

OWNERSHIP OF UNDERWATER CULTURAL HERITAGE IN THE AREA

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I. INTRODUCTION

This article addresses the ownership of Underwater Cultural Heritage (“UCH”) on the ocean floor outside of any nation’s jurisdiction (“the Area”),¹ which was discussed, but not settled, in the two main international marine conventions:² the 1982 United Nations Convention on the Law of the Sea (“1982 UNCLOS”) and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Protection of the Underwater Cultural Heritage (“2001 Convention”). After analyzing the relevant provisions of Articles 136, 149, and 303 in the 1982 UNCLOS and Article 12(6) in the 2001 Convention, two approaches were designed to settle ownership issues in the Area: the principle of common heritage of mankind as the general approach and the preferential right to the concerned “state of origin” as the *Lex specialis* approach. This article addresses the ownership of UCH in the Area by analyzing the substantial criteria of these two approaches.

Part two introduces the two approaches originally used to settle the tough ownership issue of property, then analyzes why the two approaches were expressed too vaguely to be efficiently applied to the ownership disputes, specifically, because of the drafting process and the nature of the term “state of origin.” Part three describes my own approach to the substantial criterion of the *Lex specialis* approach. This Article tries to explore the effective link between the relative UCH and the state of origin. I conclude cultural identity is a substantial criterion of *Lex specialis* approach, and is part of the legal and jurisprudential basis of the cultural identity and the application of the cultural identity in the current international legal system. Part four is a broader consideration of the substantive criterion of the general approach. The general goal is not only to preserve UCH for mankind as a whole, but, more importantly, to encourage contracting parties or specific international organizations to cooperate in the recovery and protection of UCH, while respecting the principles of non-commercial exploitation and “*in situ*” preservation as a preferred option.

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¹ “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 1.

² There was once another notable draft convention of protection UCH in 1980’s, Draft European Convention on the protection of the Underwater Cultural Heritage (1985). The Turkish government refused the adoption by the council of Europe of the draft European Convention in 1985, there was never officially adopted as convention. See ANASTASIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA, 87 (1995).

II. THE THORNY PATH TOWARDS THE OWNERSHIP OF UNDERWATER CULTURAL HERITAGE IN THE AREA IN INTERNATIONAL LAW

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) estimates that over three million ship wrecks are spread across ocean floors around the planet.³ They remain unique mysterious codes of human civilizations, which are preserved better than similar items found on land, especially before the rapid development of the diving technology and seabed excavation technology development over the last 50 years, which provides the possibility of the salvage and treasure hunting in the ocean.⁴

With the enthusiasm of human exploration of the deep ocean As a result of human enthusiasm for deep ocean exploration, the looting and pillaging of shipwrecks now takes place underwater. Maritime disputes are not only for claims to extend the continental shelf or appropriation of the seabed mineral resources, such as gas or polymetallic nodules; but also for acquiring historical and archaeological assets—Underwater Cultural Heritage (“UCH”), such as shipwrecks and associated artifacts. Most UCH disputes occur near the coasts so coastal states have the jurisdiction to settle the dispute through bilateral agreements between dispute parties, such as: the *V.O.C shipwreck Batavia* 1972,⁵ the *CSS Alabama* 1989,⁶ the *La Belle* wreck 2003⁷ and the shipwreck of *RMS Titanic* 2004 (United States, United Kingdom and Canada).⁸ A new case in the United States, *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*⁹ shows a new phenomenon in UCH disputes concerning unidentified shipwrecks located in “international water.”¹⁰

³ Famous shipwrecks such as the Armada of Philip II of Spain, the Titanic, the fleet of Kublai Khan, the China Nanhai NO.1, etc.

⁴ Invention of the aqualung by Jacques-Yves Cousteau and Emille Gangan made it possible to reach greater sea depths in 1942. Side Scan Sonar technology was used in salvage of UCH after 1950’s. Remotely Operated Vehicles (ROV) made the wrecks more accessible after 1960’s. Submarines can dive to the record depth of 10,911 meters as of 1995.

⁵ Historic Shipwrecks Act 1976, 1976 Austl. Acts No. 190, SCHEDULE 1 (Agreement between the Netherlands and Australia concerning old Dutch shipwrecks) *available at* http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html. Art.1: “The Netherlands, as successor to the property and assets of the V.O.C., transfers all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and any articles thereof to Australia which shall accept such right, title and interest.” *Id.*

⁶ Agreement concerning the wreck of the CSS Alabama, U.S.- Fr., Oct. 30, 1989, T.I.A.S. No. 11687. The CSS *Alabama*, a Confederate warship, was sunk by the USS *Kearsarge* in battle off Cherbourg, France, 1864. The government of the United States of American was entitled as the owner of the wreck, the French Association CSS Alabama as the authorized operator who have the responsibility for its actions on, to, and from the CSS *Alabama* wreck site.

⁷ Agreement Regarding the Wreck of *la belle*, U.S.-Fr., Mar. 31, 2003. See also FU KUNCHENG AND SONG YUXIANG: INTERNATIONAL LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: INTRODUCTION OF THE CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE 297 (2006); Legal Press China, 297. La Salle Research Project, THE TEXAS HISTORICAL COMMISSION, <http://www.thc.state.tx.us/belle/> (last visited Mar. 2, 2011).

⁸ Agreement Concerning The shipwrecked vessel RMS Titanic, U.S.-U.K.-Can.-Fr., Foreign & commonwealth office website, *available at* http://www.fco.gov.uk/resources/en/pdf/pdf7/fco_pdf_titanicagreementenglish.

⁹ No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. June 3, 2009). Spanish shipwreck, *Nuestra Senora de las Mercedes*, discovered by Odyssey in international waters about 100 miles west of the Straits of Gibraltar in 2007. *Id.* at *5. Judge Mark Pizzo recommended that Odyssey, as the substitute custodian, directly return the *res* to Spain. *Id.* at *59. The judge believed the court lacked jurisdiction in the case and recommended

A. THE LEGAL ISSUE OF THE OWNERSHIP OF UCH IN THE AREA

The international law doctrine of freedom of the high seas provides that activities related to cultural property found in the Area are to be governed by the flag state. The flag state of a vessel is the state under whose laws the vessel is registered. However, the flag state does not effectively control its vessels to protect UCH, even if it had appropriate national heritage laws and regulations applicable in the Area.¹¹ The underwater archeological technology to dispose or preserve underwater relics is difficult to regulate. Further, it is hard for the flag state to prohibit the flag of third states from destroying or illegally salvaging relics. All of these situations make enforcement of national legislation bewildering. However, after analyzing the relevant provisions of Articles 136, 149 and 303 from the 1982 United Nations Convention on the Law of the Sea (“1982 UNCLOS”) and Article 12(6) from the UNESCO Convention on the Protection of the Underwater Cultural Heritage (“2001 Convention”), two contemporary legal approaches, both new and meaningful, can be used to settle the ownership issue of UCH in the Area: the general approach—the principle of common heritage of mankind¹² and the *Lex specialis* approach—the preferential right to the concerned state of origin.¹³

Spain’s motion to dismiss be granted. *Id.* at *3. Additionally, the site of the treasure find was indeed that of the Mercedes, which is subject to sovereign immunity. *Id.* at*21.

¹⁰ The phrase of “the international water” in the case is not a legal term. But from the jurisdiction point of view, this term means that no state may purport to subject part of it to its sovereignty, which can be comprehended as the same meaning as the legal term “the Area,” a site where it is beyond any national jurisdiction. Therefore, this Article will analyze the ownership of UCH in the Area.

