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# The Experience of African States on the Protection of Historic Sunken Vessels in the Context of Applicable International Law and Practice

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## Abstract

Shipwrecks are archaeological, economic, historical, and political time capsules waiting to be unlocked. Their discovery results in debates over matters relating to their protection including ownership, jurisdiction, and the manner of their preservation. Interested parties include flag States, particularly in case of sunken State vessels, States in the maritime zone of which the wrecks are found, private owners of items submerged with the wrecks as well as other States linked to the objects. Sunken State vessels involve the additional disputing issue of sovereign immunity. Africa has thousands of historic shipwrecks lying around its coasts. This article examines, in the context of the African Renaissance, laws from 22 select African States in protecting underwater cultural heritage, particularly sunken (State) vessels, in light of relevant international treaties particularly the United Nations Convention on the Law of the Sea and the UNESCO Convention on the Protection of Underwater Cultural Heritage.

**Keywords:** African waters; state vessels; jurisdiction; flag States; sovereign immunity

## Introduction

With over 70 percent of the Earth's surface covered by water,<sup>1</sup> it is not surprising that more mineral and other natural resources are found in the Earth's water bodies than on the land surface. For instance, some 87 percent of the world's known offshore hydrocarbon fields are found in the exclusive economic zone (EEZ) area of the sea.<sup>2</sup> The surface of the ocean is also home to what is generally known as underwater cultural heritage (UCH) which includes shipwrecks, submerged prehistoric villages, lost cities and ancient harbors, and ports, as well as the vast historic items kept inside these items.<sup>3</sup> UCH embraces both tangible and intangible elements of historical, economic, social, and cultural value to a group/community, a nation, or humankind.<sup>4</sup> Hence, it is (or, as some argue, must be) difficult to provide an

<sup>1</sup> Ö niz, Khalil and Vivar 2024, 18, 58.

<sup>2</sup> Browne and Raff 2022, 357.

<sup>3</sup> Browne and Raff 2022, 193–200.

<sup>4</sup> Forrest 2010, 3–13.

exact value (especially monetary value) to maritime cultural heritage.<sup>5</sup> Testifying to the value to humanity of UCH, a recent study of all 1,223 World Heritage sites that examined whether the sites have potential connections with UCH showed that over 355 of such properties (that is, 29 percent, or nearly one-third of them) are related to UCH.<sup>6</sup> Scovazzi is, therefore, right to claim that “the greatest museum of human civilization lies on the seabed.”<sup>7</sup>

The focus of this article is on shipwrecks, particularly sunken State vessels.<sup>8</sup> Dromgoole states that “[a] significant proportion of UCH comprises sunken warships and other government-owned (or operated) vessels and aircraft that were engaged in war, or other public service, at the time of loss.”<sup>9</sup> The United Nations Educational, Scientific and Cultural Organization (UNESCO) estimates that there are over three million shipwrecks spread across the Earth’s ocean floors awaiting discovery, and they contain vast amounts of jewels, weapons, and other historical and cultural artifacts.<sup>10</sup> Yet, some sources say that less than one percent of these shipwrecks have been explored.<sup>11</sup> There is, for instance, a record of only around 250,000 sunken vessels among those scattered around the world’s seas and oceans.<sup>12</sup>

Shipwrecks have been the interest of archaeologists who “seek to expand our knowledge of history through a study of submerged material culture.”<sup>13</sup> They deliver information for “reconstructing lifestyles, trade routes and shipbuilding techniques that no longer exist” today<sup>14</sup> and further assist in unveiling an authentic treasure of knowledge by looking at the “navigation instruments, clothing, and even foods and medicines used aboard” the wrecks that have been rescued.<sup>15</sup> Together with other heritage resources, shipwrecks can be employed to “create, recover and preserve certain narratives about the past that significantly impact national cultural identity and the overall possible directions of the transitional process.”<sup>16</sup>

Looking at shipwrecks from the monetary point of view, it is estimated that there is around \$60 billion of unclaimed treasure in the world’s shipwrecks, and roughly 3,000 of shipwrecks are thought to have contents still onboard that are valuable enough to attract salvage missions.<sup>17</sup> Only one of these, the *San José*, a Spanish galleon which sunk in 1708, and was discovered in 2015 deep in the Caribbean waters by the Colombian Navy, is estimated to have carried a cache of gold, silver, and emeralds onboard thought to be worth as much as \$17 billion; it has hence been named “the holy grail of shipwrecks.”<sup>18</sup>

In the process of searching for the accurate past, advances in the technology of diving and remote sensing equipment, especially the invention of aqualung by Jacques Cousteau and

<sup>5</sup> Claesson 2011.

<sup>6</sup> Perez-Alvaro, Manders and Underwood 2024, 611–12, 634.

<sup>7</sup> Scovazzi 2017, 504.

<sup>8</sup> For purposes of convenience, use of the term “State vessels” in this article refers to warships and other vessels and aircraft that were owned or operated by a State and used, at the time of their sinking, only for government non-commercial purposes. The terms “shipwrecks” and “sunken vessels” are also used interchangeably.

<sup>9</sup> Dromgoole 2013, 134.

<sup>10</sup> Omelchenko 2023, 7; Browne and Raff 2022, 342.

<sup>11</sup> Bennet 2016.

<sup>12</sup> Omelchenko states: “The wreck site, an online service, has a catalog of 209,640 boats known to have sunk, 179,110 of which have a known location. On the other hand, the Global Maritime Wrecks Database contains the records of more than 250,000 sunken vessels, although some of these remain undiscovered.” Omelchenko 2023, 9–10.

<sup>13</sup> Runyan 1990, 31.

<sup>14</sup> Vadi 2009, 857.

<sup>15</sup> Vadi 2009, 857.

<sup>16</sup> Lixinski 2015, 278.

<sup>17</sup> Pomroy 2015.

<sup>18</sup> Taylor 2024.

Emile Gangnam in 1942–1943<sup>19</sup> and later self-contained underwater breathing apparatus (scuba) diving have facilitated discovery and access to shipwrecks. This has, in turn, led to an unprecedented public awareness and recovery of shipwrecks, which, before such development, were out of human reach.<sup>20</sup> These developments can also trigger, and have triggered, several conflicts,<sup>21</sup> including disputes over: ownership of the wrecks among the flag States, the finders, the countries where the shipwrecks are located or where the cargo came from, which State must exercise jurisdiction on the wrecks,<sup>22</sup> and how the wrecks are to be handled (that is, whether to be picked up in salvage or preserved *in situ*). Conflicts over shipwreck ownership are particularly problematic and complex as they very often involve the application of domestic laws on foreign-owned wrecks (some of which may be State vessels) and numerous parties, including States from different corners of the world with different interests and claims.<sup>23</sup> Specific questions that need analysis in the context of shipwreck ownership claims include: (i) who owns shipwrecks in general<sup>24</sup> and historic shipwrecks and their cargo in particular,<sup>25</sup> (ii) are sunken military vessels considered UCH,<sup>26</sup> (iii) in matters concerning historic shipwrecks, should preferential rights be granted to the coastal State, the flag State, the State of origin, the State of cultural origin, or the State of historical and archaeological origin,<sup>27</sup> (iv) does sovereign immunity apply to sunken State vessels?<sup>28</sup>

Africa is a continent fully encircled by water bodies, with the Mediterranean Sea in the North, the Red Sea, the Gulf of Aden, the Indian Ocean in the East, the Atlantic Ocean in the West, and the Atlantic and Indian Oceans merging in the South. The total coastline of the continent is around 26,000 nautical miles (48,152 kilometers), with 13 million square kilometers of EEZ, as well as a continental shelf covering an area of approximately 6.5 million square kilometers.<sup>29</sup> Africa has its share of historic shipwrecks that are of immense historical importance, witnessing ancient navigation to and from Africa, its past civilization, the advent of colonialism, and the painful history of the shipping of African slaves and wealth to all corners of the world. For instance, the waters of Egypt, which is custodian of ancient civilizations and due to its location by the Red Sea and the Mediterranean Sea, hold several shipwrecks of historical value. The discovery of the *L'Orient*, *Le Guerrier*, *L'Artemise*, *La Serieuse* and *Le Patriote*, and more than 60 shipwrecks lying on the seabed of Abukir Bay is evidence of the invaluable history that shipwrecks situated in African waters have preserved.<sup>30</sup> The South African coast, particularly the water around the Cape of Good Hope (also known as the “graveyard of ships”), is claimed to hold nearly 3,000 sunken vessels<sup>31</sup> originating from around 25 different nations in Europe, Africa, the Americas, Asia, and Australia in the time span between 1550 and 1984.<sup>32</sup> One of the most famous of these vessels is the Portuguese slave ship, the *São José Paquete Africa*, which departed Mozambique on 3 December 1794 for a 7,000-mile voyage to Maranhão, Brazil, carrying between 400

<sup>19</sup> Rachmana 2015, 357; Risvas 2020, 267–68.

<sup>20</sup> Forrest 2009, 14.

<sup>21</sup> Rachmana 2015, 357.

<sup>22</sup> Rachmana 2015, 357; Heydorn 1991, 1.

<sup>23</sup> Omelchenko 2023, 8; Rachmana 2015, 358; Kern 2021, 421.

<sup>24</sup> Lang 2018, 411.

<sup>25</sup> Lang 2018, 398; Nur 2019, 34.

<sup>26</sup> Vadi 2014, 221–33.

<sup>27</sup> Huang 2013, 223.

<sup>28</sup> Oyama 2021, 330.

<sup>29</sup> Surbun 2021, 3; Khan 2023.

<sup>30</sup> Abd El-Maguid 2012, 195, 197.

<sup>31</sup> Jenman African Safaris (n.d.).

<sup>32</sup> Werz 2003, 78.

and 500 slaves, pressed flesh to flesh with their backs on the floor, and violently crashed only 100 yards off the treacherous Cape of Good Hope with an estimated 212 of the slaves perishing in the sea.<sup>33</sup> Another study has also documented the stories of over 300 wrecks on the East African Coast (stretching some 4,000 miles from Cape Guardafui in Somalia to the Mozambique Channel) which sank between 1698 and 2002, although the earliest recorded casualty is the Portuguese galleon *San Raphael*, which grounded and burned at Mtongoni, south of Tanga, in 1499.<sup>34</sup> Shipwrecks are found all over the continent in its inland waters and in the African coasts of the Red Sea, the Mediterranean Sea, the Indian Ocean, and the Atlantic Ocean (where it is estimated that most shipwrecks of the world are found<sup>35</sup>). Records exist of shipwrecks in the waters of Eritrea, Lake Albert, Lake Victoria, Kenya, Malawi, Somalia, Mozambique, and Tanzania (East Africa); Algeria, Egypt, Libya, Morocco and Tunisia (North Africa); Namibia and South Africa (Southern Africa); and Cape Verde, Gambia, Nigeria, Senegal, and Sierra Leone (West Africa), some dating back to the early seventh century AD and the 1530s.<sup>36</sup> Most of these vessels attest to Africa's painful past as they were used to transport the rich and various African resources vandalized by the colonizers or the millions of slaves shackled and transported as cargo from African shores to plantations and other destinations of slavery in Europe and the Americas. The shipwrecks off African coasts constitute an important part of this history. An appropriate handling of the legacy of these historical shipwrecks includes their preservation under the relevant rules of international law and domestic laws, which do (should) reflect said international law rules. The result of the discussion under these rules can contribute to the further implementation of the African Renaissance, the subject of this special issue.

