

IMO's Guidelines on Particular Sensitive Sea Areas toward the Protection of Underwater Cultural Heritage

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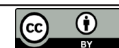
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Abstract

As an international organization established with the aim of improving maritime safety and security of international shipping, IMO sets up various guideline in assuring the establishment of international shipping. One of the those guidelines is the Guidelines for the Identification and designation of Particular Sensitive Areas (PSSAs). This article aims to analyse whether it is possible that the in situ of underwater cultural heritage can be included as PSSAs. This way would implied restrictions to international shipping in order to protect and preserve underwater cultural heritage. This research conducted through legal analyses of relevant legal documents. The method used in this paper is normative legal research with in-depth literature studies. This paper argued that while it is possible to include in situ location of underwater cultural heritage as PSSAs, however, conflicting interpretation between national and international law as well as disputes between States are imminent. Thus, IMO should play decisive role in properly co-ordinated and decide which marine areas requires restrictions in relation to the protection and preservation of underwater cultural heritage. The restrictions to international shipping with regard to the protection and preservation of underwater cultural heritage should not in any way prevent other legitimate uses of the sea as envisages under the 1982 Law of the Sea Convention (LOSC), especially on the freedom of navigation regimes. Thus co-operation and communication between IMO, other international organization and coastal State is crucial.

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Introduction

In the recent online and paperless transaction, international trade still requires goods to be transported from seller to buyer. While various mode of transportation ease the transfer of goods, shipping by sea is still favourable.¹ This is because transferring goods by sea offers efficiency relating to higher capacity and lower costs.² Thus, it is crucial to assure navigational and shipping processes are safe and secure. International Maritime Organization (IMO) is one of United Nations (UN) specialized agency having the purpose to “provide machinery for

¹Dhiana Puspitawati, *Hukum Maritim* (UB Press 2019).

² A.Gavril Fratila (Adam), SC. (Moldovan), I.A., Nita and Hrebenciuc, ‘The Importance of Maritime Transport for Economic Growth in the European Union: A Panel Data Analysis’ (2021) 13 Sustainability.

cooperation among Governments in the field of governmental regulation and practices relating to technical matters of all kinds affecting shipping engaged in international trade; to encourage and facilitate the general adoption of the highest practicable standards in matters concerning maritime safety, efficiency of navigation and prevention and control of marine pollution from ships".³ In short the IMO is an international organization responsible for the safety, security of shipping activities and the prevention of marine and atmospheric pollution by ships.⁴ It is acknowledged that ship operation alone may cause harm to marine environment relating to operational discharges, accidental or intentional pollution and other possible pollutant dispose to open seas.⁵ In addition to this, unregulated ship anchoring poses threats to physical damage of ocean inhabitants. The IMO has issued various regulations relating to this matter.⁶ This include identification and designation of ocean areas over which shipping restriction should applied. One of the IMO's breakthrough in minimalizing environmental damage at sea from shipping activities, is the Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Area (Revised PSSAs Guidelines) as envisages in the IMO Resolution A.982 (24), 2005.⁷ This Resolution is the result of series of revision of Resolution A.720 (17) concerning Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Areas, adopted in 1991.⁸

The spirit of all PSSAs Guidelines (from the first version until the revised version) was to protect marine environment from shipping activities through measures which imply restrictions to international shipping.⁹ However, such

³ Article 1 (a) Convention on the International Maritime Organization.

⁴ editor, 'Brief History of IMO' (*International Maritime Organization*) <<https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx>> accessed 1 July 2022.

⁵ Angela Jessica Desmonda and Idris, 'The Prospect of Particularly Sensitive Sea Area (PSSA) Designation in Lombok Strait' (2020) 4 *Padjajaran Journal of International Law*.

⁶ editor, 'The Lists of Conventions Produced by the IMO' (*International Maritime Organization*) <<https://www.imo.org/en/About/Conventions/Pages/ListOfConventions.aspx>> accessed 10 July 2022.

⁷ IMO Resolution A.24/ Res 982.

