory of the State and the autonomous communities (jurisdictions exercised on land or at most in maritime-territorial areas); or in connection with conflicts of jurisdiction exercised in maritime-territorial areas or in areas adjacent to these, but that are sectoral in nature, such as jurisdiction

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[59] AGUDO ZAMORA, M., "El reparto constitucional de la protección del medio ambiente marino. Especial referencia a los vertidos al mar" (The constitucional distribution of protection of the marine environment. Special reference to sea dumping") *Nuevas Políticas Públicas. Anuario multidisciplinar para la modernización de las Administraciones Públicas* nº 4 (New Public Policies. Multidisciplinary yearbook to modernise the Public Administrations, no. 4), IAAP, Seville 2008, p. 193 and ss.

over fishing; or, lastly, in the context of conflicts in which neither the State nor the autonomous community sought to exercise environmental jurisdiction (as has happened in the jurisdictional conflicts relating to sea-harvesting). Constitutional Court jurisprudence has evolved through dealing with new, specific, *de facto* cases. It can be stated that there is no clear, consolidated, homogeneous doctrine relating to the exercise of environmental jurisdiction in the sea.[60]

The first time the Constitutional Court was called upon to make a statement in this regard was to judge the power of the State as the holder of maritime-terrestrial and maritime domain, by interpreting Article 149.1.23 as it relates to Article 132.2 of the Constitution.

This first constitutional doctrine (Constitutional Court Decision 149/1991, of 4 July, that examined the constitutionality of the Law on Coastal Areas of 1988) gave a broad interpretation of the jurisdiction of the State over environmental protection, which was modified subsequently by the same Court. Constitutional Court Decision 149/1991 focuses its reasoning on the statement that while title over public domain is not *per se* a criteria limiting jurisdiction, it is considered that from this title over the public domain the State legislator derives the power to define the public domain and to establish both the legal regime to govern the property that constitutes it and the management and execution powers necessary to preserve it, improve it, preserve it and ensure its proper use. Therefore, the Constitutional Court states that even through Article 132 of the Constitution does not assign jurisdiction, the powers of the State as the holder of title over the maritime-terrestrial public domain cannot be overlooked.

From this perspective, according to the above mentioned State Council report, it can be considered that the State legislator not only can but is also obligated to protect the maritime-terrestrial public domain, in order to ensure that its integrity be maintained.[61] Furthermore, Constitutional Court Decision 149/1991 accepts State

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[60] Council of State Report of July *2006 on the powers of the different territorial administrations and general State bodies regarding the protection of the marine habitat and marine species on the declaration and management of protected marine areas.*

[61] Pursuant to this position, Constitutional Court Decision 149/1991 found the legal provisions attributing rule-making and management powers to the State to regulate and preserve the public domain constitutional, while declaring unconstitutional provisions that do not pursue such protective purposes, but are rather of an urban or territorial planning nature, and provisions that interfere in the exercise of such powers by other Administrations. In this regard, the Constitutional Court stated that "when the planning function [as in territorial planning and to a large extent environmental planning and protecting natural spaces] is attributed (…) to entities with constitutionally guaranteed political autonomy, such attribution cannot be understood in such absolute terms as to eliminate or destroy the powers the Constitution reserves for the State, although the use of them by the State may necessarily condition territorial planning [or the other environmental powers](…)" (F.J.1). While it is true that in cases of concurrent physical jurisdictions the most effective manner of avoiding conflicts is, generally, to adopt means of inter-administrative cooperation, one must keep in mind that when such means of cooperation do not make agreement possible, one of the jurisdictions must displace the others, whereby the State jurisdiction should take precedence.

action outside the maritime-terrestrial area and beaches, invoking State jurisdiction to establish basic legislation on environmental protection (Article 149.1.xxiii of the Constitution) and the basic conditions guaranteeing the equal exercise of rights (Article 149.1.i).[62]

This doctrine was amended by Decisions 102/1995 and 156/1995, followed by more recent ones, in which the Constitutional Court expressly distances itself from the position it took in Decision 149/91 and returning to the criteria it established in Decision 170/1989, which left the autonomous communities much more legal room regarding the environment than as set forth in its Decision 149/1991.

Specifically, Constitutional Court Decision 102/1995 states in Legal Grounds 8 that "*in regard to environmental matters, the State's duty to leave room in the development of basic legislation for autonomous legislation, even though such may be 'less than in other areas,' it must not achieve such a high degree of detail that it would not allow for any legislation to be developed by the autonomous communities with jurisdiction in environmental matters, thereby voiding them of content."* Legal Grounds 18 states that executive jurisdiction *"is attributed to the Autonomous Communities not in an absolute, but rather in a general sense.*"

This general rule, however, falters in four cases as set forth in the Decision (Legal Grounds 8) where State executive action is warranted, as set forth in the above mentioned report by the State Council:

1º. When there is no point of connection to allow for autonomous jurisdiction.