As Risvas correctly observed, "in general, the protection of UCH in the African context is a relatively underexplored topic in legal scholarship."<sup>37</sup> This article intends, in part, to contribute to address this dearth of attention by examining the laws of select African States in preserving, asserting jurisdiction on, or claiming ownership of the shipwrecks in their maritime zones in light of the relevant rules of international law, particularly those contained in the 1982 United Nations Convention on the Law of the Sea (LOSC) and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (CPUCH).<sup>38</sup> First, though, we will present how these two conventions regulate UCH in general and sunken (State) vessels in particular, which, Dromgoole states, comprise a significant portion of UCH and present inherent challenges and sensitivities in their regulation under international law (because of such issues as state immunity and state succession).<sup>39</sup>

<sup>33</sup> Cooper 2015.

<sup>34</sup> Shipwreck World 2009.

<sup>35</sup> Bowman (n.d.) presents a list of 111 places where 300 of the most recent shipwrecks (as of 11 February 2023) are located. Of these, 25 are located in the Atlantic Ocean, 17 in the South China Sea, 13 in the Black Sea, 13 in the Pacific Ocean, 12 in the East China Sea, and 10 in the Taiwan Strait. Sixty-nine spots have one shipwreck each, while the rest have between two and nine shipwrecks each.

<sup>36</sup> List of Shipwrecks of Africa (n.d.).

<sup>37</sup> Risvas 2020, 266.

<sup>38</sup> Other tangentially related conventions such as the 1970 United Nations Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage, the 2001 Nairobi International Convention on the Removal of Wrecks and the 1989 International Convention on Salvage as well as supplementary documents such as the 2015 International Resolution on the Legal Regime of Wrecks of Warships and Other State-owned Ships in International law (also known as the 2015 Tallinn Resolution) will not be discussed here.

<sup>39</sup> Dromgoole 2013, 134.

## UCH and Sunken State Vessels under the LOSC

### *The Inadequacy of the LOSC to Protect and Conserve UCH in General*

The history of the 1982 LOSC goes back to the 1930 Hague Conference where Members of the League of Nations negotiated to clarify the rules relating to shipping and the limits of the territorial sea, including the establishment of a contiguous zone (that is, an area of the sea beyond the traditional three nautical miles limiting the territorial sea). Both attempts failed.<sup>40</sup> The next move to codify the oceans occurred under the first Law of the Sea Conference held in Geneva and resulted in four conventions relating to the territorial sea and the contiguous zone, the high seas, the continental shelf, fishing, and conservation of the living resources of the high seas. The 1958 Conference was essentially the codification of the law of the sea. However, like its 1930 predecessor at The Hague, the 1958 Conference failed to reach an agreement on the limits of the territorial sea. The four treaties of the 1958 Conference do not contain provisions dealing with UCH.<sup>41</sup> The second Law of the Sea Conference held in 1960 in Geneva, mainly to resolve the two unresolved issues of the 1958 Conference (limits of the territorial sea and fisheries rights), neither produced any significant agreement nor did it examine the need to protect UCH.<sup>42</sup>

The greatest breakthrough in governing the oceans would come with the launching of the third Law of the Sea Conference in 1982 which resulted in the LOSC. Widely described as the “constitution of the oceans,”<sup>43</sup> the LOSC deals with “practically every aspect of the uses and resources of the seas and the oceans.”<sup>44</sup> It covers wide-ranging issues, including the determination of maritime zones,<sup>45</sup> navigation, fishing, deep-seabed mining, marine scientific research, the laying of submarine cables and pipelines, resolving maritime disputes, and the protection of the marine environment.<sup>46</sup> Despite its extensive nature (320 articles spread over 17 Parts as well as nine annexes), the LOSC contains only two provisions – Articles 149<sup>47</sup> and 303<sup>48</sup> – that, O’Keefe states, “were eventually inserted in the

<sup>40</sup> Browne and Raff 2022, 332–33.

<sup>41</sup> Browne and Raff 2022, 334.

<sup>42</sup> Browne and Raff 2022, 335.

<sup>43</sup> Rau 2002, 389, 425, 430; Browne and Raff 2022, 343.

<sup>44</sup> Browne and Raff 2022, 336.

<sup>45</sup> The zones established and recognized by the LOSC are: internal waters; the territorial sea; the contiguous zone; the EEZ; the continental shelf; the high seas; and the “Area” (the deep seabed). For a detailed presentation of each zone, see Churchill, Lowe and Sander 2022, Chapters 3, 4, 6–9, 11–12; Browne and Raff 2022, 349–66.

<sup>46</sup> Browne and Raff 2022, 336, 341. The preamble to the LOSC refers to the desire to establish “a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.”

<sup>47</sup> Which reads:

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, the State of cultural origin, or the State of historical and archaeological origin.

<sup>48</sup> Which reads:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
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.

1982 Convention.”<sup>49</sup> The two provisions refer to UCH<sup>50</sup> in general, vague and insufficient terms,<sup>51</sup> are obscure,<sup>52</sup> and, in the words of Scovazzi, “fragmentary” and “disastrous.”<sup>53</sup> The most practicable way of understanding how the LOSC regulates UCH, if at all, is to identify the rights and duties given to coastal and other States in each maritime zone of the sea.<sup>54</sup>

The general provision on the protective authority of States in the sea regarding UCH is Article 303(1) of the LOSC, which provides that “States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.” The phrase “found at sea” is understood to apply to UCH found in all maritime zones.<sup>55</sup> Authors agree that, owing to its broad content, this provision does not say very much<sup>56</sup> and is vague and ambiguous.<sup>57</sup> It is, therefore, more political<sup>58</sup> or hortatory<sup>59</sup> in its content. The term “duty” in this provision has been variously interpreted to refer to the obligation: not to deliberately damage underwater relics, to accept a request to form cooperation on protection of UCH, to report the accidental discovery of UCH sites, to take all necessary interim measures to protect UCH, to preserve UCH *in situ*, to avoid unnecessary damage’ and/or to conserve the recovered objects.<sup>60</sup> More specific rights and duties pertaining to the regulation of UCH in each maritime zone must, therefore, be sought elsewhere in the LOSC.

Internal waters, and, under Article 2 of the LOSC, the territorial sea (including its bed and subsoil) fall under the full sovereignty of the coastal State. UCH within internal waters and territorial sea is, therefore, subject to the jurisdiction of the coastal State, which can issue and enforce its domestic laws with respect to UCH (except State vessels with immunity<sup>61</sup>) and other historical relics as qualified by international law (such as the CPUCH).<sup>62</sup>

Under the architecture of the LOSC, the authority and rights of the coastal State diminish as one goes further into the sea. Thus, in the contiguous zone (the area of the sea which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured), the coastal State can, under Article 33(1) of the LOSC, only exercise the control necessary to: (i) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (ii) punish the

<sup>49</sup> O’Keefe 2020, 298.

<sup>50</sup> Wu 2024, 263–64.

<sup>51</sup> Forrest 2002, 513.

<sup>52</sup> O’Keefe 2020, 299.

<sup>53</sup> Scovazzi 2013, 79. See also, Rau 2002, 389, 394.

<sup>54</sup> Tsutskiridze, Krasnikova and Pohoretskyi 2022, 60, 67.

<sup>55</sup> Dromgoole 2013, 246; Rau 2002, 428–9; Risvas 2013, 567.

<sup>56</sup> Scovazzi 2006, 121; Browne and Raff 2022, 353; Dromgoole 2013, 246; Caflisch 1982, 20.

<sup>57</sup> Rau 2002, 400.

<sup>58</sup> Browne and Raff 2022, 353.

<sup>59</sup> Blumberg 2006, 493.

<sup>60</sup> Scovazzi 2006, 121–22; Browne and Raff 2022, 353.

<sup>61</sup> Forrest notes the widely accepted rule that:

A flag state therefore has jurisdiction over its own state vessels as well as private merchant vessels that sail under its flag. A coastal state has jurisdiction to control activities within its territorial waters, which also include activities of a vessel that sails under a foreign flag. However, customary international law recognizes that government ships operated for noncommercial purposes, including warships, are entitled to immunity from coastal state enforcement authority.

Forrest 2003, 42.

<sup>62</sup> Browne and Raff 2022, 332–33. See generally, Churchill, Lowe and Sander 2022, Chapters 3 and 4. Tanaka states that “[i]t is implicit in the LOSC that the coastal State can exercise its jurisdiction with regard to underwater cultural heritage located in the internal waters and the territorial sea.” Tanaka 2012, 178. O’Keefe also adds that “[i]t has always been accepted that in internal waters and the territorial sea the coastal State has the right to deal with underwater cultural heritage and the search for it.” O’Keefe 2020, 297.



infringement of these laws and regulations committed within its territory or territorial sea.<sup>63</sup> Given the nature of the four types of laws that can be enforced in the contiguous zone, therefore, it is difficult to argue that a coastal State has jurisdiction to regulate and enforce domestic laws on UCH in this zone. The only specific reference in the LOSC to the regulation of UCH in the contiguous zone is Article 303(2) which provides that *in order to control traffic* of objects of an archaeological and historical nature, the coastal State may presume that the *removal* of such objects from the seabed of the contiguous zone would result in an infringement within its territory or territorial sea of the laws and regulations referred to in Article 33.<sup>64</sup> Authors have made various comments on the formulation of Article 303(2). Some, like Strati,<sup>65</sup> Blake,<sup>66</sup> Risvas<sup>67</sup> and Bowens<sup>68</sup> claim that Article 303(2) has, in effect, established a 24-mile “archaeological zone”<sup>69</sup> where the coastal State can exercise legislative and enforcement authorities of its domestic laws relating to UCH. Others, such as Oxman<sup>70</sup> and Brown,<sup>71</sup> argue that Article 303(2) has only established an enforcement jurisdiction, while Rau<sup>72</sup> holds that there is not even a legislative jurisdiction established under Article 303(2). None of these authors disputes, however, that Article 303(2) limits the enforcement (and perhaps also legislative) jurisdiction of the coastal State only to the *removal* (and not, for instance, to the *destruction*, as Scovazzi observes<sup>73</sup>) of UCH with the objective of *controlling their traffic*.<sup>74</sup> There is no authority for “search for such objects, or the carrying out of archaeological or other activities impacting on underwater cultural heritage by nationals or vessels of other state.”<sup>75</sup> In practice, though, many countries, including Algeria, Cyprus, France, Tunisia, South Africa, Denmark, and China, exercise UCH jurisdiction in their contiguous zones.<sup>76</sup>

The other maritime zone where there is some regulation under the LOSC regarding UCH found therein is the deep-sea bed, also known as the “Area.” Article 1(1) of the LOSC defines the Area, which comprises about 56 percent of the Earth’s surface,<sup>77</sup> as the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction (that is, beyond the territorial sea and the continental shelf<sup>78</sup>). Article 149 of the LOSC provides that any archaeological and historical object (such as shipwreck and aircraft found sunk<sup>79</sup>) in the Area “shall be preserved or disposed of for the benefit of mankind as a whole” and that particular regard must be had 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.” Given that Articles 149 and 303(1) both apply to the Area (the former applying generally to all areas and the latter specific to the Area), authors have considered Article 149 to be *lex specialis* to

<sup>63</sup> See generally, Churchill, Lowe and Sander 2022, Chapter 7.