⁸ The first revision began in 1999 which produced IMO Resolution A. 885 (21), 19 November 1999, See A.17/ Res 885. Subsequent revisions were made in 2001 by IMO Resolution A.927 (22)

⁹ Agustin Blanco-Bazfin, 'The IMO Guidelines on Particular Sensitive Sea Areas (PSSAs)' (1996) 20 *Marine Policy*. [343-349].

restrictions should operate in a way that would not affect in any ways other interests involved in the legitimate uses of the seas, especially with regard to freedom of navigation. One of the criteria in identifying PSSAs sets up by Revised PSSAs Guidelines, include social, cultural and economic criteria, within which cultural heritage criteria can be found. According to this criteria, cultural heritage can be defines as “[a]n area that is of particular importance because of the presence of significant historical and archaeological sites”.¹⁰ Relevant to cultural heritage, 1982 Law of the Sea Convention (LOSC) provides that it is the duty of States to protect objects of an archaeological and historical nature found at sea and States shall cooperate for that purpose.¹¹ In addition to this, 2001 UNESCO Convention of the Protection of the Underwater Cultural Heritage (2001 UCH Convention) required an *in-situ* preservation as preferred choice before engaging any activities directed at such heritage.¹² Furthermore, 2001 UCH Convention defines underwater cultural heritage as:

“[A]ll traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years, such as (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character”.¹³

This paper aims to analyse whether it is possible that *in-situ* requirement of underwater cultural heritage can be included as PSSAs? So this way would implied restrictions to international shipping and possible routing provisions. While some would argue that underwater cultural heritage mainly consisting of shipwreck, it is possible that such underwater cultural heritage is part of habitat in need of special protection by measures implying restrictions to navigation. However, it is submitted that shipping restrictions with regard to the protection and preservation

¹⁰ Paragraph 4.4.14 of IMO Resolution A.24/ Res 982.

¹¹ Article 303 of LOSC.

¹² Rule 1 Annex 2001 UCH Convention, Rules Concerning Activities directed at underwater cultural heritage.

¹³ Article 1 paragraph 1 (a) of the 2001 UCH Convention.

of underwater cultural heritage should not in any way prevent other legitimate uses of the seas as provided under the LOSC.

Method of Research

This research begins with the identification of relevant legal framework relating to the protection and the preservation of underwater cultural heritage. Then, IMO Resolution regarding the identification and designation of PSSAs is analysed and discussed whether it is possible to consider under water cultural heritage as PSSAs.

Travaux-preparatoire of legal framework relevant to both protection and preservation of underwater cultural heritage as well as PSSAs regulation is used as the basis of discussion. Series revisions of IMO Resolutions on PSSAs will also be considered. Based on such juridical analyses this paper recommends indicators which can be used to determine which type of underwater cultural heritage eligible to be identified as PSSAs and thus may require shipping restrictions

Legal Basis of the PSSAs concept

International navigation hold an important role in economic sector across the world as it connects one part of the world to another. Although there are various mode of transportation which can bring goods to their destination faster, yet transporting goods via the ocean is still preferable due to its various advantages, such as bigger capacity and lower costs. However, ship operation poses a threat to ocean environment both incidental or intentional. The increasing awareness to marine environment from shipping activities has made the IMO figure out the way to preserve marine environment while still allowing shipping activities. Within such context, IMO made a breakthrough toward the protection of marine environment by mandating the identification and designation of PSSAs. As mentioned previously, first international discussion on PSSAs took place since 1986 until 1991. During that time, Malmo Declaration as declared in 1990. This declaration has influenced IMO's decision in determining PSSAs for protection