¹¹ See generally Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101–2106 (2006); Archaeological Resources Protection Act 1979, 16 U.S.C. §§ 470aa–470mm (2006); *Historic Shipwrecks Act 1976* (Austl.); Regulations of the People’s Republic of China Concerning the Administration of the Work for the Protection of Underwater Cultural Relics (promulgated by the State Council of the People’s Republic of China, Oct. 20, 1989, effective Oct. 20, 1989), <http://tradeinservices.mofcom.gov.cn/en/b/1989-10-20/18580.shtml> (China); Protection of Wrecks Act, 1973, c. 33 (Eng.); Act No. 89-874 of 1 December 1989 concerning Maritime Cultural Assets and amending the Act of 27 September 1941 Regulating Archaeological Excavations of 1 December 1989 (France) <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA>. Law on the Spanish Historical Heritage (B.O.E. 1985, 16-1985) (Spain); the Cultural Monuments Act (1988:950) (Sweden) http://ec.europa.eu/taxation_customs/resources/documents/cgoods_sv_en.pdf (or, <http://www.culturalpolicies.net/web/sweden.php?aid=533> in Eng version); the Cultural Heritage Preservation Law 1982 (Taiwan, China) <http://www.glin.gov/view.action?search=&searchDetails.queryType=BOOLEAN&searchDetails.queryString=subterm%3Aequals%28%22en+Architecture%22%29&searchDetails.sortOrder=reverseChron&searchDetails.showSummary=true&searchDetails.searchAll=true&searchDetails.activeDrills=&searchDetails.offset=290&glinID=198015&summaryLang=zh-tw&fromSearch=true>.

¹² United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter 1982 UNCLOS]. “Common heritage of mankind: The Area and its resources are the common heritage of mankind.” *Id.* at art. 136. ; “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...” *Id.* at art. 149; “The Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties.” United Nations Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, at art. 12 [hereinafter 2001 Convention].

¹³ “All objects of an archaeological and historical nature found in the Area... particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 149. “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.” *Id.* at art. 303(3). “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.” 2001 Convention, Nov. 2, 2001, 41 I.L.M. 40, at art. 12.

1. *The General Approach: The Principle of Common Heritage of Mankind*

The principle of the common heritage of mankind first came from the Chairman of the International Law Commission (“ILC”), Georges Scelle, in 1950: “[t]he continental shelf has an importance for mankind in general,”¹⁴ which was strongly refused by ILC. In its Preamble, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict¹⁵ expressed the idea that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world.”¹⁶

The ambassador of Argentina, Aldo Armando Cocca, further developed and applied this idea in 1967 when he proposed the following language for the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies:

[T]he exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.¹⁷

In the same year, Malta’s United Nations Representative, Arvid Pardo, proposed that seabed and ocean floors beyond national jurisdiction be reserved exclusively for peaceful purposes and the resources be declared “the common heritage of mankind.”¹⁸ Later, the same idea was adopted by the United Nations General Assembly through the Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction (“Declaration of 1970”).¹⁹

The Third UN Law of the Sea Conference adopted the principle of common heritage of mankind to protect UCH. This was codified in part XI, Article 149, to respect the Declaration of 1970 that “resources in the Area should be organized on behalf of mankind as a whole.”²⁰

The drafting history of the general approach demonstrates that it was initially used to protect the natural resources outside the jurisdiction of every state. However, cultural heritage is quite different than natural resources, which are always associated with a given people. Therefore, there should be a *Lex specialis* approach to UCH: the preferential right to the concerned state of origin, putting aside the general approach in the Area as an exception under some circumstances.

¹⁴ Summary Records of the 79th Meeting, [1950] 1 Y.B. Int’l L. Comm’n 305, U.N. Doc. A/CN.4/SR.79, available at http://untreaty.un.org/ilc/documentation/english/a_cn4_sr79.pdf.

¹⁵ United Nations 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

¹⁶ *Id.*

¹⁷ Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, G.A. Res. 34/68, U.N. Doc. A/RES/34/68, art. 4, (Dec. 5, 1979).

¹⁸ “Common heritage of mankind: The Area and its resources are the common heritage of mankind.” 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 136.

¹⁹ GA Res. 2749(XXV), U.N. Doc. A/RES/2749 (January 1, 1970), (with 108 votes in favor, none against and 14 abstentions).

²⁰ “All objects of an archaeological and historical nature found in the Area... particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” 1982 UNCLOS, Dec.10, 1982, 1833 U.N.T.S. 397, at art.149; GA Res. 2749(XXV), U.N. Doc. A/RES/2749 (January 1, 1970), at art.1 <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/350/14/IMG/NR035014.pdf?>

2. *The Lex Specialis Approach: The Preferential Right to the Concerned State of Origin*

The idea of a preferential right to the concerned state of origin first came from Iceland's proposal in the Geneva Conference 1958 about preferential fishery rights as follows:

Where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States.²¹

Until the second Conference was held in Geneva in 1960, studies showed that two concepts, the preferential fishing right and the fishery zone, were widely accepted by bilateral or multilateral agreements, and had since crystallized as customary law. The fishery zone extends to the twelve mile limit between the territorial sea and the high seas; the preferential fishing right is the exclusive fishing rights in favor of the coastal state where there is special dependence on its fisheries.²²

However, the nature of the preferential right in question was not settled in the second Conference. Specifically, the question whether the preferential right, under certain circumstances, should extend beyond the limit of the twelve mile fishing zone to assert an exclusive fisheries jurisdiction was left unanswered.²³

In 1974, The International Court of Justice ("ICJ") discussed this question in the *Fisheries Jurisdiction Case*.²⁴ In this case, the Court first stated its opinion of the very new notion of preferential fishery rights for the coastal State: "in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States."²⁵ Then, the Court analyzed Iceland's claims and took into account the existing rules of international law and the Exchange of Notes of 1961 (between them), because the court law could not render judgment *sub specie legis ferendae* about preferential right or anticipate the law before the legislature had laid it down.²⁶ Finally, the Court indicated that "the fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961."²⁷

The scope of the preferential right can be gleaned from the ICJ's ruling in *Fisheries Jurisdiction Case*. First, the preferential right is an actual kind of priority. Second, countries must negotiate in order to define or delimit the extent of preference operation. Third, the preference right operates in the shadow of other law, such as other legal rights according to bilateral agreement or international law.

²¹ Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, ¶ 49–78 (Jul. 25, 1974), available at <http://www.icj-cij.org/docket/files/55/5979.pdf>.

²² *Id.*

²³ Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, ¶ 19–48 (Jul. 25, 1974), available at <http://www.icj-cij.org/docket/files/55/5979.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

The preferential right was finally deliberated and codified in Article 149 of the 1982 UNCLOS and Article 12(6) of the 2001 Convention. These agreements link the right with the state of origin so they have authority concerning UCH. Article 303(3) of the 1982 UNCLOS preserves the *Lex specialis* approach, stating in the text that: "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."²⁸ Both major approaches are present in international law to settle disputes of ownership of UCH in the Area.

