REVUE BELGE DE DROIT INTERNATIONAL
2015/1-2 – Éditions BRUYLANT, Bruxelles

REGARDING "LES ÉPAVES DE NAVIRES EN HAUTE MER ET LE DROIT INTERNATIONAL. LE CAS DU MONT-LOUIS" BY GUIDO STARKLE (1984/1985-I): "SENSITIVE" WRECKS, PROTECTING THEM AND PROTECTING FROM THEM

BY

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Introduction

This contribution comments on Guido Starkle's Article "Les épaves de navires en haute mer et le droit international. Le cas du Mont-Louis", published 30 years ago by the *Revue belge*. (1) In that article, Starkle tried to describe the legal regime of wrecks in public international law, using the case of the *Mont-Louis*, a French cargo vessel carrying 450 tonnes of radioactive material (uranium hexafluoride) that sunk on 25 August 1984 about 18 km (9.7 nm) off the coast of Ostend, Belgium. Following the recovery of the radioactive material, the vessel finally collapsed, causing some fuel pollution. Starkle warned about an apparent lacuna in international law given the absence of explicit conventional rules governing the fate of wrecks in the high seas, (2) and proposed filling it with a reading of the general rules of the international law of the sea "de façon à déterminer, à travers de l'étude de divers domaines, les règles de base, les lignes de force qui paraîtraient pouvoir constituer l'armature d'un tel régime". (3)

Starkle had to rely on the general rules of the international law of the sea in force in 1985. These rules have notably changed since then. The UN

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(1) *RBDI*, vol. XVIII, 1984-1985, 496-528 (hereinafter cited as "Starkle, X").

(2) Not until 1987, as a consequence of the *Mont-Louis* case, did Belgium extend its territorial sea up to 12 nm. See, generally, E. Franckx, "Belgium and the Law of the Sea", in T. Treves (ed.), *The Law of the Sea. The European Union and its Member States*, The Hague, Martinus Nijhoff, 1997, 37-96.

(3) Starkle, 499.

Convention on the Law of the Sea entered into force on 1994, (4) and other conventions dealing with the regime governing wrecks have also come into force in the last 30 years, particularly, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (5) and the 2007 Nairobi International Convention on the Removal of Wrecks, (6) amongst others. Along with these normative novelties and the scientific literature to which they gave rise, certain other questions are relevant to a renewed interest in the regime governing wrecks today compared to that of the 1980s : the new parcelling of the sea after LOSC, which has increased coastal States' jurisdiction over marine areas, and the resulting new allocation of responsibilities ; the increased maritime traffic, particularly in relatively small spaces (such as the Belgian coast in the English Channel), most of the time under the "un-genuine link" of flags of convenience ; the impressive amount of new information that can be gathered by innovative marine technologies, which can help not only to determine the location of wrecks but also the risk they may pose to navigation, the marine environment or safety at sea ; the identification of wrecks of cultural, historical or archaeological interest meriting special protection, irrespective of whether they are Polynesian aboriginal canoes, Viking *drakkars* (*långskip*), Spanish colonial galleons, or warships sunk during WWI (hundreds in Belgian waters) ; or the identification of certain other wrecks considered human gravesites —such as, along with the aforementioned sunken warships, the *Titanic* or the *Estonia*— also meriting a particular respect and protection.

My contribution to these well-deserved *Mélanges à la Revue belge de droit international* —a *Revue* that has kindly welcomed me several times— will try to address some of these questions. (7) Like Starkle's paper 30 years ago,

(4) Adopted 10 December 1982, entered into force 16 November 1994 (1833 *UNTS* 397) (LOSC).

(5) Adopted 2 November 2001, entered into force 2 January 2009 (2562 *UNTS* 1) (UNESCO Convention). As at 15 March 2016, the UNESCO Convention was in force for the following 55 States : Albania, Algeria, Antigua and Barbuda, Argentina, Bahrain, Barbados, Belgium, Benin, Bosnia and Herzegovina, Bulgaria, Cambodia, Croatia, Cuba, Democratic Republic of the Congo, Ecuador, France, Gabon, Ghana, Grenada, Guatemala, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iran, Italy, Jamaica, Jordan, Lebanon, Libya, Lithuania, Madagascar, Mexico, Montenegro, Morocco, Namibia, Nigeria, Palestine, Panama, Paraguay, Portugal, Romania, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Togo, Trinidad and Tobago, Tunisia and Ukraine.

(6) Adopted 18 May 2007, entered into force 14 April 2015 (IMO Doc. LEG/CONF.16/19, 46 *ILM* 697) (Nairobi Convention or WRC). As at 15 March 2016, the Nairobi Convention was in force for the following 25 States : Albania, Antigua and Barbuda, Bahamas, Bulgaria, Congo, Cook Islands, Cyprus, Denmark, Germany, India, Iran, Kenya, Liberia, Malaysia, Malta, Marshall Islands, Morocco, Nigeria, Niue, Palau, Panama, South Africa, Tonga, Tuvalu and the United Kingdom. The Convention will enter into force for France on 4 May 2016 and for the Netherlands on 19 April 2016.