measures.¹⁴ As this turn out, the discussion of PSSA was culminated in the Adoption of Guidelines for the Designation of Special Areas and the Identification of Particularly Sensitive Sea Areas, which was provided within Resolution A.720 (17) in 1991. This Resolution further clarified by Resolution A. 885 (21) concerning the Procedures for the Identification of Particularly Sensitive Areas and the Adoption of Associated Protective Measures and Amendments to the Guidelines contained in Resolution A. 720 (17) , which was adopted on 25 November 1999.¹⁵ This resolution further followed by Resolution A. 927 (22) relating to Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, which was adopted on 29 November 2001.¹⁶ Both Resolution A. 885 (21) and Resolution A.927 (22) were intended to clarify and strengthen certain aspects and procedures for the identification and designation of PSSAs and the adoption of associated protective measures.¹⁷ The latest IMO resolution relating to the designation of PSSAs was again revised in Resolution A.982 (24) concerning Revised guidelines for the Identification and Designation of Particularly Sensitive Sea Areas, which was adopted on 1 December 2005.¹⁸ This guidelines consist of “regulations regarding international shipping activities and the marine environment, process, criteria, vulnerability to the impact of international shipping, protection measures, procedures in designating PSSA, also Associate Protective Measures (APM), as well as the implementation of PSSA and APM”.¹⁹

PSSAs can be seen as a sea area that should be protected for environmental reasons by measures related to international shipping restrictions.²⁰ Most important

¹⁴ Angela Jessica Desmonda and Idris (n 5).

¹⁵ IMO Resolution A.982 (24).

¹⁶ This Resolution adopted new guidelines for the Designation of Special Areas under MARPOL 73/78, which supersede chapter 2 of the Annex to Assembly Resolution A. 720 (17) and provides new guidelines for the Identification and Designation of Particularly Sensitive Areas as set forth in annex 2, which supersede chapter 3 of the Annex to Assembly Resolution A.729 (17) and A.885 (21).

¹⁷ *ibid.*

¹⁸ *ibid.*

¹⁹ *ibid.*

²⁰ Blanco-Bazfin (n 9).

question to be considered are the reasons for such limitation and how they work, noting that environmental considerations need to be balanced with other relevant interests to the lawful use of the ocean. IMO Resolution A.982 (24), 2005 on Revised PSSAs Guidelines envisages that a PSSA "is an area that needs special protection through action by IMO because of its significance for recognized ecological, socio-economic, or scientific attributes where such attributes may be vulnerable to damage by international shipping activities".²¹ PSSAs is one of several types of Marine Protected Areas (MPAs) that pertain specifically to shipping.²² IMO Resolution A.982 (24) sets up certain criteria to be fulfilled in the identification of PSSAs, only with respect to the adoption of measures to protect such areas against damage, or the identified threat of damage, from international shipping activities. The Resolution also applied both to PSSAs within and beyond the limit of territorial sea of a State. The proposed designation of PSSAs beyond territorial sea can only be done with a view that international protective measures are needed against pollution and other damage caused by shipping activities. Whereas for PSSAs within territorial sea are considered by standards which has certain attributes that are vulnerable to the damage due to shipping activities. In order to be considered as PSSAs, three elements must be present, namely: (i) the area must fall within certain criteria sets up by the Resolution; (ii) it must be vulnerable to damage by shipping activities and (iii) there must be measures which can be adopted by the IMO to protect the area from the vulnerability to damage by shipping activities.²³

Resolution A.982 (24) further listed several criteria as a guidance in designating PSSAs. These criteria is divided into three categories, which include ecological criteria; social, cultural and economic criteria; and scientific and educational criteria. Each of these categories further details indicators which should be fulfilled. Relevant to this research, one of the indicator listed under the

²¹ IMO Resolution A.24/ Res 982 paragraph 1.2

²² NOAA, 'Marine Protected Areas (MPAs)' (NOAA, 2020) <https://www.gc.noaa.gov/gcil_mpa.html> accessed 8 July 2022.

²³ National Oceanic and Atmospheric Administration, 'Marine Protected Areas (MPAs): Particularly Sensitive Sea Areas (PSSAs)' (NOAA) <https://www.gc.noaa.gov/gcil_mpa-pssa.html> accessed 15 June 2022.

criteria of social, cultural and economic criteria, is cultural heritage. Under the Resolution A.982 (24), cultural heritage is defined as “an area that is of particular importance because of the presence of significant historical and archaeological sites”.²⁴ The resolution further suggests that in order to designate PSSAs, not all indicators/ standard of each criteria should be established. However, with regard to social, cultural dan economic criteria, especially relevant to cultural heritage, all indicators can be fulfilled and therefore underwater cultural heritage sites are eligible to be designated as PSSAs. Furthermore, while one would assume that underwater cultural heritage concerns merely with ships wrecks of both state and non-state vessels, however, it is argued that such wrecks can be a place of ocean inhabitant in need of special protection. In addition to this, cargoes of sunken vessels might represent the identity of certain nation culturally. Not to mention several sunken cities that should be protected from the damage due to shipping activities.