3. *The Congenital Deficiency of Two Approaches*

Ostensibly, the two approaches are the "trump cards" for the issue of ownership of UCH in the Area, and they are expressed in a similar way in the two conventions. The general approach in the 1982 UNCLOS is the benefit of mankind as a whole, and in the 2001 Convention as the "benefit of humanity as a whole." The *Lex specialis* approach of a preferential right to the state of origin in the 1982 UNCLOS is regulated in the Article 149 as three closely-related categories: (a) "the State or country of origin," (b) "the State of cultural origin," or (c) "the State of historical and archaeological origin." But, in the 2001 Convention, the Article 12(6) provides two categories: (a) States of cultural origin or (b) states of historical or archaeological origin, which are the same categories as (b) and (c) in the 1982 UNCLOS.

The contents of the two approaches are actually far from effective and feasible as substantive criteria to settle disputes of the ownership of UCH in the Area.

The common heritage of mankind is a relatively new principle and three forms of "states of origin" are emerging as concepts in current international legal terminology. In addition, neither of the two conventions explain the meaning of the general international principle of cultural heritage of mankind, nor did they distinguish differences among the categories of "state of origin." Under what circumstances does the principle of common heritage of mankind apply as an exception to the *Lex specialis* approach? When there is a conflict between the doctrine of the freedom of the high seas (first-find-first-observe) and the approach of the preferential right, who has the right to claim the removal and acquisition of UCH in the Area: the finder, the flag state, or the state of origin? What kinds of conditions can a Member State apply within the "state of origin?" Or under what circumstances does a Member State have a priority right for the UCH in the Area: when one claims as "the State of historical and archaeological origin," and the other claims as "the State of cultural origin?" None of these answers can be found in the current conventions.

Therefore, many scholars criticized the provisions of Articles 136, 149 and 303(c) of the 1982 UNCLOS and Article 12 of the 2001 Convention as a potential trigger for many ownership disputes of UCH in the Area, even when Member States have each adopted both conventions.

B. THE INEVITABILITY AND RATIONALITY OF TWO APPROACHES

The two above international marine conventions respond to the essential issue of ownership of UCH with vague and obscure approaches. The reason could be that the national experts during conventions drafting negotiation neglect this complicated ownership issue, or they

²⁸ 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 303(3).

purposely incorporate the vague language because this ownership issue is another political compromise among great powerful nations.

The two approaches were well discussed in the Conferences on the Law of the Sea (“UNCLOS I, UNCLOS II, UNCLOS III”) during 1958 to 1982 and the subsequent 2001 Convention. There are two perspectives from which to answer this question: the process used to draft the two conventions and the nature of the three terms used to define “state of origin.”

1. *The Drafting Process of the Two Conventions*

The 1982 UNCLOS involved time-consuming negotiations with more than 160 participating nations, which discussed two controversial issues relating to ownership of UCH in the Area.

The first issue related to how to define the term “state of origin.” In Sub-Committee I of the 1973 session, the Turkish and Greek delegations first proposed ownership of UCH in the Area by discussing the term of “state of origin.” It appeared as “State of the country of origin” in the Turkish proposal, which gave preference to the State that exercises sovereignty over the country of origin of the discovered cultural property.²⁹ The Greek delegation subsequently made a similar proposal to provide the preferential right only to the “state of cultural origin.” On the other hand, an intersession proposal by the United States suggested deleting all of the relevant articles on archaeological and historical objects found in the Area.³⁰ Then, in the fourth session in 1976, the relevant paragraphs concerning historic wrecks and dispute settlement in the Area were deleted partly because of the desire of some participating nations to focus only on the salient elements (natural resources) of the article.³¹

The second issue related to the competent international organ to protect UCH in the Area under the principle of cultural heritage of mankind. The International Seabed Authority (“ISA”) was a controversial international body proposed during the drafting of the 1982 Convention.

In 1970, the Secretary General submitted A Report on the Potential Role of the International Machinery to Be Established³² to the Sea-Bed Committee that proposed a regulatory authority to (1) preserve underwater relics as a portion of the seabed, (2) discover and explore them as a legitimate use of the seabed, and (3) protect them for unusual educational, scientific, or cultural value.³³ Greece and Turkey’s proposals both suggested the ISA as the competent international body to protect the archaeological and historical objects found in the Area as the common heritage of mankind.³⁴

A few states, including the United States, intensively objected to the expansion of the powers of the ISA over non-resources-related activities during the negotiations of UNCLOS III.

²⁹ VI UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 227–228 (Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne, & Michael W. Lodge eds., 2002).

³⁰ *Id.* at 229.

³¹ *Id.*

³² 25 UN GAOR Supp. No. 21, UN Doc (A/8021), “The exploration and recovery of sunken ships and lost objects...which might be accompanied by the performance of related functions and powers by international machinery,” 61-123.

³³ As explained, “Perhaps [the wrecks, relics or lost objects lying on the seabed] are not resources or at least non natural resources. Nevertheless, they may fall under the jurisdiction of the machinery if the recovery of such objects is regarded as another use of the seabed.” *Id.* at 96.

³⁴ More information: Archaeological and Historical Treasures of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. U.N. Doc. A/AC.138/SC.I/L.16 (Aug. 2, 1972); Greece: Draft Article on Protection of Archaeological and Historical Treasures, U.N. Doc. A/AC.138/SC.I/L.25 (Aug. 14, 1973).

In the 1976 New York Session, one paragraph, designating the ISA to implement the proposed activities, was deleted. This modification remained in the Final Text of the 1982 UNCLOS.

Therefore, Professor Anastasia Strati's opinion is correct, there is not a rational explanation for the term of "state of origin" and deletion of the words "by the ISA." Rather, the process itself produced these outcomes. It is extremely difficult to achieve a rational outcome on every discussed issue when the convention uses a consensus process rather than majority vote.

UNESCO considered these two issues after it received the Buenos Aires Draft 2001 Convention on the Protection of the Underwater Heritage prepared by the International Law Association, in 1994. In the following years, UNESCO held several meetings among a group of governmental experts to draw the Draft 2001 Convention.

In the final text of this agreement the 2001 Convention, the ISA was validated as the most appropriate international body to deal with the UCH in the Area regulated in Articles 11 and 12 of the 2001 Convention.³⁵

But the other issue, the term of "the state of origin," remained suspended. The participating states determined it "would [be] better not to relate with a thorny issue of property [of UCH]."³⁶ The 2001 Convention, as a new international agreement entered into force in January 2009, after ratification by 20 contracting parties,³⁷ as required by Article 27 of the convention.³⁸ Because none of the permanent members of United Nations Security Council have ratified the 2001 Convention, it is far from a powerful and popular intentional convention. However, it still can be seen as an effective support and international legal subsequence of the 1982 UNCLOS.

After analyzing the above drafting processes of the two conventions, there was a meditated, professional discussion over the ownership issue, but neither Article 149 of the 1982 UNCLOS nor Article 12(6) of the 2001 Convention help clarify the scope of three different articulations of "states of origin."

The remaining question, then, is why there was no resolution of the meaning of the term "state of origin" in the two conventions? The answer lies in the nature of the concept "state of origin."

2. *The Nature of the Term "State of Origin"*

³⁵ "States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them." UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M.40, art. 11(2) [hereinafter 2001 Convention]; the International Seabed Authority shall also be invited to participate in consultations on how to ensure the effective protection of that underwater cultural heritage. 2001 Convention at art. 12(2).

³⁶ Garabello & Tullio Scovazzi eds., *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 106 (2003).