2º. When the phenomenon that is the object of the jurisdiction is supra-autonomous in nature and the public action exercised over it cannot be divided, providing such action can not be exercised also through cooperation or coordination mechanisms and that to do so would require a degree of continuity that can only be guaranteed by attributing it to a single holder which would necessarily be the State.

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[62] In relation to the autonomous jurisdiction to establish additional rules for environmental protection (Article 149.1.23ª), Constitutional Court Decision 149/1991 states that the "the obligation of the State to leave room in the development of basic legislation for autonomous regulation is less than in other areas and, therefore, the State rules cannot be found unconstitutional by reasoning that because of the degree of detail with which they were written they do not allow for development." This conclusion is arrived at after stating that "the terms in which the Constitution (Article 149.1.23ª) contains the exclusive jurisdiction of the State over environmental protection offers special features that cannot be overlooked in establishing its precise meaning (…). The Constitution leads naturally to the conclusion that the drafters (…) felt that the State should be the one to set forth all the environmental protection regulations it deems indispensable."

It is therefore not surprising that Constitutional Court Decision 149/1991 recognises that regulatory power plays an important role even within the area of basic legislation, going so far as even to attribute certain executive powers in the area of the environment to the State (stating, for example, that the power to grant permits for dumping into the sea from ships and aircrafts, an act of execution, corresponds to the State and not the Autonomous Communities).

3º. When it is necessary to resort to a higher body with the capacity to conciliate the opposing interests of its component parts.

4º. When there is imminent danger of irreparable damage, which would necessarily place it in the realm of the State.

However, the admission of executive jurisdiction by the State in these cases must not hide the fact that Constitutional Court Decision 102/1995 itself, in Legal Ground 20, is categorical in not attributing to the State powers of declaration and management of natural protected spaces in the maritime-terrestrial domain.

In fact, the principle that title over domain is not jurisdictional title is confirmed by expressly citing the extensive text on this in Constitutional Court Decision 149/1991: *"Now, in no case does title over domain become jurisdictional title from the point of view of environmental protection, notwithstanding of course the State functions regarding such property from its own perspective. «The powers of domain – as we have already said – can only be legitimately used to further the public purposes for which the existence of public domain is warranted, that is to say, to ensure protection of the integrity of the domain, the preservation of its natural features and free public use, and not to abusively condition use of outside jurisdiction, and in what we are most directly concerned with here, the jurisdiction of autonomous communities in regard to territorial planning»* (Constitutional Court Decision 149/1991)."[63]

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[63] This reasoning is found in the following decision:
"Natural spaces located in the maritime-terrestrial area (Art. 21.3). 20. A different situation is posed in the case of the maritime-terrestrial area, even when the response is negative. In fact, the power is reserved for the State to declare and manage natural protected spaces for the purpose of protecting seashores and riverbanks, the territorial sea and internal waters and the natural resources of the economic zone and the continental shelf (Art. 3, Law 22/1988, on Coastal areas, referred to by Art. 21.3 of Law 4/1989). The commonly accepted opinion is that having public domain does not confer any jurisdiction per se. Neither does this miraculous status take into account the significance of said property for the general interest, the community value on which its legal designation as public and the adjudication of its domain to the State is based. The legal nature of the activity is the only valid criteria for judging constitutionality. There is no need to repeat what is set forth above. The essence of the declaration as an executive act must not be diluted by alien, inoperative factors such as topographic ones. It continues to be just as true now as before what is basic is the minimal regulation, where natural spaces warranting protection are defined and demarcated and guidelines are set forth for their use and even for their management, without altering ownership. Therefore, public domain property can be established as an ad hoc category owing to its own characteristics and its social importance, together with parks, preserves, monuments, and countryside…Therefore, the designation of a segment or a piece of the maritime-terrestrial area as part of a natural protected space also corresponds to the Autonomous Community in whose territory it is. The same thing can be said of management, for the sole purpose of environmental protection, and the possibility of reciprocal interference, a common phenomenon in the exercise of concurrent jurisdictions over the same object for different purposes, does not authorize it to be unified through absorption of one by the other. Such a temptation would lead to rediscovering the centralist state. The

In conclusion, therefore, regarding the protection of the underwater object from the environmental perspective, it is necessary to have effective cooperation between the State and the autonomous communities through the promotion of coordination mechanisms among both public administrations.