It is further submitted that the approval of proposed designation of PSSAs resulted in the measures to shipping restriction as well as ship routeing. This is why the proposal of PSSAs designation should be accompanied by Associated Protected Measures (APM) of other related actions aimed at preventing, reducing, or eliminating threats or identified vulnerabilities.²⁵ Such measures should be any measures that have been approved and adopted by the IMO, which include routing systems such as Areas To be Avoided (ATBA) dan Traffic Separation Scheme (TSS).²⁶ In relation to this paper, the possible application of PSSAs upon underwater cultural heritage will be discussed. In order to gain clear understanding of the underwater cultural heritage regime, the following section highlights international legal framework relating to the protection of underwater cultural heritage.

²⁴ IMO Resolution A.24/ Res 982 paragraph 4.4.14.

²⁵ International Maritime Organization, ‘Particularly Sensitive Sea Areas’ (IMO) <<http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx>> accessed 9 December 2019.

²⁶ IMO Resolutiaon A.24/ Res 982 paragraph 7.5.3.

Legal Framework on the Protection of Underwater Cultural Heritage: Legal Basis of the Concept

Prior to 2001 UNESCO Convention of the Protection of the Underwater Cultural Heritage

International community has begun to discuss about underwater cultural heritage long before the adoption of 2001 UCH Convention. The end of world war II has made the ocean a place of many sunken warships. Not to mention various expedition across the world, even prior world war I to find colonized state, which caused some accidents and resulted to sunken commercial ships with all of its load and treasure. In addition to this, there were sunken cities and places due to climate change. In such, it is recognized that historical and archaeological value are attached to underwater cultural objects or they may represent a symbol of a State. There were approximately three million shipwrecks, sunken cities and thousands of other pre-historic sites lying on the seabed around the world.²⁷

The issue of cultural heritage was firstly discuss together with cultural property by United Nations Educational, Scientific and Cultural Organization (UNESCO). Eventually, UNESCO came up with three Convention²⁸ relating to the protection of cultural heritage, however, none of those conventions mention about underwater cultural heritage. Further discussion on cultural heritage came up during the discussion in International Law Commission (ILC) during the United Nations Conferences on the Law of the Sea I (UNCLOS I). While UNCLOS I produced four conventions on the uses of the Sea, which mainly concerns on natural resources,²⁹ ILC clearly denied the view that underwater cultural heritage

²⁷ Nie Bomin, 'On the International Legal Protection of Underwater Cultural Heritage' [2015] China Oceans Law Review.

²⁸ These Conventions include the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) and the Convention concerning the Protection of the World Cultural and Natural Heritage (1972).

²⁹ The Convention on Territorial Sea and Contiguous Zone 1958, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf.

such as wrecked ships and their cargos, can be interpreted as natural resources.³⁰ Thus, it was excluded from the rights of coastal States.

The issue of the protection of underwater cultural heritage was finally discussed in UNCLOS III and finally recognized in LOSC. There are at least three basic principles provided by the LOSC relating to the protection and preservation of underwater cultural heritage. These principles include (i) States should be responsible for the protection of underwater cultural heritage found at sea, and should cooperate for this purpose;³¹ (ii) Coastal States are given authority to decide whether certain underwater cultural heritage lying on their contiguous zone is allowed to be recovered³²; and (iii) Underwater cultural heritage found in the Area should also be protected and preserved for the benefit of mankind as a whole.³³ However, third principle should be applied by giving preferences to the State of origin, State of cultural origin or the State of historical and archaeological origin. However, it should be noted that while LOSC seems to provide rules for underwater cultural heritage, nowhere in the LOSC expressly use the term “under water cultural heritage”, instead it uses the term “objects of an archaeological and historic nature” without further explanation to what constitutes such term. Furthermore, the first principle lead to general interpretation. Since the capacity of States is differ, it is unclear how states would exercise their duties in protecting underwater cultural heritage. In addition to this, there is no further explanation on the cooperation mechanism in preserving underwater cultural heritage. There is also no elaboration on what constitute benefit of mankind as a whole; what kind of act of protection and preservation which meet the benefit of mankind as a

³⁰ The United Nations, *Yearbook of the International Law Commission* (1956).[298].