³⁷ Until Dec. of 2010, there are 36 State Parties: Panama, Bulgaria, Croatia, Spain, Libyan Arab Jamahiriya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon, Saint Lucia, Romania, Cambodia, Cuba, Montenegro, Slovenia, Barbados, Grenada, Tunisia, Slovakia, Albania, Bosnia and Herzegovina, Iran (Islamic Republic of), Haiti, Jordan, Saint Kitts and Nevis, Italy, Gabon, Argentina, Honduras, Trinidad and Tobago, Democratic Republic of the Congo, and Saint Vincent and the Grenadines by the date of deposit of instrument.

³⁸ "This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in art. 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territories three months after the date on which that State or territory has deposited its instrument." 2001 Convention, art. 27.

The three terms are easily understood by every common person without specialized knowledge. Such as, what is goodwill? What is *ex aequo et bono*? The terms are hardly given the precise definition without consideration of *de facto* circumstances.

The first term, “state or country of origin,” requires a connection between the regulating state or country and the geographic area where the object or product originated. The configuration of a state or country can change over time. For example, can the independent Syria (Syrian Arab Republic) legitimately claim restitution of a cultural property on its territory, which belonged to the United Arab Republic during 1958 to 1961,³⁹ on assumption that there is a cultural heritage conflict between the two countries?

The second term, “state of cultural origin,” gives emphasis to a cultural link between a cultural object and a state, but it neglects a situation in which several states shared the same culture in the past. For example, the Urtiin Duu (long song) which is a traditional folk song in Mongolia and China,⁴⁰ or the Processional Giants and Dragons of Belgium and France.⁴¹ The term cannot avoid potential disputes and conflicts without more explanation.

The third term, “state of historical and archaeological origin,” means that a state has a historical and archaeological link with a specific item. If this term is interpreted in such a simple way, should the Parthenon Marbles (formerly known as the Elgin Marbles) be returned to Greece without further discussion?⁴² Do the two historic bronze sculptures sold by Christie's in 2009⁴³ belong to China, so that China has the preferential right to own it because of their historical and archaeological origin?

It is obvious that the three terms of “state of origin” imply different meanings in different situations so that it is very difficult to define the terms adequately within conventions. Moreover, without explanation, it is impossible to establish a hierarchy among them. Without a hierarchy, one cannot specify who has the preferential right. Without expounding the meaning of preferential right, the 1982 UNCLOS and the 2001 Convention cannot settle the ownership issue of UCH in the Area. All of these interlinking reasons inevitably cause the wording of ownership provisions in the above two conventions to read like a broad-brush outline. This is what most nations expected—that the conventions would leave space for the terms to be developed in the future.

³⁹ The United Arab Republic was a union between Egypt and Syria, which began in 1958 and existed until 1961 when Syria seceded from the union. The United Arab Republic and Syrian Arab Republic share Islamic identity for their Arab roots.

⁴⁰ Urtiin Duu - Traditional Folk Long Song, one of the two major forms of Mongolian songs, originated 2,000 years ago, still plays a major role in the social and cultural life of nomads living in Mongolia and in the Inner Mongolia Autonomous Republic, located in the northern part of the People's Republic of China. It is inscribed on the 2008 representative list of the intangible cultural heritage of humanity proposed by China and Mongolia.

⁴¹ They firstly appeared in ritual representations at the end of the fourteenth century and now serve as emblems of identity for certain Belgian and French towns. It is inscribed on the 2008 representative list of the intangible cultural heritage of humanity proposed by Belgium and France.

⁴² The Parthenon Marbles have been sojourned at the British Museum for over 150 years, far away from their state of origin. There are continuous negotiations between the Greek government and British government for asking return. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 42-90 (2d ed. 1996).

⁴³ It is notably known that the sculptures were looted by French and British troops in 1860, during the Second Opium War when the “invaders burned down the royal garden of Yuanmingyuan in Beijing.” Five of the 12 heads have been recovered and are now displayed in a Beijing museum. *Looted Chinese Relics Sold for 14 Million Euros Each*, CHINA VIEW (Feb. 26, 2009, 3:17 AM), http://news.xinhuanet.com/english/2009-02/26/content_10897892.htm.

III. SUBSTANTIVE CRITERION TO IMPLEMENT LEX SPECIALIS APPROACH

Given this analysis, the tough issue for States in implementing the *Lex specialis* approach is to identify the legal basis to claim its interests with discovered Underwater Cultural Heritage (“UCH”) in the Area. This section discusses a possible hierarchy of the three kinds of “state of origin” as substantive criterion for every potential state from the current intentional legal system.

A. CULTURAL IDENTITY AS THE EFFECTIVE LINK BETWEEN THE UCH AND THE CONCERNED STATE OF ORIGIN

It is not difficult for disputed parties to find a link of one type or another with concerned UCH as a kind of “state of origin.” But which link has priority over others? The International Court of Justice (“ICJ”) gave a clue in *The Nottebohm Case*⁴⁴ through a description of an “effective link.” In this case, the ICJ explained the “effective link” within a nationality dispute: preference should be given to “the real and effective nationality, that which according with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.”⁴⁵ Hereafter, the ICJ suggested that the “effective link” in the *Nottebohm* case is one of the main substantial criterion to resolve nationality disputes. When two or more states claim certain links with the *res*, “the real and effective connection” or “stronger factual ties” could be the core of substantial criterion.

What can be “the real and effective connection” or “stronger factual ties” with a state of origin and the UCH? The necessary “connection” or “ties” may come from one of several possible sources: specific historical, archeological, or aesthetic facts that provide a sense of belonging to the nations in the claimed state; influence over most individuals in a state in one aspect of their social life or spiritual belief; a kind of national cohesion; or even itself as a symbol of the claimed state. All of these elaborations for the “connection” or “ties” are just alternative descriptions for cultural identity. Professor Stuart Hall defines “the cultural identity in terms of one, shared culture, a sort of collective ‘one true self,’ hiding inside the many other, more superficial or artificially imposed ‘selves,’ which people with a shared history and ancestry hold in common.”⁴⁶ Cultural identity defines us as “one people,” and gives a sense of identity and belonging to a group or culture and valuing cultural diversity. As a result, cultural identity, as evidence of a state’s spirit code, can be the substantial criterion to authorize the interested state of origin to claim the *res* (UCH).

B. THE LEGAL AND JURISPRUDENTIAL BASIS FOR APPLYING CULTURAL IDENTITY AS SUBSTANTIAL CRITERION OF LEX SPECIALIS APPROACH

⁴⁴Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (April 6), available at <http://www.icj-cij.org/docket/files/18/2674.pdf>. In this case, Nottebohm is a person who forfeited his German nationality and thus only had the nationality of Liechtenstein. *Id.* at 13. Then, the question arose as to who had the power to grant Nottebohm diplomatic protection. *Id.*

⁴⁵*Id.* at 22. Since then, it can be seen as the “effective nationality or the *Nottebohm* principle” where the national must prove a meaningful connection to the state in question. *Id.*

⁴⁶Stuart Hall, *Cultural Identity and Diaspora*, 223, available at <http://www.lwbooks.co.uk/ReadingRoom/public/IdentityDiaspora.pdf>.

The idea of cultural identity as the substantial criterion comes from the fundamental norms in international law: the human rights and national self-determination principle.