<sup>64</sup> The cross-referencing in Article 303(2) to Article 33 has been viewed by commentators as a legal fiction. Browne and Raff 2022, 352; Dromgoole 2013, 34, 43, 250–51. Oxman argues that the purpose of creating this legal fiction is to avoid “converting the contiguous zone from an area where the coastal State has limited enforcement competence to one where it has legislative competence.” Oxman 1980, 240.

<sup>65</sup> Strati 1995, 168.

<sup>66</sup> Blake 2015, 79.

<sup>67</sup> Risvas 2013, 570–71.

<sup>68</sup> Bowens 2009, 46.

<sup>69</sup> Scovazzi 2006, 123; Strati 2006, 29.

<sup>70</sup> Oxman 1980, 240.

<sup>71</sup> Brown 1996, 329–30.

<sup>72</sup> Rau 2002, 399.

<sup>73</sup> Scovazzi 2006, 123.

<sup>74</sup> Dromgoole 2013, 252.

<sup>75</sup> Frost 2004, 25.

<sup>76</sup> Strati 2006, 30–1; Scovazzi 2006, 123 (n 11); Forrest 2002, 518.

<sup>77</sup> Browne and Raff 2022, 365.

<sup>78</sup> Browne and Raff 2022, 365.

<sup>79</sup> Browne and Raff 2022, 369.

Article 303(1).<sup>80</sup> Except for the two notions introduced by Article 149 (preservation for the benefit of mankind and preferential rights given to the three types of States), however, Article 149 has been observed as vague and ambiguous<sup>81</sup> and devoid of details, such as what constitutes archaeological and historical objects.<sup>82</sup> Scovazzi observes that Article 149 appears complicated in its wording,<sup>83</sup> and Rau adds that the provision “is not only primarily programmatic in character, but also suffers from various flaws” and therefore “is generally deemed of little practical importance.”<sup>84</sup> Moreover, Tanaka argues that Article 149 “does not offer any guidance on the manner in which the ‘benefit of mankind as a whole’ should be harmonized with the rights of various categories of States.”<sup>85</sup>

The abovementioned LOSC provisions show that UCH in the EEZ and on the continental shelf beyond the contiguous zone (an area that is at least 176 miles in breadth) is, except for the general provision in Article 303(1) and other general provisions, left without any regulation.<sup>86</sup> Dromgoole states that the combined effect of Articles 149 and 303, which Shelton argues are “ambiguous at best,”<sup>87</sup> means that “they appear to leave a particular geographical ‘gap’ in the provision they afford,” a gap or lacuna that must be filled as far as UCH in the continental shelf and the EEZ.<sup>88</sup> The protection of UCH in the EEZ and on the continental shelf becomes problematic because Articles 56 and 77 of the LOSC respectively state that the coastal State’s sovereign rights in its EEZ and on its continental shelf are confined to natural resources; they do not include UCH. There is, therefore, no legal protection afforded to UCH found in the EEZ and on the continental shelf beyond the contiguous zone.<sup>89</sup> Tanaka has observed that since the LOSC is “deficient in not containing provisions for the protection of [UHC] in the EEZ or on the continental shelf[,] [t]his legal vacuum could easily lead to a first-come-first-served approach on the basis of the freedom of the seas.”<sup>90</sup> The said danger of non-protection of these objects is aggravated by Article 303(3), which leaves the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges untouched. Tanaka adds that “the application of the law of salvage may mean the application of a first-come-first-served approach which would serve the interest of private commercial gain.”<sup>91</sup> Strati concludes her observation of the protection of UCH in the EEZ or on the continental shelf beyond the contiguous zone as: “the protection of archaeological sites in these areas lies in principle at the discretion of flag States, which even if they were willing to take the appropriate measures, lack the necessary means of enforcement.”<sup>92</sup>

The state of preservation of UCH under the LOSC is, therefore, best summarized by Tanaka’s conclusion that “the LOSC is inadequate to protect archaeological and historical objects.”<sup>93</sup>

<sup>80</sup> Risvas 2013, 572; Rau 2002, 428 (n 169); Browne and Raff 2022, 353.

<sup>81</sup> Strati 2006, 33.

<sup>82</sup> Scovazzi 2013, 86; Browne and Raff 2022, 369.

<sup>83</sup> Scovazzi 2013, 86.

<sup>84</sup> Rau 2002, 398.

<sup>85</sup> Tanaka 2012, 178.

<sup>86</sup> Dromgoole 2013, 36; Wu 2024, 264; Scovazzi 2013, 83.

<sup>87</sup> Shelton 1997, 61.

<sup>88</sup> Dromgoole 2013, 35–36; Strati 2006, 31.

<sup>89</sup> Browne and Raff 2022, 358; Rau 2002, 401;

<sup>90</sup> Tanaka 2012, 178.

<sup>91</sup> Tanaka 2012, 178.

<sup>92</sup> Strati 2006, 31–32.

<sup>93</sup> Tanaka 2012, 178.



### The LOSC on Ownership of UCH

It can be stated that the LOSC does not deal with the controversial issue of ownership of UCH. The only explicit reference to ownership of UCH under the LOSC is Article 303(3) which, in the context of the protection of objects of an archaeological and historical nature found at sea, provides that the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges remain intact. This means that in the exercise of their duty, under paragraph (1), to protect and cooperate in protection of UCH and their right to enforce under paragraph (2), some domestic laws in the contiguous zone if UCH is removed from that area, States Parties must refrain from interfering in the matters raised in paragraph (3), one of which is the right of identifiable owners (as related to the law of finds).<sup>94</sup> Dromgoole states that the relationship between paragraph (3) and paragraphs (1) and (2) means that “in circumstances where [paragraphs (1) and (2)] apply, the question of ownership rights will be one that has to be determined by the applicable domestic law.”<sup>95</sup> She, however, agrees that paragraph (3) is not sufficiently clear:

The precise effect of [paragraph 3] is hard to fathom. Certainly, it is not an attempt to exclude or abolish the rights of identifiable owners; equally, it does not provide that states *must* recognize ownership rights, or give them priority over heritage protection objectives, when they implement the provisions to which this paragraph applies.<sup>96</sup>

Scovazzi laments that the worst among the “few weak, dubious and even bad” provisions of the LOSC is Article 303(3)<sup>97</sup> in the sense, in part, that “[i]f there is a conflict between the general objective to protect the underwater cultural heritage (Art. 303(1)), on the one hand, and the provisions of salvage law and other rules of admiralty [under Art. 303(3)], on the other, the latter prevail.”<sup>98</sup>

The broad exception that issues such as the right of identifiable owners and the law of salvage enjoy under Article 303(3) is, however, subject to the exception in Article 303(4), which allows for the making of “other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.” This provision has been understood to include “treaties that are concluded subsequent to, as well as antecedent to, the LOSC” and, therefore, “Article 303(3) has no effect on the freedom of the negotiators of a subject specific treaty on UCH to deal with ownership rights in whatever way they see fit.”<sup>99</sup>

### Ownership v. Jurisdiction Under the LOSC

The discussions above regarding ownership show that whether UCH is owned – for instance, in the case of sunken vessels – by private individuals or the State, the LOSC does not interfere in ascertaining, establishing, denying, or expropriating such ownership. *Ownership* of UCH must, as Forrest cautions (at least in the context of sunken State vessels), be distinguished

<sup>94</sup> Dromgoole also states that Article 303(3) applies to Article 149 (which applies to the Area) because, in principle, Article 303(3) applies to all maritime zones. Dromgoole 2013, 114.

<sup>95</sup> Dromgoole 2013, 114.

<sup>96</sup> Dromgoole 2013, 114. See also, Scovazzi 2013, 84.

<sup>97</sup> Scovazzi 2013, 79.

<sup>98</sup> Scovazzi 2013, 84. He adds that “[t]he effects of Art. 303(3) on Art. 303(2) are also particularly disastrous. The coastal State would be prevented from sanctioning the removal of the objects from its archaeological contiguous zone, as admiralty law grants to the finder or the salvor the right to remove the objects.” (n 12)

<sup>99</sup> Dromgoole 2013, 115.

from *jurisdiction* (that is, the ability of a State to control activities in its territory or over its nationals<sup>100</sup>) over UCH.<sup>101</sup> The case of shipwrecks, where in the context of UCH the question of ownership has mainly arisen,<sup>102</sup> best explains the relationship and distinction between ownership of and jurisdiction on UCH. A property's sinking to the bottom of the sea (anywhere in the maritime zones), even centuries ago, does not mean that the owner loses ownership of the property-turned-UCH. Only lawful expropriation under domestic law or express abandonment by the owner would transfer ownership to a new owner (the State or otherwise).<sup>103</sup> Coastal or other linked States, however, maintain, depending on the maritime zone in which the UCH is found, the power (that is, jurisdiction) to regulate such UCH. In the context of State vessels, which also customarily enjoy immunity, Forrest explains that if such vessels are found sunk in the *territorial* waters of a coastal State, the ownership of the vessels continues to stay with the flag State while it continues to be argued whether the coastal State, without enforcing its laws on such vessels (if they continue to have immunity), has the jurisdictional right to regulate activities conducted in relation to that vessel.<sup>104</sup> The best way to reconcile the inherent rights of coastal State jurisdiction with flag State ownership (and immunity) and thereby efficiently protect the State vessels is, as Forrest correctly suggests, "through cooperation between the coastal state and the flag states."<sup>105</sup> The further the State vessel is found sunk in the sea, the more diminished the jurisdiction of the coastal State will naturally be, while the ownership of the flag State remains constant.<sup>106</sup>

### *The LOSC on Sunken State Vessels and Their Immunity*

Due mainly to the principle of immunity attached to them, the case of warships and State vessels operated for non-commercial purposes is a politically sensitive subject, especially if they are found sunk in the seas.<sup>107</sup> The LOSC has some provisions that intend to preserve the special status of warships and such other State vessels. Under Article 30, any such ship or vessel which does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregard any request for compliance therewith which is made to it, may be required by the coastal State to leave the territorial sea immediately. Article 31 makes the flag State internationally responsible for any loss or damage to the coastal State resulting from non-compliance by these vessels concerning their passage through the territorial sea. Article 32 provides that outside of the exceptions under Articles 30 and 31, nothing in the LOSC affects the immunities of warships and other government ships operated for non-commercial purposes. Moreover, Articles 95 and 96 respectively provide that warships and ships owned or operated by a State and used only on government non-commercial service shall have complete immunity from the jurisdiction of any State other than the flag State while on the high seas. Similar to the LOSC's provisions, Article 5 of the 1989 London Salvage Convention declares that: "this Convention shall not apply to warships or other non-commercial vessels owned or operated by a state and entitled, at the time of salvage operations, to sovereign immunity under general principles of international law unless that state decides otherwise."