(7) In any case, one has to rely heavily on two comprehensive works already published on the complicated relationship between rights and duties related to wrecks when the later are both wrecks to be protected (such as historical wrecks) and wrecks to be protected from (such as polluting wrecks). These enlightening works are S. Dromgoole and C. Forrest, "The 2007 Nairobi Wreck Removal Convention and hazardous historic shipwrecks", *Lloyd's Maritime and Commercial Law*

it will only address questions of public international law, generally leaving aside other interesting questions of maritime law. Unlike Starkle's paper (and due to the change in circumstances), (8) it will deal with wrecks located in any maritime zone, not only the high seas. To this end, the first section will review certain facts and the different interests involved in wrecks (I); the next section will provide an overview of the legal regime provided for under current international law (II); and the final section of this necessarily short paper will offer a few concluding remarks.

I. — Wrecks: A kaleidoscopic legal fact

Wreck, *épave*, *pecio*, *relitto*, *wrack*, etc. Different words in different languages to describe what may be, all at once, a time capsule, hazardous waste, a gravesite, an obstacle for navigation, a source of income, an artificial reef, and public property. (9) The *Tolosa*, a Spanish galleon sunk in 1724 near the Dominican Republic, is an historical wreck, and thus part of the underwater cultural heritage, that was carrying tonnes of mercury when it sunk, some of which has not yet been recovered, making her a threat to the fragile marine environment. Or a source of income, like the *U-859*, a German submarine sunk in the Strait of Malacca, likewise carrying mercury, which was targeted by commercial salvage companies in the 1970s. The *USS Arizona*, an American battleship sunk during the 7 December 1941 attack on Pearl Harbor, has become a memorial site. Most of her surviving superstructure was scrapped in 1942, and human remains still lie within her submerged frames. But oil has continued to leak into the harbour from her hull since her sinking, at a rate of about 2 litres a day. The Red Sea, like some zones in Polynesia, is full of wrecks that have since been transformed into artificial coral reefs, making them a source of income from scuba tourism and a new target for traditional fisheries, but also severe obstacles to navigation if they are not properly identified on navigational charts.

As the above examples show, a wreck may be subject to multiple legal regimes:

— as a "thing", a wreck may have an owner, which may be either a public or private person; consequently, public rules of State immunity may apply, as might private regimes related to property, insurance, rescue or salvage, etc.;

Quarterly, No. 1, 2011, 92-122; and C. Forrest, "Culturally and environmentally sensitive sunken warships", *Australia and New Zealand Maritime Law Journal*, vol. 26/1, 2012, 80-88.

(8) The *Mont-Louis* sunk in 1984 in the high seas; today, she would be located in the Belgian territorial sea. Most casualties at sea take place in a maritime area under the sovereignty or jurisdiction of a coastal State, i.e. within the outer limit of the exclusive economic zone (EEZ).

(9) See further S. Dromgoole, "A note on the meaning of 'wreck'", *International Journal of Nautical Archaeology*, vol. 28, 1999, 319-322.

— as an object located in a maritime space, (10) a wreck is also subject to the rules of the law of the sea, mainly codified by LOSC;

— if the original vessel sunk more than 100 years ago, (11) the wreck also falls under the generally accepted definition of underwater cultural heritage, thereby meriting special protection; (12)

— if, in the interim, it has become an artificial reef, the wreck may be protected by several environmental rules and specific fishing regulations;

— however, if the wreck contains polluting debris or unexploded ammunitions (or was built from polluting materials), it is subject to other environmental and safety rules;

— if it poses an obstacle to navigation or safety at sea, then the wreck may also be subject to special norms governing these circumstances; and,

— last but not least, if the wreck (or wreck site) still contains human remains, then other specific rules, including the law of armed conflicts, may also apply.

Thus described, a wreck is an object governed by a legal regime that is usually made up of different building blocks. This regime is typically complex and only grows more so the more building blocks are involved due to the presence of different interests, as the interactions between them can lead to contradictions amongst the consequences derived from the different applicable rules. What solution would apply, for example, to a WWI British warship sunk in combat, which remains the resting place of her crew, embedded in the Egyptian coast off the entrance to the Suez Canal, still carrying polluting oil yet entirely covered by protected corals? (13) If a ship flying a third State's flag accidentally hits that wreck causing massive pollution in the area and affecting free navigation through the internationalised channel, what kind of legal responsibilities arise from the case?

(10) This paper will not discuss wrecks located in continental waters.

(11) Depending on each State's domestic legislation, this period may be longer or, generally, shorter (or even non-existent).