1. *Cultural Identity Underlies the Human Rights of Culture, Which is a Fundamental Universal Aspect of Human Rights in Human Rights Conventions*

According to the Universal Declaration of Human Rights 1948, “[e]veryone has the right to freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”⁴⁷ This notion can also be gleaned from the practices of regional organizations and their human rights conventions. The underlying objective for establishing the European Court of Human Rights (“ECHR”) included “raising consciousness about and developing the European cultural identity,”⁴⁸ which is the same aim of the Council of Europe to promote the emergence of a genuine European cultural identity.⁴⁹ The Organization of African Unity made treaties to protect human rights of culture;⁵⁰ the Asian Human Rights Charter also respects the right to cultural identity.⁵¹ This idea is later reflected in the United Nations Convention on the Rights of the Child for children’s cultural rights.⁵²

At the same time, the idea of cultural identity as an inherent requirement to justify the human rights of culture is passionately advocated in recent regional and international cultural conventions. The preamble of the European Convention for the protection of Audiovisual Heritage states, “Europe’s heritage reflects the cultural identity and diversity of its peoples.”⁵³ In the 2003 United Nations Education, Scientific and Cultural Organization (“UNESCO”) Convention for the Safeguarding of the Intangible Cultural Heritage, the definition of “intangible heritage” indirectly describes the importance of promoting the protection of intangible cultural heritage because of how it interacts with history and sense of identity.⁵⁴ The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression has an objective expression in Article 1 to “deal with the need to recognize that cultural goods and services convey identity, values and meaning.”⁵⁵ Obviously, with respect to the fundamental human rights of culture,

⁴⁷ Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), at art. 27.

⁴⁸ STRASBOURG.INFO, <http://www.strasbourg.info/echr/> (last visited Mar. 7, 2011).

⁴⁹ 36 YEARBOOK OF THE EUROPEAN CONVENTION ON THE HUMAN RIGHTS 397 (Martinus Nijhoff Publishers 1993).

⁵⁰ See African (Banjul) Charter on Human and Peoples’ Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982). “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” *Id.* at art. 22.

⁵¹ See Asian Human Rights Charter, May 17, 1998, available at <http://www.unhcr.org/refworld/docid/452678304.htm>. “They (cultural identities) are the source of pride and security.” *Id.* at art. 6.1.

⁵² G.A. Res. 44/25, annex 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49, art.29(c) “[t]he development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.” at 167 (1989), entered into force Sept. 2 1990.

⁵³ European Convention for the Protection of the Audiovisual Heritage, Nov. 8, 2001, [2001] COETS 6, available at <http://www.worldlii.org/int/other/COETS/2001/6.html>.

⁵⁴ Convention for the Safeguarding of the Intangible Cultural Heritage art. 2, Oct. 17, 2003, 2368 U.N.T.S 3. “This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” *Id.*

⁵⁵ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 1, Oct. 20, 2005, 2440 U.N.T.S. 311.

cultural identity as a substantial core right can be considered as internal cohesive to authorize the interested state of origin to claim the relative UCH. Professor Lyndel Prott also argued that the formulation of this right (rights of culture) was primarily intended to shore up the restitution of movable cultural property.⁵⁶

2. *Cultural Identity is an Internal Impetus For the Implementation of the National Self-Determination Principle in Contemporary International Law*

Cultural identity particularly manifests the right to cultural self-determination in a proper way. In 2007, the UN General Assembly finally adopted a landmark declaration on the Rights of Indigenous Peoples after more than 20 years of negotiation between nation-states and Indigenous Peoples. The right of cultural self-determination, in essence, takes shape around the right of “cultural identity,” crystallized in Article 2,⁵⁷ Article 13,⁵⁸ and Article 33⁵⁹ of the Declaration.⁶⁰ There are more than 5,000 ethnic groups located in about 192 states in the world.⁶¹

During the nineteenth century, nations recognized the need to respect the cultural identity of each ethnic minority as a requirement for territorial integrity and political unity of every multinational country. The unification of Germany and Italy during the nineteenth century were justified by the principle of national self-determination within Europe.⁶² Many new states were created after the Treaty of Versailles 1919: Finland, Latvia, Lithuania, Poland, Czechoslovakia, Austria, Hungary etc. in central Europe,⁶³ on the basis of national self-determination from ten of Wilson’s Fourteen Points.⁶⁴ In modern society, recognition of the cultural identity of ethnic minorities is adopted as a fundamental state policy. Vladimir Ilyich Lenin advocated the right of self-determination for minorities and their cultural identity as a basic principle of the Party,⁶⁵

⁵⁶ Lyndel V. Prott, *Cultural Rights as People’s Rights in International Law*, in *The Rights of Peoples* 100 (James Crawford ed., 1988).

⁵⁷ United Nations Declaration on the rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.” *Id.* at art. 2.

⁵⁸ “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.” *Id.* at art. 13.

⁵⁹ “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.” *Id.* at art. 33.

⁶⁰ Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 *Int’l & Comp. L.Q.* 867, 880 (1989).

⁶¹ Doyle, *By the Numbers: Ethnic Groups in the World*, *SCIENTIFIC AMERICAN MAGAZINE*, September 1998, available at http://www.sciamdigital.com/index.cfm?fa=Products.ViewIssuePreview&ARTICLEID_CHAR=839E9D9D-4973-4975-B697-959C1126F16.

⁶² REALISM RECONSIDERED: THE LEGACY OF HANS J. MORGENTHAU IN INTERNATIONAL RELATIONS 150 (Michael C. Williams, ed. 2007).

⁶³ Jackson J. Spielvogel, *WESTERN CIVILIZATION, ALTERNATE VOLUME: SINCE 1300* 799 (7th ed. 2009).

⁶⁴ Self-determination for the peoples, which meant the right of nations to rule themselves, was point ten of Wilson’s Fourteen Point. <http://www.johndclare.net/EA6.htm> (last visited March 7, 2011).

⁶⁵ Zhang Yunxiang, *Discussion on the Lenin theory of National Structure in Multinational Countries*, 37, *THEORY J.*, No.6 Ser. No.94 (1999); see also Yves Plasseraud, *How to solve cultural identity problems: choose your own nation*, *GLOBAL POLICY FORUM*, (May 2000) available at <http://www.globalpolicy.org/component/content/article/173-sovereign/30380.html>.

which later had an impressive influence on socialist countries. The Chinese government adopted regional autonomy for ethnic minorities with respect for their cultural identity, such as in the Tibet Autonomous Region and in the XinJiang Uygur Autonomous Region. The Philippines are another example, Lumads (indigenous people) policy in Mindanao⁶⁶ and Moro self-determination are found in the Philippines as instances confirming the significance of cultural identity.⁶⁷ On the other hand, not all federal systems were adopted as a response to national cultural identity, but it is at least a mechanism for respecting cultural identity by granting a degree of autonomy that can prove two or more nationalities can coexist under a single government. No matter which ideology a nation adheres to, capitalist or socialist, and no matter what kind of national structures is adopted, the unitary state or the federal state, respect and recognition of cultural identity of homogenous population reinforces the integrity of the sovereignty state.

On the contrary, when dominant groups (especially in possession of political power) ignore the needs of minority peoples for cultural identity, exploit the rights of cultural self-determination of minority peoples, or attempt to impose assimilation policy against minority peoples, violence, riots, or armed conflicts will occur. In multinational countries such as the Soviet Union and Yugoslavia, collapse was followed by ethnic conflicts, violence, and civil war. These conflicts involved secessionist movements. When the Sri Lankan government denied the Tamil people equal expression of their distinct identity in 1970, armed confrontation and a war of secession began⁶⁸ and lasted for 25 years until May 2009. Another example is the Lebanese Civil War (1975-1990), which resulted in an estimated 130,000 civilian fatalities. The antecedents of this war can be traced back to conflicts between Muslims and Christians, and an intricate constitutional compromise between them. The Rwandan Civil war between the majority Hutu and minority Tutsi resulted in more than one million dead and three million refugees, and tore the state apart into ethnic division. In the post-Cold War period, cultural identity policy played a key role in regional peace, even world security, large-scale violence still escalated sometimes when the majority ignored the cultural identity of the minority, such as the situation in Kosovo and Afghanistan and the conflicts between Israel and Palestinian.

