

Non-Paper submitted by Spain to the Intersessional Working Group on Underwater Cultural Heritage on the term of art and definition of human remains and underwater cultural heritage

11 December 2023

1. Spain should like to support the efforts of this intersessional Working Group on underwater cultural heritage (**WG**) to protect the human remains and the underwater cultural heritage in future regulations on exploitation in the Area. This support must be understood in the framework of the general position adopted by Spain regarding such exploitation, resumed as follows:
 - Spain considers that the main responsibility of the Council is to advance in the development of rules, regulations and procedures; and that the “two-year clause” must be interpreted and applied in conjunction with UNCLOS and the 1994 Agreement, particularly the provisions of Part XI of UNCLOS, including, the principles that govern the Area and that are contained in its 2nd Section.
 - Spain supports the need to apply the precautionary criterion or principle that is implicit in Article 145 of UNCLOS in order to “ensure effective protection of the marine environment.”
 - Spain agrees that any plan of work for exploitation should be evaluated by the LTC and subsequently considered by the Council, without any obligation to provisionally approve it; and that the Council has the power to establish orientations and guidelines so that the Commission can adequately carry out its functions.
 - Finally, Spain supports the application of a precautionary pause, that is, slowing down the transition to the exploitation phase, until the Council approves the Regulation that we are drafting, along with standards and guidelines that include environmental thresholds.
2. According with the purpose to advance gradually while waiting for better scientific knowledge as the basis for a generally accepted agreement, in the particular case of the protection of human remains and underwater cultural heritage, Spain considers premature for the WG to submit textual proposals to the Council by the 20 December 2023 deadline. Several questions under discussion —the ‘term of art’ and definitions to be used, the consideration of the intangible cultural heritage or the monitoring and cooperation system, among others— deserve an in-depth analysis and discussion to reconcile the different, and sometimes confronted, approaches to these issues by delegations and stakeholders.
3. In this Non-paper, Spain includes some proposals on the term of art and definitions which include suggestions for the consideration of intangible heritage as well. Spain’s general approach is based in a threefold assumption: *first*, mandated by Arts. 303(1) and 149 UNCLOS, underwater cultural heritage must be referred to in the Regulations; *second*, it must be referred separately, although linked to marine (natural) environment; and, *third*, with the rest of States parties to the UNESCO Convention on the Protection of the Underwater Cultural Heritage (**2001 UNESCO Convention**), Spain acknowledges the rules on application of successive treaties in the same

subject matters. The 2001 UNESCO Convention, and especially its Arts. 11 and 12, establish a particular guidance on activities incidentally affecting underwater cultural heritage—like deep-sea mining—, a question to be addressed in future commentaries and proposals to draft regulation 35.¹

4. Spain also departs from the fact that current conventional obligations on underwater cultural heritage are different depending on each State. If all negotiating States are parties to UNCLOS, only some of them are also Parties to 2001 UNESCO Convention (73 Parties); most of them are Parties to 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (**2003 UNESCO Convention**, 182 Parties);² and numerous members of this WG (including Spain) recall the recent adoption of the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction (**BBNJ Convention**, 84 Signatories). Last but not least, Spain reminds the existence of the already adopted Regulations on prospecting and exploration, which also refer to human rights and underwater cultural heritage.
5. The relativeness of such conventional rights and obligations forces us to find a common ground to define the object of regulation. Unfortunately, UNCLOS does not shed too much light in its Arts. 149 and 303, that defectively govern “archaeological and historical objects” in marine spaces, particularly in the Area. Adopted Regulations on prospecting and exploring does not help us either. Whilst common Art. 8 of these Regulations—applicable to prospectors—refers to any “object of actual or potential archaeological or historical nature”, regulations 35 (Nodules) and 37 (Sulphides and Crusts)—applicable to contractors—refer to “any human remains of an archaeological or historical nature, or any object or site of a similar nature”. Significantly enough, the regulations have not followed UNCLOS terminology *expressis verbis*.
6. Both human remains and cultural heritage are hence included among the objects to be protected in the mining activities in the Area. Intangible heritage is not mentioned, neither in UNCLOS nor in the Regulations. However, in this WG there seems to be a general acceptance that such intangible heritage must be somehow addressed. On the contrary, paleontological remains seem to be out of the scope of this Regulations. Spain agrees on these two last assumptions.
7. The three components of our discussions—human remains, underwater cultural heritage and intangible cultural heritage—therefore need, *first*, to be encapsulated in a “term of art” that, *second*, needs to be properly defined and, *third*, be included in the schedule of terms and definitions eventually listed in the regulations.
8. The term “human remains” comprises human tissue, organs and skeletons. Although the expression is used primarily to refer to the remains of parts of human bodies, it can also mean whole, preserved corpses. The challenges associated with the preservation of human remains in the seabed involve not least respect for the individuals, groups and cultures that the remains represent. Normally found not alone—*i.e.* a group of human remains in a maritime grave, a