³¹ Article 303 paragraph (1) of the LOSC reads “States have duty to protect objects of an archaeological and historic nature found at sea and shall co-operate for this purpose”.

³² Article 303 paragraph (2) of the LOSC reads “In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in zone referred to in theta article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article”.

³³ Article 149 of the LOSC reads “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”.

whole? There is also ambiguity in distinguishing between the State of origin, State of cultural origin or the State of historical and archaeological origin, envisages in Article 149 of the LOSC. How to identify and distinguish between those group of states? This principle may trigger conflicts between states upon certain under water cultural heritage.³⁴

Another ambiguity poses by the provisions of LOSC relating to underwater cultural heritage can be found in Article 303 paragraph (3) which read “[n]othing in this article affects the rights of identifiable owners, the law of salvage of other rules of admiralty, or laws and practices with respect to cultural exchanges”. As such provision reads, if the law of salvage can be applied to underwater cultural heritage with no restriction, underwater cultural heritage will not be sufficiently protected. Forrest further argued that without sufficient guidance from professional archaeologist, underwater cultural heritage found could be destroyed by salvors.³⁵ In fact the law of salvage cannot be applied to underwater cultural heritage. This is because salvage takes place to assist a vessel or any other property in danger of in distress in water, and this water means navigational tidal waters.³⁶ Whereas underwater cultural heritage clearly have sunk at the bottom of the ocean, and not under distress. In addition to this, marine danger is also a precondition for applying salvage law upon objects/ property concerned.³⁷ Thus it is questionable why LOSC mention the application of the law of salvage? In fact Salvage Convention 1989 clearly allows parties to the convention to exclude underwater cultural heritage from salvage law.³⁸ this way, although Salvage Convention 1989 does not regulates directly underwater cultural heritage, this convention contributes to the protection and preservation of underwater cultural heritage since it allows exclusion of

³⁴ Francesco Francioni, ‘Cultural Heritage, Max Planck Encyclopedia of Public International Law’ (*Oxford Public International Law*, 2020).[7].

³⁵ Craig Forrest, ‘Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?’ (2003) 34 *Journal of Maritime Law & Commerce*. [309-349].

³⁶ Article 1 Salvage Convention 1989

³⁷ Craig Forrest (n 35).[22].

³⁸ Sarah Dromgoole, *Underwater Cultural Heritage and International Law* (Cambridge University Press 2013).[179].

salvage law on this matter. The allowable reservation upon underwater cultural heritage, is clearly stated in Article 30 paragraph (1)(d) Salvage Convention 1989 as follows:

“Any State may, at the time of signature, ratification, acceptance, approval or accession, reserve the right not to apply the provisions of this convention:...

(d) when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed”.

Article 303 paragraph (4) of LOSC further envisages the recognition of other international agreements and rules of international law relating to the protection of objects of an archaeological and historical nature. In its development, the most comprehensive international agreement relating underwater cultural heritage was formulated under the auspice of UNESCO, known as UNESCO Convention on the Protection of Underwater Cultural Heritage 2001 (2001 UCH Convention). It is hoped that the Convention fills in existing gaps and ambiguity posed in LOSC and other relevant legal instruments analysed above. Further part of this paper elaborates and analyses 2001 UCH Convention.