⁶⁶ "Thirty-four percent of the 300,000 sq km total land area of the Philippines is in Mindanao. . . . Particular to Mindanao is the existence of three types of people: the Lumads (indigenous people), the Filipinos (Christians) and the Moros (Islamised Lumads)." *Extracts from "We Feel The Pain Of Our Mountain..." the report of the 1996 International Fact Finding Mission to Mindanao*, SOLIDARITY PHILIPPINES AUSTRALIA NETWORK, <http://cpcabrisbane.org/Kasama/1997/V11n3/Mindanao.htm> , 'Cagayan de Oro Declaration,'(2008), the 200 tribal leaders asserted their rights to their ancestral domain and cooperation by respect cultural identity in this way: "we commit to strengthen our unity to enable us to fully protect and preserve our rights to self-determination through peaceful dialogues with our Muslim and Christian brethren." http://www.tebtebba.org/index.php?option=com_docman&task=doc_download&gid=268&Itemid=27, see also Ma. Cecilia L. Rodriguez, *Are Lumads left out in the Quest for Peace in Mindanao?* (Sept. 19, 2008) http://rightsreporting.net/index.php?option=com_content&task=view&id=1426&Itemid=130; Levita Duhaylungsod, *Ancestral domain, cultural identity and self-determination: the case of the lumads* (1993) available at (CONFERENCE PAPER) http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1181/Ancestral_Domain%2c_Cultural_identity.pdf?sequence=1.

⁶⁷ Rizal Buendia, *Looking into the Future of Moro Self-Determination in the Philippines*, 29 PHILIPPINE POL. SCI. J. 52, 1-24 (2008).

⁶⁸ Report of The International Conference of Experts, Nov. 21-27, 1998, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, UNESCO, (1999), available at <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf>

The treatment of over 370 million indigenous people in the world is illegal, morally condemnable, and socially unjust.⁶⁹ The reasons multiethnic or multinational countries are plagued by violence, persistent ethnic conflict, or genocide are fueled by many factors, such as civilization clashes, tribalism, resource scarcity, and overpopulation.⁷⁰ One predominant factor for this is the absence of effective political instruments to implement the national self-determination and respect the needs of cultural identity of minorities.

Therefore, cultural identity provides a powerful rationale to freely participate in the cultural life of the community, and internal power for a nation to entitle their self-determination within a state. In light of the discussion above, cultural identity possesses a sufficient legal standing as a primary substantial criterion for a state of origin to claim a UCH in question based on the human rights of culture and national right of cultural self-determination.

C. THE APPLICATION OF CULTURAL IDENTITY AS SUBSTANTIAL CRITERION OF THE LEX SPECIALIS APPROACH IN CURRENT INTERNATIONAL LEGAL SYSTEMS

Current international law shows some dimensions of cultural identity as a substantial criterion of the *Lex specialis* approach. According to Article 38 of the Statute of the International Court of Justice,⁷¹ problems arise from three sources: international cultural heritage conventions, relevant international custom and general principles, and international organizations' practices and national juridical practices.

1. *International Cultural Heritage Conventions*

Ridha Fraoua argues that as a precondition to the right to cultural self-determination, all people should have the right to reclaim their cultural heritage.⁷² The following significant regional and international cultural heritage conventions⁷³ show cultural identity as the substantive criterion of ownership issue.

⁶⁹ The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples with 143 votes in favour, 4 negative votes cast (Canada, Australia, New Zealand, United States) and 11 abstentions. United Nations Declaration on the rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) available at <http://www.treatycouncil.org/PDFs/final%20adopted%20version%20of%20the%20UNDRIP.pdf>.

⁷⁰ Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFAIRS 3, 22-49 (1993).

⁷¹ The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

⁷² Ridha Fraoua, *Le trafic illicite des biens culturels et leur restitution-analyse des réglementations nationales et internationales, critiques et propositions*, FRIBOURG: EDITIONS UNIVERSITAIRES 279, (1985).

⁷³ There are some other international cultural heritage conventions, but no provisions refer to ownership issue, such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954; Convention concerning the Protection of the World Cultural and Natural Heritage 1972; the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

- a. United Nations Educational Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970

[Cultural property] belonging to the following categories form part of the cultural heritage of each State: Cultural property created by the individual or collective genius of nationals of the states concerned, cultural property of importance to the state concerned created within the territory of that state by foreign nationals or stateless persons resident with such territory.⁷⁴

This clause properly explains the relationship among territories of a state, creators, and cultural heritage. Cultural heritage here is closer and more significant to its territory than its creators—the “foreign nationals or stateless persons resident within such territory,” because cultural identity plays a significant role in this situation.

Cultural heritage is different from an invention or patent in intellectual property law, because culture is nourished within its relevant society. Different societies cultivate different culture, following an ancient Chinese proverb: the same seed grows up orange south of Huai River, but trifoliate orange north of Huai River.⁷⁵ The proverb emphasizes that the unique feature of a local environment always gives special characteristics to plants. This proverb is also understood by Chinese to mean that different areas breed different cultures and people.⁷⁶ The dragon provides another example. It can symbolize the Chinese race itself and is portrayed as nobility, heroism, power, excellence, perseverance, and divinity. On the other hand, it can symbolize a terrifying evil monster in the West.

“As a ‘historical reservoir,’ culture is an important factor in shaping identity.”⁷⁷ Therefore, historical and geographical elements have more effective power than creators during a process of generating new cultural heritage to justify the ownership of cultural heritage in this circumstance based on social cultural identity.

- b. Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (Convention of San Salvador) 1976

This famous regional convention begins with the reason why such looted and plundered native cultural heritage should be returned: “[t]hat such acts of pillage have damaged and reduced the archeological, historical and artistic wealth, through which the national character of their peoples is expressed.”⁷⁸

“[T]he archeological, historical, and artistic wealth” of cultural heritage is seen as the spirit of a nation. Each State Party has a responsibility to effectively prevent any illegal acts—such as unlawful excavation or plundering of other State Party’s cultural heritage and destruction of their national “archeological, historical, and artistic wealth.”⁷⁹

⁷⁴ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S 231, art. 4 [hereinafter 1970 Convention].

⁷⁵ 《晏子春秋》：“橘生淮南则为橘，生于淮北则为枳。”

⁷⁶ 一方水土养育一方人。

⁷⁷ Pratt Nicola, *Identity, Culture and Democratization: The Case of Egypt*, 27 *Journal of New Political Science* 69, (2005).

⁷⁸ Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador), Jun. 16, 1976, 15 I.L.M. 1350.

⁷⁹ *Id.*

This clause means excavating or plundering other states' cultural heritage is prohibited. Because of the "archeological, historical, or artistic wealth" link with its nation or its people, the state can be justified as the state of origin on this legal basis of cultural identity. So, an archeological, historical, or artistic wealth link is an indirect clue for the substantial criterion of ownership of UCH in the Area.

c. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 is intended to facilitate the restitution and return of stolen or illegally exported cultural objects. In Article 5, this Convention applies to claims of the return of an illegally exported cultural object, if:

[T]he requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.⁸⁰

Conditions (a) through (d) enumerate the merits of returning a cultural object. These legal bases can be the substantial criterion to justify the ownership of cultural heritage in this circumstance.