<sup>100</sup> Forrest 2003, 42.

<sup>101</sup> Forrest 2003, 42.

<sup>102</sup> Dromgoole 2013, 97.

<sup>103</sup> Dromgoole 2013, 102; Aznar-Gómez 2003, 67–68.

<sup>104</sup> Forrest 2003, 42.

<sup>105</sup> Forrest 2003, 51.

<sup>106</sup> Forrest 2002, 529, 541–44; Forrest 2003, 51.

<sup>107</sup> Dromgoole 2013, 134.

According to Migliorino, immunity means that vessels “are not to be stopped, detained, seized or in any way subject to aggressive action by a foreign ship.”<sup>108</sup> There are three questions that are linked to the treatment of the immunity of State vessels under the LOSC and other relevant fields of international law. The first question is whether sovereign immunity should apply to State vessels *equally* in the territorial waters and other maritime zones.<sup>109</sup> The second, more controversial, question is whether the principle of sovereign immunity *continues* to apply to State vessels after they have *sunk*; commentators have differences on this subject.<sup>110</sup> The third practical question is whether the immunity of sunken State vessels *expires* with the passing of time. It has been asked whether customary and conventional international law recognize immunity to State vessels that have sunk more than 100 years ago.<sup>111</sup> Looking at the provisions of the LOSC leads to the conclusion that whether in the context of treating such sunken State vessels as UCH otherwise, the LOSC does not provide adequate responses to these questions in relation to such vessels. A more satisfactory response (in the context of treating such vessels as UCH) that takes into consideration the different maritime zones wherein these vessels are located would later be provided under the CPUCH.

## UCH and Sunken State Vessels under the CPUCH

### *The Evolution of the CPUCH in Brief*

As mentioned above, UCH was barely regulated under the LOSC which had its focus on other matters of the ocean.<sup>112</sup> It would take a separate initiative that culminated in the adoption, under the auspices of UNESCO, of the CPUCH.

The CPUCH is the result of initiatives launched outside of UNESCO. The earliest of these was the initiative by the Parliamentary Assembly of the Council of Europe, which, frustrated by the slow progress of the third United Nations Conference on the Law of the Sea and the low attention given to UCH in that conference,<sup>113</sup> authorized, in 1977, the establishment of a committee to make recommendations on how to generally protect European UCH and particularly prevent shipwrecks from illicit exploration. The committee produced a report (called the Ruper Report) on archaeological and legal aspects and incorporated a formal recommendation entitled “Recommendation 848 on the Underwater Cultural Heritage.” The process led to the preparation in March 1985 of a draft European Convention on the Protection of the Underwater Cultural Heritage. Turkey’s objections (mainly directed at Greece<sup>114</sup>) to the provisions relating to the territorial scope of the Convention meant that the draft was never adopted.<sup>115</sup> The Council of Europe continued to work on the pan-European protection of UCH and produced the 1992 European Convention on the Protection of the Archaeological Heritage (Revised) (also known as the Valletta Convention), which

<sup>108</sup> Migliorino 1985, 250.

<sup>109</sup> Forrest 2003, 42; Dromgoole 2013, 136.

<sup>110</sup> Forrest 2003, 45–46. Forrest states that “the question of whether the principle of sovereign immunity applies to sunken state vessels requires international resolution.” On the varying views, see Dromgoole 2013, 137–8. See also, Aznar-Gómez 2003, 67–8; 76; Strati 2006, 49 (n 56); Garnett 2021, 17; Zenkiewicz and Wasilewski 2019, 339–40; Oyama 2021, 329; Vadi 2014, 245.

<sup>111</sup> Forrest 2003, 42.

<sup>112</sup> O’Keefe noted that “underwater cultural heritage was not of major significance for most delegates [who drafted the LOSC]” and adds: “Underwater cultural heritage had a low priority in the negotiations. The Swiss international lawyer, Caflisch, refers to a study ‘on the legal regime of submarine antiquities’ by the United Nations Conference on the Law of the Sea as ‘cursory’.” O’Keefe 2020, 298. See also, Risvas 2013, 564–65; Vadi 2013, 333–78.

<sup>113</sup> Blake 1996, 821.

<sup>114</sup> O’Keefe 2020, 297–8.

<sup>115</sup> Dromgoole 2013, 36–44; Rau 2002, 388–89; Blake 1996, 820–22, 824–27; Strati 1995, 86–89.

updated an earlier convention of 1969 that barely regulated UCH.<sup>116</sup> The draft treaty of 1985 and the Valletta Convention were used as the key inspiration for the International Law Association (ILA), which took its separate initiative for the international regulation of UCH.<sup>117</sup>

In 1988, the ILA, using the window opened under Article 303(4) of the LOSC, began working on the preparation of a draft convention on UCH. I also approached the International Council on Monuments and Sites to also assist in the preparation of a set of archaeological principles and standards to be attached to the draft. Three draft conventions were prepared in 1990, 1992, and 1994, the last one of which was adopted at the ILA's 66th Conference in Buenos Aires and submitted to UNESCO for consideration.<sup>118</sup> The final ILA draft became the "blueprint for the development of" the CPUCH.<sup>119</sup> Challenging issues during the preparation of the ILA draft included: (i) whether the treaty should apply to all UCH (particularly sunken State vessels) or only to UCHs abandoned by their owners, (ii) whether the jurisdiction of the coastal State in preserving UCH should be extended up to 200 miles from the base line (that is, the need to establish a "cultural heritage zone"), and (iii) whether traditional salvage law and law of finds (allowed to continue to be in force under Article 303(3) of the LOSC) should be allowed to apply to UCH falling under the treaty.<sup>120</sup> These issues continued to be the most controversial matters during the deliberations that led to the adoption of the CPUCH.<sup>121</sup>

### *Content of the CPUCH in Brief*

The CPUCH contains 35 articles and an annex that has 36 Rules. The treaty, which Dromgoole states is a "substantial and technically complex treaty," was prepared with the aim of ensuring and strengthening the protection of UCH (Article 2(1)) with the overall objective of the preservation of UCH for the benefit of humanity (Article 2(3)). The cornerstone for the implementation of the treaty is cooperation between States, other organizations, and interested parties (Article 2(2) and Preambular clause 10). By ensuring the protection of UCH as such, the treaty intends to "control treasure-hunting activities in international waters"<sup>122</sup> by, *inter alia*, banning the commercialization of UCH (Article 2(7)).<sup>123</sup> The CPUCH intends to work in tandem with the LOSC "by ensuring and strengthening the international protection of UCH" through "increasing awareness amongst the international community," linking the protection of UCH to that of heritage found on land, and emphasizing their cultural value over their economic value.<sup>124</sup>

Article 1(1) of the CPUCH defines UCH 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..." and includes vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context. The Convention intends not to prejudice the rights, jurisdiction, and duties of States under international law, including the LOSC, and must be interpreted

<sup>116</sup> Dromgoole 2013, 44–48; Blake 1996, 827–29; Browne and Raff 2022, 384–85; Strati 1995, 80–81.

<sup>117</sup> Dromgoole 2013, 50; Browne and Raff 2022, 385; Dromgoole 2013, 59.

<sup>118</sup> Forrest 2002, 515; Dromgoole 2013, 49–50; Browne and Raff 2022, 385; Blake 1996, 830–38; Blake 2015, 94–97.

<sup>119</sup> O'Keefe 2002, 12, 23; Aznar-Gómez 2003, 62 (n 1).

<sup>120</sup> Forrest 2002, 515; Dromgoole 2013, 50; Blake 1996, 831–32.

<sup>121</sup> Rau 2002, 393, 413; Dromgoole 2013, 53–54, 154; Garabelló 2003, 89–192.

<sup>122</sup> Browne and Raff 2022, 388.

<sup>123</sup> For a summary of the cornerstone principles of the CPUCH, see Varmer 2014, 28; Rachmana 2015, 363.

<sup>124</sup> Vadi 2009, 863; Panayotopoulos 2009, 35–37.

and applied in the context of and in a manner consistent with them (Article 3).<sup>125</sup> The Convention mainly focuses on activities *directed at* UCH, in contrast to activities *incidentally affecting* UCH (both defined respectively under Article 1(6) and (7)). As far as the protection of UCH is concerned, the Convention prefers *in situ* preservation as the first option before allowing or engaging any activities directed at this heritage (Article 2(5)).<sup>126</sup> In addition to the elaborate rules of maritime zone-based UCH protection listed in Articles 7–12 (see below), Articles 14 and 16 also allow port state and nationality powers to authorize States Parties to respectively “prevent the entry into their territory, the dealing in, or the possession of, [UCH] illicitly exported, and/or recovered, where recovery was contrary to the Convention” and “ensure that their nationals and vessels flying their flag do not engage in any activity directed at [UCH] in a manner not in conformity with this Convention.”

### *The CPUCH on the Thorny Issue of Jurisdiction*

Regarding the issue of jurisdiction, the Convention intends to carefully balance the powers of coastal States with the interests of those States which, for reasons including ownership or different levels of link with the UCH, are interested in activities affecting a particular UCH. To achieve this objective, the jurisdiction of coastal States is, without interfering with the ownership of UCH found wherever, progressively diminished as the location of the UCH moves further from internal waters, archipelagic waters, and territorial sea towards the Area (Articles 7–12).<sup>127</sup>

Within their internal waters, archipelagic waters and territorial sea, States Parties have, in the exercise of their sovereignty, the exclusive right to regulate and authorize activities directed at UCH (Article 7(1)) and shall require that the annexed Rules be applied to activities directed at UCH in these areas (Article 7(2)).