After 2001 UNESCO Convention of the Protection of the Underwater Cultural Heritage

The issue on underwater cultural heritage continues to find a way for sufficient solutions. In 1997 UNESCO decided to address such issue into an international convention.³⁹ As the result of the continuous discussions at international level, in 2001 UNESCO adopted the 2001 UCH Convention. Some argued that the Convention has four main principles, namely obligation to preserve underwater cultural heritage for the benefit of humanity;⁴⁰ *in-situ* preservation; prohibition of commercial exploitation and promotion of training and information sharing.⁴¹ In

³⁹ For chronological details and the series of conferences toward such convention, read Patrick J. O’Keefe, ‘Protection of the Underwater Cultural Heritage: Developments at UNESCO’ (1996) 25 *The International Journal of Nautical Archaeology*. [169-176].

⁴⁰ Article 2 paragraph (3) of 2001 UCH Convention; See also Pearson, Natali Pearson, *Protecting and Preserving Underwater Cultural Heritage in Southeast Asia (The Palgrave Handbook on Art Crime)* (Duncan Chappell Saskia Hufnagel ed, Palgrave Macmillan 2019). [685-730].

⁴¹ Article 21 of 2001 UCH Convention.

detail, compared to the LOSC, the 2001 UCH Convention sets up more specific rules relating to the protection of underwater cultural heritage. The vulnerability of underwater cultural heritage on its removal⁴² has made the Convention applied an *in-situ* preservation of underwater cultural heritage. This *in-situ* preservation, however, should be conducted to provide optimal benefit of the underwater cultural heritage. Thus, removal or any other activities directed to the underwater cultural heritage may be authorized so long as it could “make a significant contribution to protection or knowledge or enhancement of underwater cultural heritage”.⁴³ So, *in-situ* preservation in fact can be excluded in certain strict condition.

Even so, the Convention further sets up an alternative regime in protecting underwater cultural heritage, that is strict restriction to apply salvage law. In contrary to Article 303 paragraph (3) of the LOSC, Article 4 of the 2001 UCH Convention stipulates pre-requisite condition to apply salvage law. These conditions include as long as it is authorized by the competent authorities; is in full conformity with the Convention and ensures that any recovery of the underwater cultural heritage achieves its maximum protection. It is argued that the word “full conformity” and “maximum protection” indicates strict condition of salvage law exclusion.⁴⁴ Thus, the *in-situ* preservation is still the first option. The 2001 UCH Convention further refers to the provisions provided by the LOSC relating to jurisdictional regime where the underwater cultural heritage located. If it located in the territorial waters of a State, so it is under the full and exclusive jurisdiction of a coastal State. Whereas if it located in exclusive economic zone (EEZ) or continental shelf, the coastal State should authorized any action directed to it. If it located in the Area, that is beyond national jurisdiction of any State, three steps, that is report, consultation and protection or urgent measures, should be taken.

⁴² See Roberta Garabello, Salvage, *Max Planck Encyclopedia of Public International Law* (2007). [4]; Patrick J. O’Keefe (n 39). Etienne Clement, ‘Current Developments at UNESCO Concerning the Protection of the Underwater Cultural Heritage’ (1996) 20 *Marine Policy Journal* <[https://doi.org/10.1016/0308-597X\(96\)00015-2](https://doi.org/10.1016/0308-597X(96)00015-2)>.[313-316].

⁴³ Annex of 2001 UCH Convention, Rule 1.

⁴⁴ Nie Bomin (n 27)., Requirements of procedures and documents to be fulfil can be found in Annex of the 2001 UCH Convention, Rule 10, 14, 15, 26, 27, 30 and 31.

The 2001 UCH Convention also differentiate the wreck of state vessels and aircraft to any other underwater cultural heritage. For a wreck of state vessels and aircraft located in the territorial sea, coastal State should have full authority and shall notify the flag State immediately in case of removal or any other action directed to it.⁴⁵ If such wrecks are located in EEZ or continental shelf, such wrecks remain immune from activities by coastal State, subject to certain exceptions,⁴⁶ including the existing conditions as envisages in article 10 paragraph (2) of the Convention.⁴⁷ Furthermore, for the wrecks of state vessel or aircraft located in the Area only subjects to the actions of flag States, with no exceptions.⁴⁸

Underwater Cultural Heritage and its relevance to PSSAs

It is submitted that the nature concept of PSSAs was to protect marine environment from the possible damage caused by shipping activities through measures of shipping restriction. In line with this concept, underwater cultural heritage located spreading all over seabed is very vulnerable to removal, or disturbance by shipping activities and other activities. Thus, it is questionable whether the concept of PSSAs can be applied to underwater cultural heritage by measures of shipping restriction especially over the area where the underwater cultural heritage is located. In order to answer such question, firstly the discussion on what constitute underwater cultural heritage should be analysed. Secondly, analyses of the rules provided in the Resolution A.982 (24) on the Revised Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas will be conducted.