(12) In the late 1970s, the *Revue belge* published one of the seminal papers on underwater cultural heritage by two of the most highly regarded authors on the subject. See L. V. Prott and P. J. O'Keffe, "International legal protection of the underwater cultural heritage", *RBDI*, vol. XIV, 1978-1979, 85-103.

(13) Whilst this is a hypothetical case, one could point to the similar (real) example noted by Craig Forrest regarding the *UB38*, a WWI German submarine sunk in the Dover Strait, with torpedoes and ammunition still on board, as well as the remains of the crew, requiring its removal in 2008 to deeper waters (Forrest, *Culturally and environmentally…*, *supra* n. 7, 81).

II. — Legal regime of wrecks

Wrecks are, therefore, objects located at sea, which sometimes merit protection but other times require monitoring or even an intervention to minimise or eliminate the potential hazard they pose.

A. — *Wrecks as objects : ownership*

As Starkle underlined in his contribution to this *Revue*, "[l]a question qui importe est en effet celle de savoir si l'État du pavillon peut encore prétendre exercer sa juridiction sur l'épave [...]". (14) As is well known, Art. 91 LOSC establishes that the nationality of vessels shall be subject to the "genuine link" principle, and Art. 94 LOSC recalls the criteria of effective authority, jurisdiction and, therefore, responsibility over the vessel. The flag State has the exclusive right to give its flag to a ship ; however, from the duty to maintain a "genuine link" with the ship, there follows a link of responsibility, which includes, as recalled by the International Tribunal for the Law of the Sea (ITLOS), the obligation "to secure more effective implementation of the duties of the flag State". (15) The link thus created by the flag given to a vessel, which does not necessarily disappear when that vessel sinks, (16) not only affords the flag State rights, but also duties : as Starkle summarised, the flag State has the obligation not to compromise the peaceful use of maritime spaces, the obligation to prevent the pollution of such spaces and, generally speaking, the obligation to keep the public order of the oceans. (17) Ownership of both private and public vessels thus generates a direct link of responsibility.

The UNESCO Convention does not discuss the ownership of wrecks. Dealing with sunken State vessels, it refers to them only with a non-prejudice clause included in Article 2(8), whereby nothing in the 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

(14) Starkle, 506.

(15) M/V "*Saiga*" *(No. 2)* Case, Merits, Judgement of 1 July 1999, *ITLOS Reports 1999*, paragraph 83. In its Advisory Opinion of 1 February 2011 on the *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, the same Tribunal seriously warned that "[t]he spread of sponsoring States 'of convenience' would jeopardize uniform application of the highest standards of protection of the marine environment, the safe development of activities in the Area and protection of the common heritage of mankind". *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011*, paragraph 159.

(16) Under a functional approach, a wreck is not a vessel and, therefore, the rules may be different. However, sunken State vessels, at least, remain the public property of their flag State unless expressly abandoned.

(17) Starkle, 514.

its State vessels and aircraft". (18) These rules and practice seem to militate in favour of acknowledging both the immunity of sunken State vessels before any jurisdiction other than the flag State's and the flag State's continued ownership thereof (except where expressly abandoned, relinquished or transferred). (19) A less strict rule seems to apply to commercial or privately owned vessels.

B. — *Objects at sea: wrecks and the law of the sea*

Wrecks can be located in different maritime spaces. (20) Thus, the law of the sea applies. (21) However, LOSC does not contain a complete set of rules for dealing with wrecks. Some of them refer to wrecks as objects to be protected, others to wrecks as hazardous objects, and still others are missing entirely:

— LOSC deals only with vessels; it does not address the legal regime governing these vessels when they are wrecked. As noted above, Articles 91 and 94 only address the nationality of vessels; they do not determine the legal regime for wrecks (protection, removal, responsibility, etc.).

— As objects to be protected, Article 303(1), applicable to archaeological and historical objects found in any part of the sea, recalls the general obligation whereby "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose". (22) Specifically with regard to the Area, under Article 149,

(18) Different cooperation regimes (albeit ones that do not allocate title) seem to be established depending on where the wreck is located: if it is in the territorial sea, the coastal State *should* inform the flag State about any activity affecting the wreck (Art. 7(3)); if it is in the EEZ or on the continental shelf, or in the Area, then no activity may be conducted without the flag State's agreement or consent (Arts. 10(7) and 12(7), respectively).

(19) This was the position adopted by the *Institut de droit international* in its recent Resolution on "The Legal regime of Wrecks of Warships and Other State-owned Ships in International Law", adopted on 29 August 2015, Tallinn Session (available at http://www.justitiaetpace.org/idiE/resolutionsE/2015_Tallinn_09_en.pdf), Arts. 3 and 4. See M. J. Aznar, "Treasure hunters, sunken State vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage", *The International Journal of Marine and Coastal Law*, vol. 25, 2010, 209-236. See further L. Caflisch, "La condition des épaves maritimes en droit international public", in L. A. Sicilianos (ed.), *Droit et justice. Mélanges en l'honneur de Nicolas Valticos*, Paris, Pedone, 1999, 68-88; and T. Scovazzi, "Les épaves de navires d'État", *AFDI*, vol. LII, 2006, 400-417.