¹ In this Non-paper, capitalized “Regulations” mean the entire set of individual “regulations” (in lowercase), the later referring to a particular *regulation* of the *Regulations*.

² It is to be reminded, however, that UNCLOS States parties like Australia, Canada, Russia, or the UK are not Parties to the 2003 UNESCO Convention.

sacrifice place, or embedded with other archaeological objects—, human remains are also to be preserved in its underwater natural context, normally as a venerated or memorial place. In cases of war-graves, general international rules of the law of conflicts impose a special respect and protection.³ In absence of a particular legal regime for them, special memory must be also given to the rest of human remains found at sea, for example—and most particularly—to the remains of human beings “merchandised” across the seas as slaves along history.

9. Yet, there are still sound discussions on the definition of underwater cultural heritage. The lack of definition in UNCLOS was resolved by the 2001 UNESCO Convention—at least for its State parties. The detailed definition of underwater cultural heritage contained in its Art. 1(1)(a) has been proposed by some delegations and stakeholders. Some others, in light of the limited ratification of the 2001 UNESCO Convention, discussed or opposed such approach, and a transactional text was also offered by some stakeholders, adapting that definition to the particular purposes of the regulations. In any case, it must be reminded that this definition was inspired—as other parts of the 2001 UNESCO Convention—by the *Charter on the Protection and Management of the Underwater Cultural Heritage (Charter of Sofia)*, adopted in 1996 by the International Council on Monuments and Sites (ICOMOS),⁴ the most important NGO associated with UNESCO in cultural matters.
10. Finally, regarding the wide acceptance of the 2003 UNESCO Convention, its definition of intangible cultural heritage could be generally accepted. This definition refers to “the practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage [...]” This definition intimately links but distinguishes between “the practices, representations, expressions, knowledge and skills” (intangible by nature) and “the instruments, objects, artefacts and cultural spaces associated therewith” (tangible by nature). The 2003 UNESCO Convention does not divide them, but their distinction may be useful for the protection of intangible cultural heritage in the regulations on exploitation.
11. Spain, as State party to the 2001 and 2003 UNESCO Conventions abides by the definitions of underwater and intangible cultural heritage contained in its Arts. 1(1)(a) and 2(1), respectively. Spain also agrees with the necessary respect of human remains deposited in the seabed. However, Spain realizes that there is a need—for the sake of clarity, consistency and security—to find a term of art and a definition that be clear, practical, realistic, and generally accepted by States (parties or not to the UNESCO Conventions) and stakeholders. Such concept must be included in the schedule of terms and definitions of the regulations.
12. Spain considers that the “term of art” should be “human remains and cultural heritage”. Whereas the first component (human remains) is clear, acceptable and already used in the Mining Code, the component “cultural heritage”—which is not—is proposed for several reasons:

³ See generally Rules 112-116 on Customary International Humanitarian Law, as Collected by the ICRC (available at <<https://ihl-databases.icrc.org/en/customary-ihl/v1>>).

⁴ Available at <https://www.icomos.org/images/DOCUMENTS/Charters/underwater_e.pdf>.