2. *Customary International Law and General Principle*

The issue of who owns sunken warships and state-owned vessels can be solved based on the UCH's inevitable cultural identity. One doctrine of customary international law, "freedom of the high seas," cannot be applied in the situation of warships and state-owned vessels sunk in the Area when a State or country of origin does not forfeit their ownership rights, and instead stands on their absolute status to own identifiable public property of States, which complies with the general principle of "*Lex specialis derogat legi generali*."

a. The Freedom of the High Seas Excludes the Situation of Warships and State-Owned Vessels

Under current customary international law, the principle of "freedom of the high seas" provides that the high seas are open to all States. The principle of freedom of the high seas may therefore apply to all ocean activities, even research or excavating UCH in the Area, which is not specifically mentioned in the 1982 United Nations Convention on the Law of the Sea ("1982 UNCLOS").⁸¹ At the same time, the flag State has jurisdiction to regulate its nationals or ships as part of its territories when operating on the high sea, even when salvaging UCH, because the ship flies that State's flag. This easily leads to a "first come, first serve" approach to acquire

⁸⁰ UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.

⁸¹ See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 87–88.

UCH by the flag state when cultural items are accidentally discovered by exploration of seabed resources near the site of sunken vessels. However, the priority of the flag state will not be applied to identifiable UCH, such as warships and state-owned vessels.

b. A State Has Exclusive Sovereignty of Its Identifiable Warships and State-Owned Vessels in the Area

The flag state has the authority and sole applicable jurisdiction over the vessels under its flag. Some scholars incorrectly explain sunken vessels lose the legal basis to claim the exclusive jurisdiction by their flag state, because sunken vessels cannot qualify as a “ship” due to their inability to navigate when lying on the bottom of the seabed.⁸² This is an absurd and mechanical explanation. The legal reason is that the Law of Finds, which should apply to abandoned shipwrecks, states that warships and state-owned vessels in the Area should be returned to their identifiable state. It is difficult to prove warships and other state-owned vessels are abandoned, so that the identifiable UCH undoubtedly belongs to its identifiable states with respect of the sovereignty principle, wherever the location. The warships and state-owned vessels can be considered as a patrimonial right of identifiable state or country of origin, and present significant value to their states.

Finally, international custom, codified in the 1982 UNCLOS states “warships and state-owned or operated vessels, used only on government non-commercial service, enjoy complete immunity from the jurisdiction of any state other than the flag state on the high seas.”⁸³ This principle is also reflected in the 2001 Convention in similar language.⁸⁴

The agreement between the U.S. and France of the *La Belle* wreck (2003)⁸⁵ can be seen as the best national practice. The *La Belle* is a French ship sunk in 1686 in Matagorda Bay, near the United States’ state of Texas. In this agreement, Article 1 states: “The French Republic has not abandoned or transferred title of the wreck of *La Belle* and continues to retain title to the wreck of *La Belle*.”⁸⁶ Therefore, the identifiable sunken State vessel was titled to the sovereign states unless expressly abandoned.

3. *International Organizations’ Practices and National Juridical Practices*

a. The United Nations and UNESCO Acknowledge This Substantial Criterion in Its Resolutions, Conventions, and Conferences

UNESCO’s Intergovernmental Committee for Promoting Return of Cultural Property to its Countries of Origin or its Restitution in the Case of Illicit Appropriation stated that “the cultural property that should be returned is: ‘that which is particularly representative of the

⁸² See ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 237 n.36 (1995).

⁸³ 1982 UNCLOS PART VII ART.96.

⁸⁴ Compare 1982 UNCLOS Part VII art. 95-96 (stating warships and state owned ships have “complete immunity from jurisdiction of any state other than the flag state.”) with 2001 Convention art.12 (7) (stating “No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State”).

⁸⁵ Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of *la belle*, U.S.-Fr., Mar. 31, 2003.

⁸⁶ *Id.* at art. 1(2).

cultural identity of a specific people” and “the country of origin” is defined as “to whose cultural tradition the object is linked.”⁸⁷ Salah Stétié, the Chairman of the first three sessions of the UNSECO Intergovernmental Committee, said cultural property should be returned with the consideration that, “the extent that the absence or withdrawal of a particular item would constitute an irreparable deprivation, and an irreplaceable loss in the chain of actions and interactions which go to make up a living culture.”⁸⁸

Article 7 of the Resolution on the Restitution or Return of Cultural Property to the Countries of Origin (“Resolution”) states that the U.N. General Assembly: “[a]lso invites Member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures.”⁸⁹

Without providing directly for the return of discovered underwater cultural treasures to its state of origin, the Resolution properly provides another confirmation of cultural identity—the essential criterion to justify that a state of origin is the historical and cultural link with the recovered property.

The Athens International Conference on the “Return of Cultural Property to its Country of Origin”⁹⁰ in 2008 was the first in a series of international gatherings organized by UNESCO and its Member States to foster awareness and provide for reflection and exchange on the issue of the return of cultural property. This conference concluded that “the return of cultural objects is directly linked to the rights of humanity (preservation of cultural identity and preservation of world heritage.)”⁹¹

In April 2010, at the Cairo Conference, countries united for repatriation of looted cultural heritage artifacts. Twenty-two attendant countries were advised to submit their lists with “top priority” antiquities designated. These top priority antiquities were those that they sought to be returned because they were a piece of the country’s history and national identity. For instance, the Parthenon Marbles are a “top priority” for Greece. Cultural tradition can be understood as the social, artistic, and historical value that is the core of cultural identity. The return of cultural property to the state of origin should be of spiritual, cultural, or historical significance to a state’s social realization or aesthetic appreciations.

⁸⁷ Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Rep. on its 4th Sess., 4, Apr. 2-5, 1985, available at <http://unesdoc.unesco.org/images/0006/000632/063270eo.pdf>.

⁸⁸ *Id.*

⁸⁹ Return or restitution of cultural property to the countries of origin, GA Res. 48/15, U.N. GAOR, 47th Sess., Supp. No. 49 at 19, U.N. Doc. A/48/49 (Nov. 2, 1993).

⁹⁰ *Athens International Conference on the “Return of Cultural Property to its Country of Origin*, UNESCO (2008), http://portal.unesco.org/culture/en/ev.php-URL_ID=36430&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html.

⁹¹ Conclusion of the Athens International Conference on the Return of Cultural Objects to their Countries of Origin (Mar. 17–18, 2008), http://www.unesco.org/culture/laws/pdf/Conclusions_Athens_en.pdf.

b. United States Practices This Substantial Criterion Within Its Judicial System

The abandoned shipwrecks, embedded in submerged lands of a state, are simultaneously transferred to United States in accordance with United States legislation.⁹² The situation changes when it happens in the Area.

The United States returned an Egyptian Mummy after a CT scan of the mummy taken in 1999 revealed that the mummy was Egypt's King Ramses I. Emory University's Michael Carlos Museum returned the mummy to Egypt, and it is now exhibited in Egypt's Luxor Museum. Peter Lacovara, an Egyptologist and curator of ancient art at the Michael C. Carlos Museum said, "[t]here was never any question about whether the mummy would be returned to Egypt if it proved to be a royal."⁹³ This emphasizes the great importance of the national identity of cultural heritage.