(20) As is well known, the remains of vessels (sometimes even entire scrapped vessels) may also be located along beaches and deltas, where their owners abandon them without any care for the environment or safety. Such is the case of, for example, Nouadhibou Bay in Mauritania, the Alang beach in India or Gadani Beach in Pakistan. In other cases, climate change has transformed maritime or fresh water areas into new dry zones where former wrecks become abandoned objects, such as the Aral Sea in Uzbekistan or some parts of the Kamchatka inlet in Russia.

(21) As Starkle noted, none of the previous 1958 Geneva Conventions mentions wrecks (Starkle, 500).

(22) Paragraph 2 of this Article establishes a complicated regime for the control of these objects in the contiguous zone; paragraph 3 provides for "the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges"; and

"[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, 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."

— With regard to wrecks and the protection of the environment, Articles 192 and 194 LOSC recall the general obligation of States to protect and preserve the marine environment. This general principle may be applied both to wrecks that become artificial reefs deserving protection as part of the marine environment and to wrecks that are potentially or actually endangering this environment because of their deteriorating structure or the polluting cargo still aboard. (23) Beyond this basic duty, Article 21(1)(a) LOSC provides that a coastal State may adopt laws and regulations, in conformity with other provisions of LOSC and other rules of international law, relating to innocent passage through the territorial sea, in respect of the safety of navigation and the regulation of maritime traffic. Beyond the territorial sea, Article 221(1) LOSC recognises the right of coastal States, "pursuant to international law, both customary and conventional, to take and enforce measures proportionate to the actual or threatened damage to protect their coastline or related interests [...] from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences". (24)

— Finally, LOSC does not explicitly address the issue of the protection of maritime graves in international waters. (25)

paragraph 4 includes a non-prejudice clause with regard to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

(23) Specifically, Art. 194(3)(b) deals with the measures to be taken by States, including those designed to minimise to the fullest possible extent "pollution from vessels, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, preventing intentional and unintentional discharges, and regulating the design, construction, equipment, operation and manning of vessels".

(24) This article codifies basic principles under the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (970 *UNTS* 211) and its Protocol of 1973 (1313 *UNTS* 4), which, it has been said, clarifies and crystallises a customary rule. See R. R. Churchill and V. Lowe, *The Law of the Sea*, 3rd ed., Manchester, Manchester University Press, 1999, 355. See, further, E. Franckx (ed.), *Vessel-Source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction Relating to Marine Pollution*, The Hague, Kluwer, 2001, 94.

(25) Notwithstanding this, the UN General Assembly has recently expressed again its concern "at the desecration of graves at sea and the looting of wrecks of ships constituting such graves, and calls upon States to cooperate, as appropriate, to prevent the looting and desecration of wrecks of ships constituting graves in order to ensure that proper respect is given to all human remains located in maritime waters, consistent with international law, including, as appropriate, the 2001 Convention on the Protection of the Underwater Cultural Heritage, among parties thereto" (A/RES/70/235, 23 December 2015, paragraph 314).

This regime seems to be incomplete. Indeed, the regime provided for under Articles 149 and 303 has been aptly qualified as "contradictory and counterproductive". (26) These articles have failed to preclude activities that, directly or indirectly affecting underwater cultural heritage, have caused irreversible damage to archaeological and historical objects. Such activities include not only treasure-hunting activities, that is, the looting of different wrecks around the world, (27) but also legitimate and legal human activities along the coast (fishing, mining, coastal engineering, off-shore installations, etc.), which have also destroyed or threatened these fragile time capsules.

Meanwhile, the scope of Article 211(2) LOSC, as under the Intervention Convention of 1969 and its 1973 Protocol, is restricted to casualties of a catastrophic nature likely to cause major harmful consequences to a State's coastline and related interests. Moreover, they are restricted to damage to coastal or related interests from pollution. Accordingly, these treaties do not clearly empower coastal States generally to intervene to remove wrecks in waters beyond their territorial sea in situations in which the safety of navigation, rather than damage from pollution, is an issue, or to intervene in cases of pollution that do not result in major harmful consequences.

The international community has reacted and tried to fill these legal lacunae negotiating new agreements and adapting general rules to particular cases. This has made it possible to envision wrecks as both objects to be protected and objects to protect against, in terms of the damage that they can cause.