Regarding UCH in the contiguous zone, the Convention states that, in addition to the provisions of Article 303(2) of the LOSC, States Parties may regulate and authorize activities directed at UCH and shall require that the Rules be applied.

Regarding UCH in the EEZ and on the continental shelf, it was stated earlier that this area was essentially left as a vacuum under the LOSC. Thus, as Rau correctly mentioned, the issue of the protection of UCH in the EEZ and on the continental shelf was a very difficult and controversial subject during the negotiations for the CPUCH,<sup>128</sup> and the drafters had to come up with a complicated system to respond to the various issues raised in this regard.<sup>129</sup> The protection of UCH in the EEZ and on the continental shelf is essentially based on the cooperation between the State on whose EEZ and the continental shelf the UCH is located (called the Coordinating State); the State whose national, or a vessel flying its flag, discovers or intends to engage in activities directed at UCH; and States which intend to be consulted on the process because of a verifiable link,<sup>130</sup> especially a cultural, historical, or archaeological link that they have with the UCH (Articles 9–10). At all times, the State in whose EEZ or continental shelf the UCH is located has the right to prohibit or authorize any activity

<sup>125</sup> Although beyond the scope of this Article, there are concerns as to the inconsistency between some provisions of the CPUCH and the LOSC (Articles 303(4) and 311 in particular). For a detailed presentation of these issues, see Rau 2002, 425–45; Dromgoole 2013, 278–79.

<sup>126</sup> Dromgoole notes in this regard that “[i]t is good to remember however that the principle of *in situ* preservation means in effect significant interference in rights of the owners; thus, states may have to remedy this with the requirement of compensating the owners.” Dromgoole 2013, 118.

<sup>127</sup> For more details, see Strati 2006, 43–8.

<sup>128</sup> Rau 2002, 412.

<sup>129</sup> O’Keefe 2020, 306.

<sup>130</sup> For further discussion on what “verifiable link” means (should mean) under the CPUCH, see Maarleveld 2014, 101–19; Huang 2013, 220–25.

directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law, including the LOSC (Article 19(2)).

Regarding UCH in the Area, the purpose is to further implement Article 149 of the LOSC. Accordingly, when a national or a vessel flying the flag of a State Party discovers or intends to engage in activities directed at UCH located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it (Article 11(1)). States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them (Article 11(3)). State Parties with a verifiable link to the UCH in the Area may also request the Director-General and the Secretary-General to be consulted on how to ensure the effective protection of that UCH (Article 11(3)). The Director-General then assembles all interested States Parties and the International Seabed Authority to coordinate their efforts in protecting the UCH in the Area and to select a Coordinating State. In the process, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties (Article 12(1)-(5)). Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned (Article 12(6)).

### *The CPUCH on Ownership of UCH*

The CPUCH does not contain provisions on private or public ownership rights of UCH.<sup>131</sup> Strati explains that the reason for this could be the fact that the CPUCH “does not deal with the question of title, as it is directed at interference with cultural heritage and the quality of the work done in relation to that heritage.”<sup>132</sup> Dromgoole reflects on this approach in the following words:

In light of the difficulties in trying to deal with the matter ‘head-on,’ the UNESCO Convention makes no reference to ownership at all. In the absence of any guidance from the treaty, the assumption must be that ownership rights will continue to exist in material falling within the scope of the Convention unless the applicable domestic law provides otherwise. Leaving ownership as a matter to be determined by national laws was the pragmatic way forward. Not only did it facilitate the inclusion of warships within the scope of the Convention, but also the negotiation process as a whole. The approach means that national heritage authorities and, ultimately, national courts will have to deal with any ownership claims that might arise with respect to material falling within the definition of the Convention.<sup>133</sup>

### *The CPUCH on the Law of Salvage and the Law of Finds*

The recovery of sunken wrecks in the oceans has traditionally been regulated under national and international salvage law; however, the subject “has long been a contentious issue” because salvage activities are believed to run contrary to the preservation (especially *in situ*

<sup>131</sup> Dromgoole 2013, 60.

<sup>132</sup> Strati 2006, 43.

<sup>133</sup> Dromgoole 2013, 117. Forrest makes a similar observation:

A great deal of litigation with regard to UCH concerns private law issues of ownership and abandonment. Each state has jurisdiction to determine title to and disposition of UCH found in its territory. The state’s courts will, in accordance with its choice of law rules, determine ownership to UCH, ordinarily respecting ownership if there has not been any act of abandonment. However, these national laws differ dramatically from state to state.

Forrest 2003, 48. See also Browne and Raff 2022, 383.



preservation) of sunken wrecks.<sup>134</sup> Forrest notes that the fact that “salvage law is at odds with the preservation of historic wreck, was generally accepted during negotiations [of drafting the CPUCH].”<sup>135</sup> Moreover, salvage is intimately related to the “controversial issue of ownership of historic wrecks.”<sup>136</sup> As mentioned above, the broad exception granted to the laws of salvage and finds under Article 303(3) of the LOSC could legitimately be overridden under Article 303(4) by making other international agreements regarding UCH. Thus, drafters of the CPUCH found the freedom to regulate the laws of salvage and finds in a manner that primarily preserves UCH but also gives room for regulated activities under these two widely practiced laws. Article 4 of the CPUCH, therefore, provides that any activity relating to UCH to which the Convention applies<sup>137</sup> “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.”<sup>138</sup> O’Keefe mentions that such authorization would have to be given by the competent authorities mentioned in Articles 7, 8, 10, and 12 of the Convention, and the salvage activity must also comply with the guidelines contained in the Annex. He states that “What article 4 does in requiring application of the three preconditions is to strip away the possibility of making a profit from the salvage.”<sup>139</sup>

### *The CPUCH on Sunken State Vessels and Their Immunity*

The final issue under the CPUCH to be discussed for purposes of this article is the way sunken<sup>140</sup> State vessels and their immunity have been handled.<sup>141</sup> As Dromgoule observes, “a

<sup>134</sup> Browne and Raff 2022, 392.

<sup>135</sup> Forrest 2009, 27. He also refers to the same attitude during the drafting of the ILA Draft Convention where it was mentioned in the official commentary that:

It should be noted that the law of salvage relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is...

<sup>136</sup> Browne and Raff 2022, 392. O’Keefe asks:

The ownership of shipwrecks and their cargo was much contested once divers were capable of reaching the depths at which they lay. When the ship sank, what happened to ownership rights? ... should the law encourage recovery of the wreck or cargo, and, if so, what is the effect on ownership? O’Keefe 2020, 299–300.

<sup>137</sup> This leaves the law of salvage and the law of finds to apply, as provided under Article 303(3) of the LOSC, to UCH not covered under the CPUCH definition of UCH.

<sup>138</sup> For more on the subject, see Forrest 2009, 1–33.

<sup>139</sup> O’Keefe 2020, 310.

<sup>140</sup> Regarding State vessels that are in operation and have not sunk, Article 13 of the CPUCH provides that flag States, while retaining immunity of their sunken vessels, have the duty to contribute to the protective objectives of the CPUCH:

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11, and 12 of this Convention. However, States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

<sup>141</sup> At the time of preparing the CPUCH, the issue of whether or not flag States should have a role in the disposal or the *in situ* preservation of their sunken military vessels stirred a heated debate. On the one hand, various States proposed that sunken military vessels should enjoy sovereign immunity and not be subject to implicit abandonment, while another group of States proposed that any wreck found within a radius of 200 miles should fall under the coastal State’s jurisdiction regardless of its qualification as a war wreck, asserting that the UCH is the property of the State in which it is found and is, therefore, the heritage of humanity. Oyama 2021, 324, 328; Vadi 2014, 242–43; Bankes 2020, 54.

significant proportion of UCH comprises sunken warships and other government-owned (or operated) vessels and aircraft that were engaged in war, or other public service, at the time of loss.”<sup>142</sup> By its very nature, interfering with these vessels is a “matter of great political sensitivity”<sup>143</sup> and was, therefore, a “hotly debated issue”<sup>144</sup> during the drafting of the CPOCH. O’Keefe explains the reason behind such sensitivity as follows:

[State vessels] are closely related to the sovereignty of the State. They are in effect part of the State, and so any action to interfere with them is an interference with the State itself. There are other reasons which may apply to particular vessels. The possibility that human remains may be found is significant. The State will want to ensure that they are properly treated; in the words of the Convention itself, that they are treated with ‘proper respect’. There may be papers on board that could be embarrassing to the State if they still survive having been sealed in special containers.<sup>145</sup>

That State vessels whose ownership has not been expressly abandoned by the flag State<sup>146</sup> or have not been captured or surrendered during war enjoy immunity is an established principle. Regarding State vessels, three questions were raised in the section on LOSC: (i) should sovereign immunity apply to State vessels in the territorial waters and other maritime zones equally? (b) should the principle of sovereign immunity continue to apply to State vessels after they have sunk? and (c) should the immunity of sunken State vessels expire with the passing of time? Given its focus, the LOSC did not answer these questions adequately.<sup>147</sup> The CPOCH had to address these questions because allowing States other than the flag State (particularly coastal States) to participate in different capacities in preserving all UCH would mean that there would be a probability for interfering with the sunken State vessels, which are sheltered from any contact by the immunity they enjoy under international law. The CPOCH had to, therefore, carefully balance these interests by making use of the tested solution of granting more powers to the coastal State as the location of the sunken State vessels goes further into the sea. It needs to be remembered that this balanced, maritime, zone-based treatment of sunken State vessels applies only to those vessels that sank more than 100 years ago; if they sank less than 100 years ago, there will be no interference on them.<sup>148</sup> Moreover, it needs to be noted that the special rules applicable under CPOCH to sunken State vessels are additional to the protection rules mentioned above that vary according to the maritime zone where the UCH is located (Articles 7–12 of the CPOCH).

Accordingly, within internal waters, coastal States continue to enjoy, without any interference from the flag State of the sunken vessels, the exclusive right to regulate and authorize activities directed at such vessels (Article 7(1)). Within archipelagic waters or the territorial sea, the coastal State should *inform* the flag State party of State vessels discovered in its internal waters before regulating and authorizing activities directed at the protection of such vessels (Article 7(3)). In the EEZ or on the continental shelf, activities directed at protecting sunken State vessels shall not be conducted without the *agreement* of the flag

<sup>142</sup> Dromgoole 2013, 134.

<sup>143</sup> Dromgoole 2013, 134. See also, Browne and Raff 2022, 680.

<sup>144</sup> O’Keefe 2020, 311.

<sup>145</sup> O’Keefe 2020, 311. See also, Forrest 2003, 43.

<sup>146</sup> On the importance of, and varying stances on, the notion of express abandonment in determining ownership of sunken State vessels, see Forrest 2003, 46–52; Dromgoole 2013, 106–10; Aznar-Gómez 2003, 62–101; Strati 2006, 43; Meskin 2015, 109–13; Triay 2014, 41; Kern 2021, 393; Harris 2001, 117; Aznar-Gómez 2003, 84; Oyama 2021, 329.