VI. FINAL REMARKS

Although the recent entry into force of the 2001 Convention on the Underwater Cultural Heritage is undoubtedly good news for the protection of the legacy of past generations, there still remains much to be done. On the one hand, practical implementation of the Convention and participation in it to date is limited. Outside the 2001 Convention, the current international law applicable to the underwater heritage is dispersed through a number of world and regional treaties, most of which are aimed at purposes other than specifically protecting this type of legacy, such as the UNCLOS (Arts. 149 and 303), certain world and regional treaties that protect the cultural heritage in general, and some regional environmental treaties. Furthermore, there also exist a limited number of bilateral and multilateral treaties regarding specific wrecks. In this regard, the above mentioned treaties, as a whole, have given rise to an increasingly more accurate protection of the underwater cultural heritage, as technology is providing greater possibilities for knowledge, observation, and recovery of same, and as far as the international community is becoming increasingly aware of the value of the cultural legacy of past generations

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conclusion can be none other than to eliminate this third paragraph, as was done with the last paragraph of Art. 21, because it violates the constitutional order of powers and is therefore unconstitutional."

The decision rules: *"1.To declare the nullity of the Fifth Additional Provision contained in Law 4/1989, of 27 March, on Conservation of National Spaces and Wildlife, whereby its Articles 21.3 are considered basic…"*.

The problem arises, according to the aforementioned Report by the Council of State, in that while all the reasoning is set forth in relation to maritime-terrestrial spaces (the heading of Legal Ground 8) and it states expressly that *"therefore, the designation of a segment or a piece of the maritime-terrestrial area as part of a natural protected space also corresponds to the Autonomous Community in whose territory it is,"* it also eliminates all of Article 21.3 as basic legislation (not only the part that refers to the maritime-terrestrial zone.).

Article 21.3 (which, furthermore, was subsequently formally revoked by the First Revocation Provision of Law 41/1997: "Paragraphs 3 and 4 Article 21 are hereby revoked, as well as (…) of Law 4/1989, of 27 March, on "Conservation of Natural Spaces and Wildlife") stating that "3. The declaration and management of the protected natural spaces referred to in the previous chapter correspond to the State when it is for the purpose of protecting the property as set forth in Art. *3 of Law 22/1988, of 28 July on Coasts*" and, therefore, attribute to the State the establishment of protected natural spaces not only in the maritime-terrestrial areas, but also in the remainder of the maritime domain (since all the components and not only the maritime-terrestrial zone are listed in Article 3 of the Law on Coasts).

Therefore, the decision went beyond what the reasoning implied and therefore, as seen in section III.3.1, in 2003 "part of the former text of Article 21.3 of Law 4/1989 (now Article 21.1) was reinstated, although only in regard to the territorial sea.

and deciding to cooperate more actively to protect it. However, despite progress in achieving more specific protection, to date such protection remains scattered and in most cases, insufficient.

As has been extensively studied in available doctrine, both the 2001 Convention and the provisions of the international treaties to which reference has been made, share the problem of seeking to protect an object that is difficult to define. Not only that, but in many instances the property that is cultural in nature and entitled to protection by the above mentioned provisions, is also entitled to attention by legal regimes owing to other characteristics, therefore adding to the problems that arise from difficulties in definition with problems arising from conflicting interests or values. Such is the case with sovereign immunity rights, applicable to warships and other State vessels; salvage rights, applicable to the merchant marine and in some cases, also to warships; environmental rights; the rules of navigation, safety, etc. This causes problems not only for implementing these provisions in the abstract, but also in interconnecting different provisions, whether from successive treaties on the same subject or from conventional provisions that are simultaneously or specially applicable.

The situation described not only affects the application of international norms, but also projects and transfers such difficulties to the States that often find they have to apply norms or implement internal law in the context of fragility described above. This circumstance seems to most intensely affect States with jurisdiction that has been transferred "upward" to an international integration organization, or "downward," through territorial decentralization. In this regard, the case of Spain, as a Member of the European Union on the one hand and as a State with a system of autonomous regions, similar to a federal State structure, on the other, can be an illustrative example. The Spanish State is a party, among others, to the 2001 Convention, the UNCLOS, the 1989 Convention on Salvage, the 1982 SPA Protocol and the 1995 SPAMI Protocol. Furthermore, as a member of the European Union, it has made few attributions to the EC in the area of culture, but the EU, as a regional organization, has major powers in regard to environmental protection and transport, in addition to exclusive customs union authorities. And lastly, Spain is an "autonomic" State and, as such, it has transferred powers in several of the abovementioned areas to the autonomous communities, although, as it usually occurs with the international norms, there is a lack of a clear definition of the distribution of powers between the State and said autonomous regions.