C. — *Protecting wrecks*

Wrecks deserve to be protected on, at least, three different grounds: as cultural objects, as gravesites, and as natural landscapes.

a) As *cultural objects*, wrecks are listed as an example of underwater cultural heritage in Article 1(a)(ii) of the 2001 UNESCO Convention. (28) Under

(26) T. Scovazzi, "A Contradictory and Counterproductive Regime", in R. Garabello and T. Scovazzi (eds), *The Protection of the Underwater Cultural Heritage, Before and After the 2001 UNESCO Convention*, Leiden, Martinus Nijhoff, 2003, 3-18; *Mediterraneo*, Milan, Giuffrè Editore, 1987, 351-354; or A. Strati, "Protection of the Underwater Cultural Heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the UNESCO Convention", in A. Strati *et al.* (eds), *Unresolved Issues and the New Challenges to the Law of the Sea*, The Hague, Martinus Nijhoff, 2006, 21-62. See also my contribution "La protection juridique du patrimoine culturel subaquatique: préoccupations et propositions", in *Annuaire du droit de la mer*, vol. 19, 2014, 133-153.

(27) Such as the *Geldermalsen* in Indonesia, the *Atocha* in the Florida Keys, the *São José* in Mozambique, the *Mercedes* in Portugal, or —in the very near future— the *Lord Clive* in Uruguay.

(28) The definition of underwater cultural heritage thus given is "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as [...] (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context [...]". The 100-year span is a minimum period established by the Convention that States parties may reduce.

this provision, once a wreck has spent at least 100 years underwater, whether totally or partially submerged, periodically or continuously, it may be considered as pertaining to the underwater cultural heritage providing it has a cultural, historical or archaeological character. (29) States parties thus undertake to protect such wrecks in their territorial seas and contiguous zones under their (adapted, when necessary) domestic legislations. (30) Beyond the outer limit of this zone, the Convention establishes a cooperative system amongst the States parties, which have different responsibilities depending on whether the wreck is located in the exclusive economic zone, on the continental shelf or in the Area. Collaboration and cross-communication are landmark pieces of the cooperative system established in the 2001 UNESCO Convention. (31)

b) As *gravesites*, too many wrecks remain the resting place of sailors (civilian and military) and passengers. Vessels and places falling under this category range from the *Mercedes* to the *Kõnigsberg* or the *Arizona*, from the *Titanic* and the *Lusitania* to the *Estonia*, from the wrecks of the Battle of Jutland in 1916 or the Battle of Midway in 1942 to those of the Malvinas/Falkland combats in 1982, to name but a few. In short, the world's seas have witnessed the deaths at sea of thousands of men and women. As Craig Forrest has noted, unlike the land theatres of war, "the last resting places of those lost are not found in vast cemeteries or formal battle site memorials, but mainly on the seabed with the vessels upon which they served. In many cases, the vessels sunk took most, if not all, of their crew with them." (32) Human interference and natural forces may threaten these tombs at sea. Whilst the latter may be unavoidable, and perhaps poetically enables the return of our figurative ashes to earth, human activities

(29) Therefore, not *any* wreck may be labelled underwater cultural heritage as has been argued, amongst others, by the British Government in its concern about the "blanket protection" allegedly given by the 2001 UNESCO Convention. See S. DROMGOOLE, "Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001", *Marine Policy*, vol. 38, 2013, 116-123.

(30) For the latter, see M. J. AZNAR, "The contiguous zone as an archaeological maritime zone", *The International Journal of Marine and Coastal Law*, vol. 29, 2014, 1-51.

(31) States parties may also seek scientific cooperation from UNESCO and the Scientific and Technical Advisory Body created by the Convention. This is what occurred recently with Haiti in 2014 and with Madagascar and Panama in 2015, in relation to treasure-hunting operations in their waters.

(32) C. FORREST, "Towards the Recognition of Maritime War Graves in International Law", in *Underwater Cultural Heritage from World War I*, Proceedings of the Scientific Conference on the Occasion of the Centenary of WWI (Bruges, 26 and 27 June 2014), Paris, UNESCO, 2015, 26-134, at 126-127 (available at http://www.unesco.org/culture/underwater/world-warI.pdf). See further E. PÉREZ-ÁLVARO, "The management of human remains on shipwrecks: ethical attitudes and legal approaches", in H. V. TILBURG *et al.* (eds), *Second Asia-Pacific Regional Conference on Underwater Cultural Heritage*, Honolulu, Electric Pencil, 2014, 39-48; and P. HERSHEY, "Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites", *Journal of Environmental Law and Litigation*, vol. 27, 2012, 363-400.

intentionally affecting these gravesites must be prevented. Uncontrolled salvage operations are destroying underwater sites containing human remains, and some States now fiercely oppose such activities, such as Spain in the case of the *Mercedes* (a Royal Spanish Navy frigate sunk in combat in 1804) or the UK when it prevented the salvage of the RMS *Laconia*, the SS *Cairnhill* and the SS *Mantola*. However, others remain beyond control, as they lie in international waters or in the waters of third States that are not particularly concerned with these memorial cases.