<sup>147</sup> Malanczuk 2002, 119.

<sup>148</sup> Forrest 2003, 43.

State (Article 10(7)). In the Area, no activity concerning the protection of sunken State vehicles shall be carried out without the *consent* of the flag State (Article 12(7)).

By the employment of such arrangements in the different maritime zones, the CPUCH ensures the rule in Article 2(8) that “[c]onsistent with State practice and international law, including the [LOSC], 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.”

### Treatment of UCH and Sunken (State) Vessels by African States

Conducting a comparative analysis of the legislative experiences of different countries in protecting UCH and examining them from the international perspective is not a new exercise in the field of international cultural heritage law.<sup>149</sup> This section discusses 23 laws<sup>150</sup> from 22 African States<sup>151</sup> to examine general trends in the preservation, territorial scope of application, as well as ownership of shipwrecks in their maritime zones in light of the LOSC and CPUCH, particularly the latter. The States were selected on the basis of: (i) their representation of the varying geographies of the continent, (ii) their adjacency to the different waterbodies circling the continent, (iii) their status as islands, land-locked or coastal, (iv) their varying status of membership in the LOSC and CPUCH, and the varying years when their respective heritage laws were issued (from the 1960s to the 2010s). They are: Algeria, Angola, Cameroon, Chad, Comoros, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mali, Mauritius, Niger, Nigeria, Senegal, Seychelles, South Africa, Tunisia, Uganda, and Zambia. The African Union Model Law on the Protection of Cultural Property and Heritage (AU Model Law) will also be referred to. For purpose of easiness, a tabulated presentation of the following has been prepared indicating: (i) LOSC membership of the States, (ii) CPUCH membership of the States, (iii) name and date of the relevant heritage laws, (iv) what the laws state about ownership of heritage, (v) the territorial scope of the law (jurisdiction), and (vi) whether there is a separate regulation of sunken vessels or whether sunken vessels are included in the definition of heritage in those laws (see Table 1).

### General Overview

Four of these laws were issued in the 1960s, three in the 1970s, five in the 1980s, seven in the 1990s, three in the 2000s, and one in the 2010s. Eight of the 23 laws were issued before the adoption of the LOSC in 1982, and 20 of them were issued before the adoption of the CPUCH in 2001.

Except for Libya, Eritrea, and Ethiopia, all of the selected States are States Parties to the LOSC. Ten of them (Algeria, Egypt, Libya, Madagascar, Malawi, Mali, Nigeria, Senegal, South Africa, and Tunisia) are States Parties to the CPUCH – as of 1 March 2025, 23 of the 78 States Parties to the CPUCH, that is nearly 30 percent, are African States<sup>152</sup> – and issued their laws before the adoption of the CPUCH.

<sup>149</sup> See, for instance, Dromgoole 1999 where the experiences of 13 countries from all over the world (Australia, China, France, Greece, Ireland, Italy, Poland, South Africa, Spain, Sweden, Turkey, the UK, and the USA) was conducted and an international perspective was provided.

<sup>150</sup> Two Tunisian laws have been selected for their relevance; the rest represent one law from each State. Thus, some of the analyses may refer to 23 laws instead of 22 laws.

<sup>151</sup> Obtained from UNESCO’s Database of National Cultural Heritage Laws (n.d.).

<sup>152</sup> These are: Algeria, Benin, Cabo Verde, Democratic Republic of the Congo, Egypt, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Libya, Madagascar, Malawi, Mali, Mauritania, Morocco, Namibia, Nigeria, Sao Tome and Principe, Senegal, South Africa, Togo, and Tunisia.

**Table 1.** Tabulated presentation of the regulation of shipwrecks under the heritage laws of select African States and the African Union Model Law on the Protection of Cultural Property and Heritage

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
Algeria	Yes	Yes	Law No. 98–04 of 15 June 1998 Relating to the Protection of Cultural Heritage	Several provisions recognize continuity of private ownership of cultural heritage	Article 2 states that the law applies to cultural property existing on ... as well as in the subsoil of national internal and territorial waters ...	Under Article 2 definition of cultural property includes objects found in territorial waters
Angola	Yes	No	Decree No. 80/76 of 3 September 1976 Determining the Form of Conservation and Protection of the Angolan People's Historical and Cultural Heritage	Allows continuity of private ownership but requires state authorization to transfer their ownership (Article 3); export is prohibited (Article 2)	No specific provision exists determining the territorial scope of the law	The definition seems to exclude them, focusing on other items of historical and cultural heritage
Cameroon	Yes	No	Federal Act No. 63–22 of 19 June 1963 Organizing for the Protection of Monuments, Sites, and Objects of Historic or Artistic Interest	Not clear, because the focus of the law is on the administration of monuments, sites, and objects of historic or artistic interest	No specific provision exists determining the territorial scope of the law because the focus of the law is on the administration of monuments, sites, and objects of historic or artistic interest	Not clear, because the focus of the law is on the administration of monuments, sites, and objects of historic or artistic interest
Chad	Yes	No	Act no. 14–60 of 2 November 1960 on the protection of national monuments and sites	Several provisions recognize continuity of private ownership of properties, monuments, and sites of heritage value	No specific provision exists determining the territorial scope of the law	The Act refers generally to properties, monuments, and sites of heritage value and may include shipwrecks

(Continued)

Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
Comoros	Yes	No	Law No. 94–022/AF of 27 June 1994 Protecting National Cultural Heritage	Private monuments remain in private ownership, and public ones stay in public	No specific provision exists determining the territorial scope of the law	Difficult to determine if vessels are included in the definition of “historical monuments” in Article 1
Egypt	Yes	Yes	Law No. 117 of 6 August 1983 Promulgating the Protection of Antiquities	<ul style="list-style-type: none"> <li>- A number of provisions recognize ownership of an antiquity by owners other than the State</li> <li>- Article 18 allows the expropriation of land belonging to individuals because of its archaeological interest.</li> </ul>	Article 5 allows the Egyptian Antiquities Organization to research antiquities found on the surface of the ground and excavations aimed at discovering those buried underground or found in Egyptian internal and territorial waters	Article 1, defining an “antique” is too broad and can include shipwrecks as it refers to any movable or immovable property produced by different civilizations or constituting an artistic, scientific, literary or religious creation of the prehistoric era or successive periods of history and dating back more than a hundred years
Eritrea	No	No	The Cultural and Natural Heritage Proclamation No. 177 of 30 September 2015	<ul style="list-style-type: none"> <li>- Article 4(1) declares the ownership of all cultural and natural heritage to be vested in the State</li> <li>- Article 4(1) allows the continuation of private ownership of heritage that is privately owned or located in private property</li> </ul>	The law applies to all cultural and natural heritage located on or under the surface of Eritrean territorial sovereignty, understood to include territorial waters	The definition of “cultural property” in Article 2(1) (h) is broad enough to include shipwrecks

(Continued)

Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
Ethiopia	Ratified but has not submitted instrument of ratification to the United Nations	No	Proclamation 229 of 29 January 1966, A Proclamation to Provide for the Protection and Preservation of Antiquities	<ul style="list-style-type: none"> <li>- Article 3(a) declares that all antiquities existing on the coming into effect of the law are the property of the State</li> <li>- Article 5 states that private owners of antiquities shall continue to possess them until they are notified to transfer them to the State</li> </ul>	Article 3(a) states that the law applies to “all antiquities ... existing within Ethiopia”; it may be read to include Ethiopia’s then territorial waters	The definition of “antiquity” in Article 2(a) is broad enough to include shipwrecks
Kenya	Yes	No	National Museums and Heritage Act No. 6 of 23 August 2006	Article 46 declares that antiquities (not monuments) ... shall be the property of the Government	Article 2(2) states that the Act extends to heritage, including monuments, antiquities, and shipwrecks in lakes and waters within Kenya or on the seabed within the territorial waters of Kenya	Article 2(1) includes a shipwreck more than fifty years old as a monument, which itself is part of the definition of “cultural heritage”
Libya	Signed but not acceded	Yes	Law No. (3) of 29 August 1424 FBP (1995) on protecting antiquities, museums, ancient cities, and historical buildings	Recognizes continued private ownership of movable (Article 21) and immovable artefacts (Article 16)	Not clearly provided. Article 24 provides that the competent body may authorize exploratory archaeological excavations or temporary on-site practical investigations anywhere in the State’s territory or regional waters	Definitions of artefacts and antiquities, as well as movable and immovable artifacts in Article 1, are too broad and can include shipwrecks

(Continued)



Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
Madagascar	Yes	Yes	Law No. 99–028 of 3 February 2000 Recasting the Maritime Code	Maritime wrecks of historical, archaeological, or cultural interest are State property. Their former owners are not entitled to any compensation. (Article 5.5.0.2)	The chapter on protection of wrecks of historical, archaeological or cultural interest applies to those wrecks immersed in the EEZ of Madagascar (Article 5.5.0.1)	Has a separate chapter dedicated to “wrecks of historical, archaeological or cultural interest” defined as which are wrecks immersed more than 30 years ago
Malawi	Yes	Yes	Monuments and Relics Act of 14 March 1991	Under Article 25(1), all monuments and relics ... are declared to be the absolute property of the Government, except some select privately owned monuments	Article 25(1) refers to “all monuments and relics, whether movable or immovable, lying on or beneath the surface of the ground or in a river, a lake or other waters ...”	The definition of monuments in Article 2 is too broad and can include shipwrecks
Mali	Yes	Yes	Law No. 85–40/AN- RM of 26 July 1985 Relating to the Protection of the National Cultural Heritage	Article 4 vaguely states that the State shall have preemptive right over property likely to enrich the cultural heritage of the Nation. Articles 8–11 recognize owners, holders, or occupants of cultural properties	No specific provision exists determining the territorial scope of the law	The definition of cultural heritage in Section 2 is too broad and can include shipwrecks
Mauritius	Yes	No	National Heritage Fund Act No. 40 of 8 November 2003	Article 13 states that ownership of national heritage shall remain vested in the owner	The definition of “site” where the national heritages are found means “any area on land or underwater”	The definition of “monuments” in Article 2 seems to focus on buildings and similar structures; thus, including shipwrecks in the definition may be difficult

(Continued)

Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
Niger	Yes	No	Law No. 97-022 of 30 June 1997 Pertaining to the Protection, Conservation, and Presentation of the National Cultural Heritage	Article 19 recognizes different types of ownerships (State, communities, public establishments, and individuals) of movable property of heritage value	No specific provision exists determining the territorial scope of the law	The definitions of “monuments” and “cultural property” in Article 3 are too broad and can include shipwrecks
Nigeria	Yes	Yes	National Commission for Museums and Monuments Act No. 77 of 28 September 1979	Various provisions of the Act recognize private ownership of antiquities or monuments	No specific provision exists determining the territorial scope of the law	The definition of “antiquities,” though broad, is not clear if it can include shipwrecks
Senegal	Yes	Yes	Law No. 71-12 of 25 January 1971 Establishing the Regime for Historic Monuments and That of Excavations and Discoveries	Recognizes private and public ownership of historic monuments	No specific provision exists determining the territorial scope of the law	There is no clear definition of “historic monuments”; hence, it is difficult to argue if the definition includes shipwrecks
Seychelles	Yes	No	National Monuments Act No. 29 of 29 July 1980	Various provisions of the Act recognize private ownership of monuments and their participation in preservation	No specific provision exists determining the territorial scope of the law	The definition of “monument” is broad enough and may include shipwrecks

*(Continued)*

Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
South Africa	Yes	Yes	National Heritage Resources Act No. 25 of 28 April 1999	Numerous provisions exist showing that private individuals continue to be owners of heritage objects or sites	Article 2(ii)(c) applies to any vessel or aircraft, or any part thereof, which was wrecked in South Africa, whether on land, in the internal waters, the territorial waters or in the maritime culture zone of the Republic...	Article 2(ii)(c) defines “archaeological” to include wrecks... and any cargo, debris, or artefacts found or associated therewith...
Tunisia	Yes	Yes	Protection of Archaeological Property, Historic Monuments and Natural Urban Sites Law No 86–35 of 9 May 1988	Article 8 states that ownership of archaeological property belongs to the State with the exception of some movable and immovable archaeological property	<ul style="list-style-type: none"> <li>- Article 1 states that Tunisia shall protect heritage objects within its territorial and maritime boundaries</li> <li>- (Article 2) refers to excavations of ruins which may be found in inland waters, territorial waters, and the contiguous zone up to 24 nautical miles from the baseline</li> </ul>	The definition of “archaeological property” (Article 3) is narrow as to include shipwrecks, although the law (Article 2) refers to excavations of ruins, which may be found in inland waters, territorial waters, and the contiguous zone up to 24 nautical miles from the baseline
Tunisia	Yes	Yes	Law No. 94–35 of 24 February 1994 Relating to the Archaeological and Historical Heritage Code and Traditional Arts	Archaeological property, movable or immovable, discovered in internal waters or territorial water is considered property of the State (Article 73)	<ul style="list-style-type: none"> <li>- Article 1 refers to any vestige bequeathed by civilizations or previous generations, discovered or researched, on land or at sea</li> </ul>	A separate chapter (Chapter II, Articles 73–76) is dedicated to archaeological property, movable or immovable, discovered in internal waters or territorial

(Continued)

Table 1. *Continued*

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
					- Articles 73–76 apply to archaeological property, movable or immovable, discovered in internal waters or territorial water.	water (may mean shipwrecks)
Uganda	Yes	No	Historical Monuments Act of 21 October 1967	Recognizes the continued private ownership of an object of archaeological, paleontological, ethnographical, traditional, or historical interest	No specific provision exists determining the territorial scope of the law	The phrase “any object of archaeological, paleontological ethnographical, traditional or historical interest” is too broad and can include shipwrecks
Zambia	Yes	No	The National Heritage Conservation Commission Act No. 23 of 29 December 1989	Numerous provisions recognize owners or possessors of heritage objects	The ancient heritage (which must have been erected, constructed, or its use began before 1 January 1024) could be located aboveground, underground, or underwater (Article 2(q))	Article 2(i) includes “any bar made of sunken vessels” as “ancient heritage”; ancient heritage
The African Union			African Union Model Law on the Protection of Cultural Property and Heritage	<ul style="list-style-type: none"> <li>- Article 3 intends to establish State ownership of cultural property and heritage</li> <li>- Article 18 vests ownership of cultural property and</li> </ul>		<p>Article 21(1) requires the State to preserve all objects of cultural, archaeological, and historical nature found in the internal waters, archipelagic waters, and territorial sea as well as in</p> <ul style="list-style-type: none"> <li>- There is a specific reference to CPUCH in the preamble</li> <li>- “cultural property and heritage” includes objects situated underwater (Article 2)</li> </ul>

(Continued)

Table 1. Continued

State	LOSC membership	CPUCH membership	Name and date of the law	On the ownership of UCH	On the territorial scope of the law	On separate regulation of sunken vessels or their inclusion in the definition of heritage
				<p>heritage in the State or any authorized person</p> <ul style="list-style-type: none"><li>- Article 21 (1) states that all objects of cultural, archaeological, and historical nature found in the areas when the law shall be preserved by the State as its own</li><li>- Article 26 allows expropriation with compensation of cultural property and heritage previously belonging to other persons</li></ul>	<p>the contiguous and exclusive economic zones shall be preserved by the State as its cultural property and heritage;</p>	<ul style="list-style-type: none"><li>- There is a separate definition for UCH by reference to the meaning assigned to it under Article 1 of the CPUCH</li><li>- Article 21 is dedicated to UCH, with a specific mention of historic shipwrecks (focuses on registration and reservation of the UCH)</li></ul>

### *Specific Regulation of Sunken Vessels*

UCH generally; sunken vessels, particularly; and sunken State vessels, more particularly are barely recognized or regulated under the selected African laws. Search of these and other African heritage laws produced no result of a law specifically proclaimed for the protection of UCH or, obviously, for sunken (State) vessels.

As far as the inclusion of sunken vessels in the definition of heritage objects is concerned, the attention of most of the laws appears to be more on objects located in or under land territories. It is only through a broad reading of the definitions of heritage (named as monuments, antiquities, sites, cultural property, etc.) that one can incorporate sunken vessels or wrecks in the scope of most of these laws. Only the laws of Kenya, Madagascar, South Africa, Tunisia, and Zambia clearly include wrecks or sunken vessels in their definitions of heritage objects.

As far as the dedication of separate chapters for the regulation of wrecks or sunken vessels within the heritage laws is concerned, only the laws of Madagascar and Tunisia have separate chapters dedicated specifically to wrecks (Madagascar) or UCH in general (Tunisia). However, these separate chapters are far less comprehensive to correspond to the requirements of UCH protection under the CPUCH. It is common knowledge that Madagascar and Tunisia (which have laws with provisions specific to UCH) and the other eight CPUCH States Parties (which are yet to have such specific UCH provisions in their laws) have the obligation to reflect provisions of the CPUCH in their domestic laws.

### *Ownership of UCH*

It has already been mentioned above that neither the LOSC nor the CPUCH dwell on the issue of ownership of UCH. Ownership of UCH is determined by the domestic laws of the relevant States under their choice of law rules.<sup>153</sup> It has also been underlined that ownership of UCH is different from and must be distinguished from the jurisdiction of UCH in whichever maritime zone the UCH is located. However, the declaration of state ownership by domestic law of UCH does not necessarily mean that it will not have an effect on some provisions of the LOSC and the CPUCH. This is particularly true in cases where domestic law declares that heritage objects (including UCH) belong to the State and the definition of UCH includes sunken State vessels. The recognition under the LOSC and the CPUCH of the continued immunity of these State vessels implies that their ownership is still retained by the flag States because no State can claim immunity on a sunken vessel unless it can show that the vessel is owned<sup>154</sup> by it. That is why, as mentioned above, the best way to reconcile the interests of the coastal State and the flag State ownership is to have cooperation between them.<sup>155</sup>

Seventeen of the 23 African laws studied for this article recognize the continuation of the ownership of heritage objects by persons (private or public) other than the State that issued the heritage law. The remaining six laws of Eritrea, Ethiopia, Kenya, Madagascar, Malawi, and Tunisia (all of which expressly or by interpretation include UCH in the scope of the heritage objects they protect) provide that heritage objects belong to (are owned by) the State. Among these, the laws of Eritrea, Malawi, and Tunisia declare that, by default, all heritage objects belong to the State while leaving some room for the continuity of private ownership under some conditions. The laws of Ethiopia, Kenya, and Madagascar leave no

<sup>153</sup> Forrest 2003, 48.

<sup>154</sup> Both the LOSC and CPUCH make use of the phrase “owned or operated by a State for government non-commercial service (purposes)” when they refer to State vessels that continue to enjoy immunity.

<sup>155</sup> Forrest 2003, 51.



such space for private or other ownership. Thus, the implementation of the laws of the two coastal States among these (Kenya and Madagascar) may collide with the continued enjoyment of ownership (and immunity) of historic foreign State vessels found in their maritime waters, which they have by law declared to belong to them or their governments.

### *Jurisdiction on UCH*

As discussed above, the CPUCH provides an elaborate set of rules on the role of coastal and other relevant States in the protection of UCH (generally) and sunken State vessels (specifically) in different maritime zones. The roles of all of these States are carefully balanced as more (or less) power is given to each such State depending on the particular maritime zone where the UCH or sunken State vessels are found. Thus, it is expected for coastal States, particularly those which are state parties to the CPUCH, to make sure that their heritage laws (if they apply to UCH) consider the jurisdictional limit given to them in each maritime zone where their heritage laws apply.

The laws of 12 of the 23 States studied (Algeria, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, South Africa, Tunisia, and Zambia) expressly or by a broader interpretation of the relevant provisions state that the area of their application extends up to the territorial water, the contiguous zone or the EEZ. The other 11 laws do not contain provisions that indicate their territorial scope. Of the 12 laws, the law of Tunisia extends its application up to the contiguous zone, while the law of Madagascar extends its application up to the EEZ. A reading of these two laws shows that the protection of UCH in these maritime zones is left essentially to the State and the institutions it has established to implement the law. There are no provisions referring to the cooperative protection of UCH found in their maritime zones. Madagascar's law (Chapter 8) recognizes and respects the immunity of foreign warships and State vessels used exclusively for a non-commercial public service; however, it is not clear whether such recognition is extended to sunken foreign State vessels found in the waters of Madagascar.

### *The AU Model Law*

As its name indicates the AU Model law<sup>156</sup> is not a binding instrument on African States, but is intended to assist African States in preparing or updating laws pertaining to the protection of cultural property and heritage. It was prepared between 2015 and 2018 and has 44 articles. It contains provisions touching upon the three criteria used above in assessing the selected African laws (specific regulation of sunken vessels, ownership, and jurisdiction).