Resolution A.982 (24) defines cultural heritage as “an area that is of particular importance because of the presence of significant historical and archaeological

⁴⁵ Article 7 paragraph (3) of 2001 UCH Convention.

⁴⁶ Article 10 paragraph (7) of 2001 UCH Convention.

⁴⁷ Article 10 paragraph (2) of 2001 UCH Convention reads: “A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

⁴⁸ Article 12 paragraph (7) of 2001 UCH Convention.

sites." This guideline does not further elaborate the types and examples of such cultural heritage. However, one thing for sure that such cultural heritage referred to cultural heritage found at sea or lies beneath the seabed. On the other hand, 2001 UCH Convention provides more details scope and definition regarding to cultural heritage. This convention, in fact implicitly uses the term "underwater cultural heritage" and not merely "cultural heritage." Article 1 of 2011 UCH Convention defines underwater cultural heritage as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.." This article further listed scope of the objects, which include: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircrafts, other vehicles or any part thereof, their cargo of other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character. Thus, cultural heritage as envisages in Resolution A.982 (24) should not interpreted narrowly as only to shipwrecks. While the restriction to freedom of navigation can only be done based on a very crucial reasons, the vulnerability of underwater cultural heritage to damage cause by shipping operation should be considered. For example, sunken warship would also serves as graveyard having sacred nature and represent a nation's history, should remain *in-situ* and thus shipping restriction or at least routing provisions would apply. In addition to this such graveyard can be considered as having a prehistoric nature. Another example is that there are possibilities for any underwater cultural heritage, due to the duration it remains underwater, has form a place or even part of habitat in need of special protection. Thus, the application of PSSAs is apparent.

Since there are hundreds of thousands underwater cultural heritage⁴⁹ lies in the seabed all over the world, the designation of such areas as PSSAs might

⁴⁹ Sorna Khakzad, 'Underwater Cultural Heritage Sites on the Way to World Heritage: To Ratify the 2001 Convention or Not to Ratify?' (2014) 2 Journal of Anthropology and Archaeology. [1-16].

resulted in many areas having restricted shipping operation which would infringe the freedom of navigation in some extent. In respond to this kind of possibility, Article 1 of 2001 UCH Convention in fact provides time restriction for underwater objects to be considered as underwater cultural heritage. To be considered as underwater cultural heritage, the object should be "...partially or totally under water, periodically or continuously, for at least 100 years..".⁵⁰ This way, it reduces the possible areas to be designated as PSSAs. However, in such cases, it could be expected that provisions restricting shipping would be complemented with other measures which may be beyond the scope of activities of IMO. Thus, it is important to establish cooperation with other organizations to ensure adequate interrelation between both shipping and non-shipping provisions needed to protect PSSAs in order to preserve underwater cultural heritage.

Furthermore, while both international provisions on the designation and PSSAs can be corelated, another aspect to be considered is national interpretation on underwater cultural heritage. Not all States where underwater cultural heritage is located, are the parties of 2001 UCH Convention and thus may have different perspective in the way it protect underwater cultural heritage lies in their territory. This might lead to the conflict between international law and national law. Up to date he 2001 UCH Convention has been ratified by 71 States.⁵¹ In addition to this there are several ambiguity related to the types of states recognized by the 2001 UCH Convention and LOSC. Under the 2001 UCH Convention there are some types of states, called "other States with a verifiable link", which may not have both jurisdiction and ownership over the underwater cultural heritage, yet are entitled to certain interests and should declare their interests based on verifiable

⁵⁰ Article 1 of 2001 UCH Convention.