General international law of armed conflicts protects those who die in combat (including naval combat). If the prohibition of the despoliation of dead bodies is an application of the general prohibition of pillage, (33) it may also cover underwater looting in areas with human remains. Rule 115 (Disposal of the Dead) of Customary International Humanitarian Law (34) establishes that "[t]he dead must be disposed of in a respectful manner and their graves respected and properly maintained". This Rule is induced from widely accepted conventional norms (35) and practice. (36)

The 2001 UNESCO Convention recalls that "States Parties shall ensure that proper respect is given to all human remains located in maritime waters". (37) Two other multilateral treaties specifically deal with maritime gravesites: the 1995 Agreement between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding the *M/S Estonia* (38) and the 2000 Agreement Concerning the Shipwrecked Vessel RMS *Titanic*. (39) It has been argued that in these cases, notwithstanding the relative character of the conventions *ratione personæ* (although both

(33) See the 1907 Hague Convention (X), Art. 16; the 1949 Geneva Conventions: (I) Art. 15(1), (II) Art. 18(1), (IV) Art. 16(2); and the 1977 Additional Protocol (I), Art. 34(1).

(34) Prepared, maintained and updated by the International Committee of the Red Cross and available electronically at https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law.

(35) 1929 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Art. 4(5); 1929 Geneva Convention Relative to the Treatment of Prisoners of War, Art. 76(3); 1949 Geneva Conventions: (I) Art. 17, (II) Art. 20, (III) Art. 120; (IV) Art. 130; 1977 Additional Protocols: (I), Art. 34(2), and (II), Art. 8.

(36) The requirement to respect and maintain gravesites is laid down in numerous, if not all, military manuals and domestic legislations.

(37) Art. 2(9). Further, according to Rule 5 of its Annex, "Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites."

(38) 23 February 1995 (and Protocol of 23 April 1996), reprinted in *Marine Policy*, vol. 20, 1996, 355-356. Art. 2 establishes that "[t]he wreck of the M/S Estonia and surrounding area, as defined in Article 2, shall be regarded as a final place of rest of victims of the disaster, and such shall be afforded appropriate respect."

(39) Concluded on 5 January 2000 and negotiated by the United Kingdom, France, Canada and the United States, it has not yet entered into force (text available at www.gc.noaa.gov/documents/titanic-agreement.pdf). Art. 2 of the Agreement establishes that the "RMS Titanic shall be recognized as (a) a memorial to those men, women and children who perished and whose remains should be given appropriate respect, in accordance with this Agreement; and (b) an underwater historical wreck of exceptional international importance having a unique symbolic value".

agreements are open to all States), an objective regime may be supposed to exist protecting these maritime gravesites *erga omnes*. (40)

c) As natural landscapes, wrecks usually eventually become artificial reefs, which, as marine habitats, are of scientific interest for biological reasons, amongst others (corrosion studies, interaction with fauna and flora, leisure activities and scuba tourism, etc.). Although practice is growing elsewhere, (41) there are no clear international rules governing these cases except for general environmental ones, as interpreted by domestic legislations and courts, (42) and soft-law rules such as the 2009 London Convention and Protocol/UNEP Guidelines for the Placement of Artificial Reefs. (43) As sites where marine species live, general rules may apply, such as Art. 194(5) and 237 LOSC, the 1971 Convention on the Protection of Wetlands, (44) or the 1992 UN Convention on Biological Diversity, (45) amongst others.

D. — *Protecting from wrecks*

As already noted, wrecks can also be hazardous objects. Some parts of the oceans are particularly threatened by polluting wrecks, the case of the Pacific Ocean being paramount. (46) But, as Starkle pointed out in his 1985

(40) For the *Estonia*, see J. Klabbers, "Les cimetières marins sont-ils établis comme des régimes objectifs ? À propos de l'accord sur l'épave du *M/S Estonia*", *Espaces et Ressources Maritimes*, vol. 11, 1997, 121-133 (an English translation may be found at www.helsinki.fi/eci/Publications/Klabbers/Estonia.pdf); and for the *Titanic*, see M. J. Aznar and O. Varmer, "The Titanic as underwater cultural heritage: challenges to its legal international protection", *Ocean Development and International Law*, vol. 44, 2013, 96-112; or R. Goy, "L'épave du Titanic et le droit des épaves en haute mer", *AFDI*, vol. XXXV, 1989, 752-773.

(41) See M. Baine, "Artificial reefs: a review of their design, application, management and performance", *Ocean and Coastal Management*, vol. 44, 2001, 241-259. An initial view may be found in J. L. Seymour, "Preliminary legal considerations in developing artificial reefs", *Coastal Zone Management Journal*, vol. 2, 1975, 149-169.