Judge Mark Pizzo championed this substantial criterion in *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*⁹⁴ stating "[t]he debris field's location, coins, cannons, and artifacts persuasively match the *Mercedes's* historical record. I find the evidence as to the *res's* identity so one-sided that Spain would prevail as a matter of law."⁹⁵

Thus, when cultural identity is an inherent element to give common ground to a people's "being," or an internal impetus to implement national rights of cultural self-determination, or even a precondition to resuscitate the most significant cultural objects of patrimony, cultural identity stands as a sufficient legal basis as the substantial criterion of the preferential right to "state of origin" to justify the effective link by its historical, cultural, and archeological nature.

IV. BROADER CONSIDERATIONS: SUBSTANTIVE CRITERIA TO THE GENERAL APPROACH

Since the beginning of the twenty-first century, the international community has been concerned about the protection of all kinds of cultural heritage.⁹⁶ The same is true of salvage operations by individual states or persons in the Area. While the *Lex specialis* approach cannot settle all Underwater Cultural Heritage ("UCH") ownership disputes in the Area, the general approach, the principle of common heritage of mankind, applied for the efficient protection of UCH under some circumstances. For example, when an "effective link" fails to be established through current technology between UCH and certain states, it is classified as an unidentifiable item (or *bona vacantia*). According to the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Protection of the Underwater Cultural Heritage ("2001 Convention") and its Annex, the International Seabed Authority ("ISA") and UNESCO

⁹² See generally 43 U.S.C. §2105 (2006), "The United States asserts title to any abandoned shipwreck that is (1) embedded in submerged lands of a State;(2) embedded in coralline formations protected by a State on submerged lands of a State."

⁹³ Hillary Mayell, *U.S. Museum to Return Ramses I Mummy to Egypt*, NATIONAL GEOGRAPHIC NEWS (Apr. 30, 2003), http://news.nationalgeographic.com/news/2003/04/0430_030430_royalmummy.html.

⁹⁴ No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. June 3, 2009).

⁹⁵ *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088, at *21 & n.10 (M.D. Fla. June 3, 2009), available at <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/209/0.pdf>.

⁹⁶ The Convention of the Protection of the Underwater Cultural Heritage (2001); the Convention for the Safeguarding of the Intangible Cultural Heritage (2003); the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

were required to provide notice of such discoveries to Member States according to the Article 11 notification obligation. Then, the ISA could authorize a Member State or a specific international organization to contractually salvage and operate protection issue. Finally, the ISA may keep the artifacts in an underwater museum or other designated museum belonging to the ISA or to the UN.

To regulate the principle in a convention is one thing, but legal practice in a national system is another thing. The ownership issue of unclaimed wrecks found in extraterritorial waters is a great challenge for legal systems to balance commercial exploitation under the salvage law and the greatest possible protection of the UCH under the general approach.

The *RMS Lusitania* case provides a good example. The *RMS Lusitania* was an ocean liner, and the property of Cunard Steamship Company Ltd. at the time of its sinking in 1915. The insurers paid the owners the total loss and subsequently acquired legal title to the ship. In 1982, salvage operations were performed on the wreck, and approximately ninety-four items were salvaged.⁹⁷ Then, American entrepreneur Gregg Bemis bought the wreck of the *RMS Lusitania* from insurers in 1982 and went to England's courts to ensure his ownership was legally in force. Justice Sheen in an English court first admitted "[t]here was a lacuna in the provisions for the disposal of 'extraterritorial wrecks' if unclaimed by the owner."⁹⁸ Then, the English court stated that the salvager could formerly received a salvage reward, but "the Crown would have asserted *a droit* of Admiralty."⁹⁹ In the *RMS Lusitania* case, "the Crown had no right to unclaimed wrecks and chattels found in extraterritorial waters"¹⁰⁰ in 1982. The *Lusitania* torpedoed in 1915, now belonged to the finders, who are able to "[assert] a finder's title or alternatively, [seek] out the true owner and claiming salvage."¹⁰¹

In *Bemis v. The RMS Lusitania*, the United States Court of Appeals for the Fourth Circuit denied "a salvage award and prevented the salvor from taking artifacts from the wreck with "its scientific, historical and archeological significance,"¹⁰² because the salvor did not use "good archeological practice or due diligence."¹⁰³ In 2007, after Bemis received a five-year exploration license, he planned to dive and recover artifacts and evidence in the wreck that could help piece together the story of what happened to the ship. First, the Underwater Archaeology Unit ("UAU") with the National Monuments Service, which manages Ireland's Heritage, joined the survey team "to ensure that the research was carried out in a non-invasive manner."¹⁰⁴ Then, Bemis promised any items found would be given to museums and belong to the British government to analyze. A salvaged four-blade propeller is now on exhibit in Merseyside

⁹⁷ *Pierce v. Bemis*, [1986] Q.B. 384 (Eng.).

⁹⁸ ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 258 (1995).

⁹⁹ Lillington, S.D., *Wreck or wrecuum maris?: Lloyd's Maritime and Commercial Law Quarterly* (1987), 272.

¹⁰⁰ See ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 227 (1995).

¹⁰¹ Lillington, S.D., *Wreck or wrecuum maris?: Lloyd's Maritime and Commercial Law Quarterly* (1987), 272.

¹⁰² ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 284 (Barbara T. Hoffman ed. 2006), *Cambridge University Press*.

¹⁰³ *Id.*

¹⁰⁴ Eithne Shortall, *Riddle of Lusitania sinking may finally be solved*, THE TIMES, Jul. 20, 2008, <http://www.timesonline.co.uk/tol/news/world/ireland/article4364701.ece>.

Maritime Museum, Albert Dock in Liverpool, UK.¹⁰⁵ Any fine art recovered, such as paintings, would remain in the ownership of the Irish Government.

The above national legal practice elucidated the salvage doctrine and did not apply to the ownership issue of the *bona vacantia* UCH in the Area. The UCH with national identity should be returned to its state.

Therefore, the substantive criteria of the general approach are not only just to entitle UCH to mankind as a whole. But, more importantly, it is to recognize the significance for the contracting parties or specific international organizations to cooperate in the recovery and protection of UCH, in accordance with the principle of non-commercial exploitation and the principle “*in situ*” preservation as a preferred option. Only in so doing can the outstanding universal value of UCH be maximized.

V. CONCLUSION

Although the 1982 United Nations Convention on the Law of the Sea, the 2001 United Nations Educational, Scientific and Cultural Organization, and the Convention on the Protection of the Underwater Cultural Heritage provide some rules of the Underwater Cultural Heritage (“UCH”) ownership in the Area, the rules lack “teeth” to settle the claim of ownership of UCH in the Area. After the above analysis, cultural identity provides a sufficient legal base to be deemed a substantive criterion of the *Lex specialis* approach to justify the claimed UCH in the Area for a state of origin. The International Seabed Authority should adopt the general approach: the principle of common heritage of mankind for protection UCH when UCH is classified as unidentifiable items. The two approaches need more national or international judicial practices and should be crystallized in more international conventions as the evidence of *opinio juris* in the future so it can be used better to protect the UCH in the Area and effectively settle the relevant disputes.

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Merseyside Maritime Museum,
<http://www.liverpoolmuseums.org.uk/maritime/collections/liners/lusitania/propeller.aspx> (last visited, Mar. 25, 2011).