⁵¹ UNESCO, 'The List of Ratifying States' (UNESCO, 2021) <<https://en.unesco.org/underwater-heritage/ratification>> accessed 20 July 2022. For instance, Indonesia has not ratified this convention although there are thousands of underwater cultural heritages lie on its water. Thus, Indonesia's perspective on underwater cultural heritage differs from provisions provided within the 2001 UCH Convention. For the detail of the discussion on Indonesia's perspective upon 2001 UCH Convention see further Rizky Widiassa, 'Penolakan Indonesia Dalam Meratifikasi Konvensi UNESCO Tahun 2001 Tentang Perlindungan Cagar Budaya Bawah Air' (2021) 6 Indonesian Perspective.[22-37].

link.⁵² How can such States be identified? Similar to this, LOSC recognized three types of States, State of origin, State of cultural origin and State of historical and archaeological origin.⁵³ It is questionable what makes a State, a State with verifiable link or a State of origin? In addition to this, what if there are more than one State that fit this criteria, which State shall enjoy priority? These unfortunately may lead to disputes between States and thus will prevent the protection and the preservation of underwater cultural heritage. Such possibilities must be considered toward the establishment to what extent the PSSAs concept as it develop to date can be applied to the protection of underwater cultural heritage. It is submitted that the Revised Guidelines, while it mention the possibility in applying the concept of PSSAs in protecting underwater cultural heritage, it does not further address the way it could be done. Another important aspect to be considered is that shipping restriction as the result of PSSAs in protection underwater cultural heritage should also consider other rights of the legitimate uses of the sea, that is freedom of shipping and other rights relating to rights and obligation of States in relation to maritime zone as envisaged by LOSC.⁵⁴

With regard to freedom of shipping, Article 87 of LOSC recognizes various freedoms applicable on the high seas. These include (i) freedom of Navigation, (ii) fishing, (iii) laying and Maintenance of submarine cables and pipelines (right of immersion). (iv) freedom of overflight, (v) freedom to construct artificial islands and other installations and (vi) freedom of Scientific Research. While it is possible that underwater cultural heritage might be found in high seas, the designation of the location where underwater cultural heritage was found, as the PSSAs, would in certain degree reduce the freedom of navigation. It is submitted that if *in-situ* preservation of underwater cultural heritage resulted in the designation of

⁵² Article 7 paragraph (3), Article 9 paragraph (5) and Article 11 paragraph (4) of the 2001 UCH Convention.

⁵³ Article 149 LOSC.

⁵⁴ This is a reference of various navigational rights established under maritime zones provided by LOSC. The location of underwater cultural heritage will determine to what extent the rights of Coastal State upon such underwater cultural heritage. See also R.R. Churchill and A.V. Lowe, *The Law of the Sea* (4th edn, Juris Publishing, Manchester University Press 2022)., Dhiana Puspitawati, *Hukum Laut Internasional* (2nd edn, Prenada Media 2020).

PSSAs, the restriction of shipping should not in any way prevent the application of freedom recognized by the LOSC over the high seas.

Conclusion

Underwater cultural heritage is not merely relating to sunken vessels and its cargoes, but also site, structures, buildings, artefacts and human remains, together with their archaeological and natural context as well as objects of prehistoric character. While the 2001 UCH Convention has comprehensively regulates the protection to preserve underwater cultural heritage, however, in its application certain measures is needed. The concept of PSSAs having measures of shipping restriction provisions is considered sufficient in protecting underwater cultural heritage. While several ambiguities relating to provisions provided within Resolution A. 982 (24) and the 2001 UCH Convention may lead to disputes between States as well as conflict between international and national laws, IMO decisive role is important. It is submitted that the establishment of cooperation and communication between IMO and other relevant international organization as well as States is crucial. While shipping restriction under PSSAs designation is sufficient in determining measures toward the protection of underwater cultural heritage, such restriction should not in any way prevent other legitimate uses of the seas as envisages under the LOSC, especially with regard to freedom of navigation and other navigational rights.

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