These areas of dysfunction are taken advantage of by treasure hunting companies, such as Odyssey Marine Exploration Inc., which, in early 2007, discovered, pillaged and exported to the United States of America via Gibraltar, the valuable cargo of a warship, then code-named the *Black Swan*, the wreck of which was falsely stated to be located at coordinates corresponding to the English Channel, and was considered an unknown ship for the purposes of claiming it through an *actio in rem* in the courts of said country.[64] Fortunately, two recent judicial

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[64] See documentation on the proceedings in the United States Courts (US District Court, Middle District of Florida, Tampa Division) Document no. 1, by which Odyssey filed an *in rem* action.

resolutions are frustrating such expectations. Firstly, the *Report and Recommendation* by Magistrate Mark A. Pizzo, of 3 June 2009, in said *actio in rem*, has clarified some important issues in the case and recommended that the pertinent district judge rule in favour of the interest of the Spanish State. In regard to the data that is most relevant to our work, the judge's report points out that the treasure is from the *La Mercedes* (page 12), a Spanish Navy warship that was sunk in combat in 1804 and is a key to understanding the history of Spain, among other reasons, because one of the factors that precipitated Spain's declaration of war against Britain (page 1) was that it was blown up and sunk, costing 250 lives (page 7). Furthermore, it also clarifies that the remains of the sunken ship were found some 100 miles west of the Strait of Gibraltar, very far, therefore, from the purported location of the find as falsely given (page 2). Finally, the U.S. judge also accredited the fact that the ship was a Spanish warship, property of Spain (page 17) and was not engaging in any commercial purpose or use when it was sunk (page 27). Based on the aforementioned data, Judge Pizzo concluded that there was no reason not to apply the U.S. Foreign Sovereign Immunities Act (page 1), whose Section 1609 states that "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, the property in the United States of a foreign state shall be immune from attachment, arrest, and execution (…)", and that in application of the 1902 Treaty of Friendship and General Relations between the United States and Spain, "in cases of shipwreck (…) each party shall afford to the vessels of the other, whether belonging to the State or to individuals, the same assistance and protection and the same immunities which would have granted to its own vessels in similar cases"[65] (page 24), the protection that the United States grants to its own sunken warships, whose sovereign immunity is maintained regardless of the length of time since the shipwreck occurred also protects *La Mercedes* (pages 25 and 28). For all these reasons, the decision states that 'International law recognizes the solemnity of the memorial of those who perished the fateful day the Mercedes was blown up, and Spain's sovereign interests in preserving it' (page 33), and the Judge ordered the dismissal of the *in rem* action sought by Odyssey, and that it, "as the substitute custodian, be directed to return the *res* to Spain within ten days or as mutually agreed" (page 34). Secondly, the very recent Order by judge Steven D. Merryday (US District Court, Middle District of Florida, Tampa Division), done on December 22, 2009, confirms the findings made by Judge Pizzo in his Report and Recommendation,[66] granting the Spain's motion to dismiss the Odyssey's claims, and orders the substitute custodian (Odyssey) to

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[65] Treaty of Friendship and General Relations, US-Spain, Art. X, July, 3, 1902.

[66] In addition, Judge Merryday claims that "the ineffable truth of this case is that the *Mercedes* is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain and are entitled in good conscience and in law to lay undisturbed in perpetuity absent the consent of Spain and despite any man's aspiration to the contrary. That the *Mercedes* is now irreparably disturbed and her cargo brought to the United States, without the consent of Spain and athwart venerable principles of law, neither bestows jurisdiction on the United States to litigate conflicting claims of ownership (to all or part of the cargo)

return the *res* to Spain within ten days under the circumstances and in a manner subject to approval by the Magistrate Judge.[67]