The Preamble places Africa's past (the colonial experience and the systematic transferring and illicit trafficking during the colonial era) and future (as reflected in such documents as the Charter for African Cultural Renaissance and the African Union Agenda 2063) in the context of securing sustainable development and in due consideration of the obligations of African States under international legal instruments (such as the CPUCH) as they "devise ways and means for the full protection and preservation of cultural property and heritage." Article 2 defines cultural property and heritage as:

movable and immovable cultural property including any object, as well as any monument, group of buildings, site or structure of any other kind, *whether situated on land or underwater* or removed thereof, which is on religious or secular grounds, classified or

<sup>156</sup> African Union (2022)

defined as archaeology, prehistory, ethnology, history, literature, art or science and whatever is considered as monument and/or cultural heritage by national laws. (*Emphasis added.*)

The model law then identifies the different forms of violations that are committed against cultural property and heritage, such as trafficking and illicit transactions, theft and international or negligent damage, and destruction or disfiguration (Article 5). It also extensively provides for the establishment of, and activities to be carried out by, the national entities entrusted with implementing the national law on cultural property and heritage (Articles 6–12). Under Article 18, the AU Model Law declares that “[o]wnership of cultural property and heritage shall be vested in the State or any authorized person) (para. 1), that “[a]ll undiscovered cultural property and heritage are owned by the State” (para. 2), and that “[a]ny person who finds or discovers an unregistered cultural property and heritage shall promptly report to the National Body (para. 3).” It provides that the State may, in the interest of the public, expropriate, upon payment of fair and adequate compensation, cultural property and heritage from any person (Articles 19 and 26). It also contains other provisions relating, *inter alia*, to education, research, and training (Article 24); restitution (Article 27); heritage impact assessment (Article 30); international cooperation (Article 38); and dispute settlement (Article 40).

Article 21 specifically applies to underwater cultural property and heritage. Para. (1) states that such objects “found in the internal waters, archipelagic waters and territorial sea as well as in the contiguous and exclusive economic zones shall be preserved by the State as its cultural property and heritage.” Para. (2) provides that “[u]pon registration, the National Body may maintain confidential the name or exact location of underwater cultural property and heritage sites, including historical shipwrecks where appropriate *in situ* protection and monitoring cannot be guaranteed.” Since one of the purposes of the AU Model law is to make sure that not only the CPUCH but also the other relevant cultural heritage treaties are properly reflected in the national heritage laws, it cannot be expected to go further than Article 21 and the other generally applicable provisions in it in reflecting the essence of CPUCH.

## Conclusions

The African Union’s theme for 2025 is “Justice for Africans and People of African Descent Through Reparations” as part of the movement in the Global South for a reckoning and payment of fitting compensation for the unimaginable damage caused by the experience of colonialism. According to the African Union, “[t]his initiative underscores the AU’s commitment to addressing historical injustices, including the trans-Atlantic slave trade, colonialism, apartheid, and genocide. It builds on decades of advocacy and collaboration, aiming to foster unity and establish mechanisms for reparatory justice on a global scale.”<sup>157</sup> This process needs to include preserving the legacies and physical traces of that dark experience for the future generations of the world. Part of that history is contained in the thousands of shipwrecks lying off the shores surrounding the continent. These wrecks are custodians not only of colonial history or the darker experience of slave trade but also of many other positive experiences such as the history of navigation to and from the continent, early civilization (some dating back to the seventh century AD) in the continent, and active trade, and thereby assist Africa occupy in its appropriate historical space.

<sup>157</sup> African Union (n.d.).

African States have made their intent known to engage in this endeavour partly by enacting heritage laws beginning from the 1960s and becoming States Parties to a number of key international treaties, such as the LOSC and the various UNESCO treaties dwelling on the preservation of cultural and natural heritage. Thirty-six African States have registered 108 (that is 8.83 percent of the total 1,223) UNESCO World Heritage Sites.<sup>158</sup> However, African States have been more active in preserving land-based heritage resources than UCH, although it needs to be mentioned that the global focus on preserving UCH is itself a latecomer in the regime of international cultural heritage law. But, still, this article has shown that African States are lagging behind in giving proper space to UCH, and more so the thousands of shipwrecks in African coastal waters in their heritage laws. More legislative initiative and fitting implementation needs to be shown to be faithful at least to the commitment made by African States to the relevant UNESCO treaties, including the CPUCH, as well as other continental pledges such as the Charter for the African Cultural Renaissance to preserve land- and sea-based heritage resources.

Specific to the issue of how African laws have hitherto handled the preservation of UCH generally and sunken (State) vessels specifically, the image is not encouraging. Most of the laws studied for this article show that UCH/sunken (State) vessels do not even clearly make it to the definition of heritage objects targeted by these laws. The very few laws that include UCH or shipwrecks in their scope (expressly or by broad interpretation of the relevant provisions of these laws) contain only general provisions on registering the heritage objects and protecting them from harm. None of the laws engage in the forefront and the complex issues involved in the regime of UCH discussed above.

The primary cause of this state of affairs is arguably technological and other resource (human, institutional, and financial) limitations prevalent in nearly all matters affecting African development. Another key cause could be the fact that a large majority of these laws were issued years and decades before the adoption of the CPUCH and have not been comprehensively amended to reflect the international legal regime for protecting UCH. Another possible cause is the dearth of disputes or other interactions (such as salvage) of UCH/sunken (State) vessels off the African coast that could trigger interest in regulating African UCH/sunken (State) vessels. As such, African UCH remains undisturbed, and no discernible attention has been given to it and this may have contributed to the scantiness of African heritage laws in protecting UCH. A fourth cause, although not as strong as the three already mentioned, could, looking at it from the perspective of the CPUCH, be the fact that most of the shipwrecks in African coasts sunk no earlier than the CPUCH minimum of 100 years and may not have reached the time when they will demand an international protective attention. A Wikipedia list of nearly 110 African shipwrecks, for instance, shows that the large majority of them sank during the Second World War (1940–45, and more particularly in 1942 during the peak of the war) in the Algerian, Libyan, and Moroccan coasts in the Mediterranean Sea in the 2000s.<sup>159</sup>

<sup>158</sup> UNESCO (n.d.).

<sup>159</sup> Wikipedia 2025. The Eritrean experience, where the authors are from, is not that different. The Eritrean coast, because of its strategic location by the southern Red Sea, is known for being home to several invaluable historic shipwrecks, some of them reclining only three meters below the surface while others are as deep as four kilometers, and dating back to the fifth century AD, the World War II years, and the war for independence against Ethiopian rule. The discovery of the wrecks of *Nazario Sauro*, *Urania*, *Black Assarca*, *Prometeo*, *Boleslaw*, *Krzywousty*, *Sambuk*, *Krefeld*, *Adua*, *Guiseppo Mazzini*, *Capitano Bottengo*, *Panaria*, and *Josephina*, and, in general, all of the nearly 35 shipwrecks that sunk in the waters of Eritrea, with or without cargoes, around the islands of *Dihl*, *Dahlak*, *Dessie*, *Durguam-durgela*, *Nakura*, *Black Assarca*, *Deleme*, and others, solidify the fact that Eritrea is home to several historically valuable shipwrecks evidencing an active maritime past. Tesfazghi 2022; Gebreyesus 2018.

## The Way Forward

The broader picture to look at in the context of the preservation of UCH generally and sunken (State) vessels particularly is the African Renaissance initiative and the rising African demand for righting historical wrongs committed in and against Africa as well as the global initiatives to preserve cultural heritage for the benefit of present and future generations. To remedy the shortcomings observed in African laws in the regime of preserving UCH/sunken (State) vessels, three measures that can be taken at three levels are recommended below.

The first intervention is what can be done minimally at the national level. As already mentioned, African heritage laws, mostly issued decades before the adoption of the CPOCH, need to be amended to comprehensively incorporate the CPOCH regime of UCH protection. However, since UCH is a *separate* heritage resource that brings its own complexities, the more advisable recommendation is for African States – at least the 23 (nearly half of the African States) which are State Parties to the CPOCH – to come up with laws separately regulating UCH wherein specific provisions are inserted to regulate the sensitive issue of sunken foreign (State) vessels.

The second intervention is what can be done bilaterally regarding sunken (State) vessels. Article 6(1) of the CPOCH encourages State Parties to enter into “bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of UCH.” Dromgoole states that “[t]he majority of [UCH-related] agreements are of a bilateral nature and relate to the sunken warship(s) of one state located in the territorial sea of another state.”<sup>160</sup> Garabello adds, although writing in the context of the years before the adoption of the CPOCH or its non-application, that:

... State practice ... is interesting in that it shows that bilateral arrangements are the most suitable solution for settling potential disputes surrounding military wrecks, both historic and recent. They are indeed a very flexible means of solving delicate issues such as ownership, management, sharing of treasures, destiny of human bodies, etc. The lack of rules of international law (customary or conventional) concerning sunken warships – at least until the UNESCO Convention – makes the need for practical arrangements quite stringent and the bilateral solution for the right answer.<sup>161</sup>

At least as far as the State vessels off the African coast that sank during the Second World War are concerned, in less than two decades, their time for protection under the CPOCH will mature. Preparations need to be made for their protection through bilateral, trilateral, or plurilateral agreements, as the case may be. The contribution of bilateral agreements, since the late 1970s, in the historical development of the international UCH regime is well recorded. Lessons can be learned from prominent examples from all over the world.<sup>162</sup>

<sup>160</sup> Dromgoole 2013, 338.

<sup>161</sup> Garabello 2003, 179.

<sup>162</sup> These include:

- (i) The Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Italy Regarding the Salvage of HMS Spartan (Rome, 6 November 1952);
- (ii) The Agreement between the Netherlands and Australia concerning Old Dutch Shipwrecks (The Hague, 6 November 1972);
- (iii) The Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead (Pretoria, 22 September 1989);
- (iv) The Agreement between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the CSS Alabama (Paris, 3 October 1989);

The third intervention can occur at a continental level. The presence of the CPUCH and accession to it by many African States makes the need for developing a pan-African UCH treaty redundant. The UCH provisions of the AU Model Law can, however, be adapted by African States as they develop or modify their laws on heritage in general or UCH in particular. The AU Model Law may also be reviewed to expand its provisions on UCH or, since UCH demands separate attention, a new AU Model Law on UCH may be developed to inspire the development or making of domestic UCH laws in Africa.

With these and other crucial interventions, such as the furthering of technical assistance from the developed world and concerned international organizations in identifying, researching and preserving Africa's rich UCH/shipwreck resource, Africa's serious initiative to mend its historical wound and have a promising cultural future through, in part, the African Renaissance can be better served.

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- (v) The Memorandum of Understanding between the Governments of Great Britain and Canada pertaining to the shipwrecks HMS *Erebus* and HMS *Terror* (5, 8 August 1997);
  - (vi) Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of La Belle (Washington, 31 March 2003);
  - (vii) Agreement between the United Kingdom, France and Egypt over Napoleonic Wars shipwrecks in Aboukir Bay (1802) (Note that this is a trilateral agreement; it has mainly been included because it involves an African country).

The texts of all these agreements, except the agreement on HMS *Spartan* and the agreement on Napoleonic Wars shipwrecks are reproduced in Garabello and Scovazzi 2003, 254–66. For more details see, Dromgoole 2013, 110, 338–39; Risvas 2013, 579–80.

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