(42) Australia is perhaps one of the most advanced countries in the enactment of these kinds of rules (see some of its guidelines at http://www.gbrmpa.gov.au/about-us/legislation-regulations-and-policies/policies-and-position-statements/guidelines-for-the-management-of-artificial-reefs-in-the-marine-park). In the US, for example, the 1953 Submerged Lands Act (67 Stat. 29, 43 U.S.C. Sec. 1301-1315) helped an Admiralty Court protect an historical vessel sunk in Florida waters, arguing, "[t]he remains of abandoned, two hundred year old shipwrecks, which have lain undisturbed for centuries under an undetermined amount of sand, reasonably can be characterized as natural resources for the purposes of the federal Act." *Subaqueous Exploration and Archaeology, Ltd., and Atlantic Ship Historical Society, Inc., Plaintiffs v. The Unidentified, Wrecked and Abandoned Vessel, etc., et al., Defendants*, 577 F.Sup. 597, 613 (D. Md. 1983), aff'd, 765 F.2d 139 (4th Cir. 1985).

(43) UNEP Regional Seas Reports and Studies No. 187/IMO reference N114E (text, with accompanying study, available at http://www.unep.org/regionaLseas/Publications/reports/RSRS/pdfs/rsrs_187.pdf).

(44) 996 *UNTS* 245.

(45) 1760 *UNTS* 79.

(46) See, for example, R. Monfils, T. Gilbert and S. Nawadra, "Sunken WWII shipwrecks of the Pacific and East Asia: The need for regional collaboration to address the potential marine pollution threat", *Ocean and Coastal Management*, vol. 49, 2006, 779-788; or W. Irving, "The Nairobi

article, "[l]e droit international n'interdit aucunement d'abandonner des épaves en haute mer. Outre que personne ne songe à le contester, cette pratique est validée par l'existence d'une liberté d'immersion en haute mer." (47) Although from the outset in the codification of the law of the sea, both a general environmental limit —to prevent pollution of the seas— and a safety-related limit —not to endanger or hamper international navigation— have been imposed on States, polluting and otherwise hazardous wrecks have not been a well-governed issue, which has forced the international community to seek out new *ad hoc* instruments.

Amongst these, the 2007 Nairobi Convention fills a gap in the existing international legal framework by providing a set of uniform international rules for the prompt and effective removal (48) of wrecks located in each State party's exclusive economic zone or equivalent 200 nautical-mile zone (the so-called "Convention Area") (49) when they pose "a danger or impediment to navigation" (Art. 1(5)(a)) or "may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more states" (Art. 1(5)(b)). (50) The Nairobi Convention places strict liability on owners for locating, marking and removing wrecks deemed to be a hazard and makes State certification of insurance, or another form of financial security for such liability, compul-

Convention: Reforming wreck removal in New Zealand", *Australia and New Zealand Maritime Law Journal*, vol. 24, 2011, 76-92. The Council of Europe has also warned about this issue for European surrounding waters: see its Resolution 1869 (2012), 9 March 2012, on the environmental impact of sunken warships, recommending the ratification of the Nairobi Convention (available electronically at http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid = 18077&lang = en) and the previous Report of 20 January 2012, Doc. 12872 (available at http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID = 13079&lang = en).

(47) STARKLE, 515.

(48) The Convention adopts a broad understanding of the term "removal", construed as "any form of prevention, mitigation or elimination of the hazard created by a wreck" (Art. 1(7)).

(49) It also contains a clause that enables States parties to "opt in" to the application of certain provisions to their territory, including the territorial sea (Art. 3). As at 15 March 2016, the following States had made this declaration: Albania, Antigua and Barbuda, Bahamas, Bulgaria, Cyprus, France, Denmark, Kenya, Liberia, Malta, the Marshall Islands, Niue, Panama and the United Kingdom.

This would add to States parties' catalogue of rights over their territorial sea the availability of the liability and financial security regime for maritime casualties provided for under the Nairobi Convention, but not the right to remove the wreck, which is an inherent right of the coastal State in order to prevent damage to the marine environment or navigational obstacles. This principle is to be balanced with other third States' (particularly flag States') rights, whether customary or conventional.

(50) These "related interests" interestingly refer to the interests of a coastal State directly affected or threatened by a wreck —and, thus, not only the State where the wreck is located— and include: "(a) maritime coastal, port and estuarine activities, including fisheries activities, constituting an essential means of livelihood of the persons concerned; (b) tourist attractions and other economic interests of the area concerned; (c) the health of the coastal population and the well-being of the area concerned, including conservation of marine living resources and of wildlife; and (d) offshore and underwater infrastructure" Art. 1(6).

sory for ships of 300 gt or more. It also provides States parties with a right of direct action against insurers.

Nevertheless, the Nairobi Convention would not apply in accordance with two criteria: (i) the general *ratione temporis* criterion (non-retroactivity of treaties), whereby the Convention would not apply to vessels wrecked before the entry into force of the Convention; and (ii) the non-application of the Convention "to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise" (Art. 4(2)). As a result of these two exceptions, the Convention would not apply to historical shipwrecks and, particularly, to historical sunken State vessels. However, at least the first point of this preliminary and rather superficial conclusion could be challenged.