In line with the above, the change in the attitude of the Spanish State regarding its underwater heritage, which began with the claim over the wrecks of the *Juno* and the *Galga de Andalucía*, in 1998, is positively continued in the *La Mercedes* case, whose current judicial situation gives rise to well-founded hopes for a happy ending for Spanish interests and for protection of the underwater heritage against speculation and pillage. Also promising in this regard are a number of different legislative and political actions being adopted at both the national and the autonomous government levels which we referred to previously, which was recently augmented by the Council of Ministers approval of the National Plan for the Protection of the Underwater Heritage,[68] and the cooperation agreement between the Spanish ministers of Culture and Defence to draft archaeological charts of wrecks, particularly of State ships, in waters under Spanish sovereignty or jurisdiction, along with the corresponding endowment of funds for exploration, and where possible, removal and recovery of the wrecks. Furthermore, the protocol provides that such agreements, as may be necessary, are to be entered into with the autonomous communities or with other administrations involved in protection of the underwater archaeological heritage by the Ministry of Culture, with prior agreement by the Ministry of Defence through the Navy.[69] This is expected to ensure that appropriate actions will be carried out in accordance with the principles established in the 2001 Convention, to which Spain is a party, as well as the establishment of coordination between the central power and the autonomous powers. However, as in the case of the international measures in this area, much still remains to be done.

ABSTRACT

The recent entry into force of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage means certainly good news for the protection of this part of the legacy of past generations. A great deal still remains to be done, however. 2001 Convention has a limited personal and material scope of application. In its absence, the international regime applicable to this kind of heritage spreads out among a number of heterogeneous instruments focused on diverse topics. One of the problems that the said diversity and heterogeneity causes is the variety of terms and definitions used by it. On the other hand, the implementation

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nor empowers the United States to compel the sovereign nation of Spain to appear and defend in a court of the United States".

[67] Nevertheless, "the status quo of the *res* shall persist until the earlier of 1/ the day after the Eleventh Circuit Court of Appeals issues a mandate in this case or, 2/ if no party appeals, the expiration of the time to notice an appeal."

[68] Agreement of 30 November 2007.

[69] General Protocol on collaboration and coordination in the area of protection of the Underwater Archaeological Heritage, signed in Cartagena on 9 July 2009 (Press Release from the Ministry of Culture, www.mcu.es).

of a series of instruments so different becomes particularly complex when referring to States that have partially transferred their competences "up" to a regional integration organization, like the European Union, and "down" to decentralized territorial units, like the so-called Autonomous Communities. To this respect, the case of Spain provides with a good example of such difficulties.

Keywords

Law of the Sea, Underwater Cultural Heritage, Andalusia, Spain, Cultural Heritage, UNESCO

RESUMEN

La reciente entrada en vigor de la Convención de la UNESCO de 2 de noviembre de 2001 sobre la Protección del Patrimonio Subacuático es sin duda una buena noticia para la protección de esta parte del legado de las generaciones pasadas. Sin embargo, aun queda mucho por hacer. La Convención de 2001 tiene un ámbito de aplicación personal y material limitado. En su defecto, el derecho regulador de este tipo de patrimonio se encuentra disperso entre numerosos instrumentos heterogéneos dedicados a fines diversos. Uno de los problemas que ocasiona esa diversidad y heterogeneidad es la variedad de términos y definiciones empleados. Por otra parte, la aplicación de una serie de instrumentos tan distintos se hace especialmente compleja cuando se trata de Estados que han transferido parte de sus competencias en la materia tanto hacia "arriba", a una organización regional de integración como es la Unión Europea, como hacia "abajo", a unidades territoriales descentralizadas como son las Comunidades Autónomas. El caso de España puede ser, a este respecto, un ejemplo ilustrativo de tales dificultades.

Palabras Clave

Derecho del Mar, Patrimonio subacuático, Andalucía, España, Patrimonio cultural, UNESCO

RÉSUMÉ

La récente entrée en vigueur de la Convention de la UNESCO le 2 Novembre 2001 sur la Protection du patrimoine sous-marin, c'est sans doute une bonne nouvelle pour la protection de ce côté du légat des anciennes générations. Néanmoins, ça reste encore beaucoup à faire. La Convention du 2001 a un cadre d'application personnel et matériel limité. Par défaut, le droit régulateur de ce genre de patrimoine se trouve dispersé entre les nombreux instruments hétérogènes consacrés aux buts divers.

Un des problèmes qui cause cette diversité et hétérogénéité est la variété de termes et définitions utilisées. D'un autre côté, l'application d'une série d'instruments tellement différents se fait spécialement complexe quand s'agit d'Etats qui ont

transféré une partie de leurs compétences dans la matière bien “en haut”, vers une organisation régionale d’intégration comme l’Union Européenne; ou bien “en bas”, vers unités territoriales décentralisées comme les Communautés Autonomes. Dans le cas d’Espagne ça peut être, à ce sujet, un éclairant exemple de telles difficultés.

Mots clefs

Droit de la Mer, Patrimoine sous-marin, Andalousie, Espagne, Patrimoine culturel, UNESCO