With regard to non-retroactivity, as has already been observed, "[t]he focus of the WRC [Nairobi Convention] is therefore clearly upon hazards rather than wrecks, and it could be argued that the application of the WRC therefore should be dependent upon the existence of a hazard after the WRC comes into force, rather than the time when the maritime casualty occurred". (51) This may be a fair interpretation to adapt some of the Convention's logic. However, placing the burden on the wrecks' owners and insurers rather than on the flag States (leaving aside the case of sunken State vessels) (52) does not work so well when dealing with historical shipwrecks.

With regard to sunken State vessels, it must be underscored that none of the States parties to the Nairobi Convention have decided to permit its application to such wrecks. (53) Additionally, the Nairobi Convention applies to "maritime casualties", i.e. "a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo". It is important to note that the wreckage of sunken State vessels, and particularly warships, does not generally derive from a maritime casualty so defined, but rather from an act of war.

(51) Dromgoole and Forrest, *supra* n. 7, 106. Although preparatory works shade this interpretation. Only one document seems to refer to historical wrecks, leaving them aside from the proposed Convention: when discussing Art. 1(6), it states, "As regards the comment to add 'underwater cultural heritage' to the definition of 'Related interests', it is considered that the provisions of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (November 2001) provide the necessary safeguards for traces of human existence having cultural, historical or archaeological character; more in particular the articles 3, 5, 9 and 10" Doc. IMO LEG85/3, 17 August 2002.

(52) Moreover, most of the time the identification of the flag State of an historical shipwreck is a rather complicated scientific issue. Whilst it may be clear with modern-era and contemporary vessels, what about a Phoenician vessel found along the Tunisian coast, a Viking *drakkar* found in a Scottish firth, or a junk found in the Mekong Delta?

(53) See the status of the Convention as at 15 March 2016 with the declarations and reservations at http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202016.pdf.

Some concluding remarks

As already said, the current legal regime of wrecks is made up of different, complexly interrelated building blocks. The regime is governed by LOSC and customary international law, since both the UNESCO Convention and the Nairobi Convention include non-prejudice clauses recognising their superior rank within the hierarchy. (54) The latter also cedes before the 1969 Intervention Convention and its 1973 Protocol, as amended. (55) In case of dispute, all of them provide for a very similar dispute settlement mechanism based on Part XV LOSC. (56)

One of the unresolved questions is the place of "danger" with regard to wrecks located in the EEZ: whilst under the UNESCO Convention, the threat is *to* the wreck, under the Nairobi Convention the threat stems *from* the wreck. This can give rise to the paradox that a legitimate action to address the latter —i.e. to remove a threat— may constitute an "immediate danger" to the wreck under the former. Article 10(4) of the UNESCO Convention states that "[w]ithout prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties." During the drafting of the Operational Guidelines of the UNESCO Convention, "immediate danger" was provisionally defined as the existence of conditions that can reasonably be expected to cause damage, destruction or looting in relation to a specific piece of the underwater cultural heritage within a short span of time and which can be eliminated by taking safeguard measures. However, this definition was not ultimately included in the Guidelines. (57) The issue of how to reconcile the two interests, which remains unresolved in the two conflicting conventions, may perhaps be settled under Article 59 LOSC (non attribution of rights in the EEZ).

(54) UNESCO Convention, Art. 3; Nairobi Convention, Art. 16. For the relationship between both conventions under Belgian recent legislation, see Art. 4(1) of the *Loi relative a la protection du patrimoine culturel subaquatique*, 4 April 2014.

(55) Nairobi Convention, Art. 4(1).

(56) UNESCO Convention, Art. 25; Nairobi Convention, Art. 15.

(57) Archive on file with the author, who was a member of the Spanish Delegation in the Working Group that drafted these Guidelines, adopted by Resolution 6/MSP 4 of the Conference of States Parties to the Convention (UNESCO Doc. CLT/CEH/CHP/2013/OG/H/1, August 2013, available electronically at http://unesdoc.unesco.org/images/0022/002226/222670E.pdf).

Another outstanding question is the status to be given to human remains. Unlike the UNESCO Convention, which requires them to be given special treatment, LOSC and the Nairobi Convention do not address this question, which could be included amongst the "related interests" to which the later Convention refers. General international law and, where applicable, the UNESCO Convention would impose and regulate the care due to these remains in any wreck removal operation.

Starkle finished his paper arguing that "[i]l est de toute manière évident que c'est dans la rédaction d'une convention internationale sur l'enlèvement des épaves en mer que réside la solution. Elle seule permettra de réaliser le compromis entre les intérêts de l'État du pavillon dont un navire a fait naufrage et les intérêts de la sécurité de la navigation, c'est-à-dire en définitive entre les intérêts de tous et de chacun". (58) As practice has shown, ultimately is not to a single text but rather to complementary, albeit contradictory, building blocks (of different legal natures) that the responsibility to regulate the complex issue of wrecks in current international law falls.

(58) Starkle, 528.