- Is the term generally used at UNESCO in all its conventions since the adoption of the 1972 World Heritage Convention, including the 2001 and the 2003 Conventions;⁵
 - Acting under Chapter VII of the UN Charter in reaction to the destruction and looting of “cultural heritage”, the Security Council adopted this term in its resolutions, particularly from its seminal resolution 2347 (2017), of 24 March 2017, onwards;
 - The term “cultural heritage” covers both tangible and intangible heritage; and
 - Is the term generally used by the scientific international community, being ICOMOS charters and resolutions a well and widely accepted example.
13. Accordingly, Spain proposes that an encompassing definition of “human remains and cultural heritage” for the purposes of the regulations could read as follows:
- “All traces of human existence found in the Area —together with their archaeological and natural context— having a cultural, historical or archaeological character, or associated with the intangible cultural heritage recognized by communities, groups and, in some cases, individuals, such as human remains, objects of prehistoric character, sites, structures, buildings, artifacts, vessels, aircraft, other vehicles or any part thereof, their cargo or other contents.”
14. Spain considers that this definition,
- departs from a generally accepted concept of today’s underwater cultural heritage, based on accepted cultural, historical, archaeological or intangible relevance;
 - tries not to define underwater cultural heritage in the Area but just the concept used for the purposes of the regulations;
 - retains the relevance —“character”, “recognized”— of the traces, not including any (probably disputed) time limit nor the way the objects have been underwater, in our case on the deep sea-bed, which to some extent makes unnecessary the reference to being partially or totally underwater, periodically or continuously;
 - connects the heritage with its archaeological and natural context, thus linking cultural heritage with natural heritage, leaving for other regulations the consequences for contractors and the Authority, for example on the establishment of a protected buffer zone, which makes unnecessary the (disputed in this WG) use of “sites” in current negotiated texts, particularly draft regulation 35, but are included as an example in the definition proposed in previous paragraph; and
 - envisages only tangible cultural objects (included those associated with intangible cultural heritage), leaving for other regulation⁶ the protection of sacred or venerated maritime areas/zones linked with intangible practices, representations, expressions, knowledge and skills, following perhaps de model of protected areas under the BBNJ Convention or under the 1995 SPAMI Protocol to de Barcelona Convention for the Mediterranean.

⁵ It has been also used by UNESCO in general: see <<https://uis.unesco.org/en/glossary-term/cultural-heritage>>.

⁶ For example, as proposed by our Facilitator, when dealing with “Best Environmental Practices” in the Schedule, as well as rely on references to socio cultural uses and impacts in Annex IV (Environmental Impact Statement) in the Regulations; or in relation with the proposals for Regional Environmental Management Plans. It may be also referred to in our proposal on “Best archaeological practices” (see below para. 17).

15. Spain also retains the importance of integrating the protection of human remains and cultural heritage in baseline surveys and impact assessments like those foreseen for natural environmental. Either independently or within a differentiated chapter/section in environmental impact assessments—a decision still to be resolved (the question of “unfolding”)—, the main concern for Spain is that practice generally shows how the “folding” has habitually blurred or diluted archaeological aspects into natural baselines data, impact assessment and methodological approaches, in addition of the lack of appropriate specialists on underwater cultural heritage drafting these assessments reports. Here Spain recalls the importance of cooperation between the Authority and the UNESCO and other competent organizations as well as relevant NGOs.
16. It is important to include a definition of harm, threat or danger to human remains and cultural heritage when exploiting the mineral resources in the Area. Considering the term “Serious harm” to marine environment included in the current Presidential Text on “Use of Terms and Scope”, Spain proposes to add a definition of serious harm to human remains and cultural heritage, as follows:

“ ‘**Serious harm to human remains and/or cultural heritage**’ means any effect from exploration or exploitation activities in the Area which may physically disturb or otherwise damage human remains, the cultural heritage, and/or its archaeological and natural context, determined according to the rules, regulations and procedures adopted by the Authority on the basis of internationally recognized [standards and practices informed by best available scientific evidence][best archaeological practices].”

This definition (a) adds the terms “exploration or exploration” to “activities in the Area” to be more concise, thus deleting the proposed “unlawful” because possible harm will generally come from incidental activities; (b) links the harm to human remains and cultural heritage with their natural context with an “and/or” conjunction to underline their inextricable combination; and (c) prefers scientific “evidence” instead of “information” to support a strict scientific approach to possible States’ and contractors’ limitations, but, alternatively, proposes to refer instead to “best archaeological practices”.

17. As a consequence of previous proposals, Spain further suggests to add as term of art in the section “Use of Terms and Scope”, a definition of “Best archaeological practices” as follows:

“ ‘**Best archaeological practices**’ means the application of the most appropriate combination of decisions based on current and future cultural heritage management practice as determined by the evolving available scientific information, technology and methodology as established, accepted and collected in authoritative standards and guidelines, and taking into account, if applicable, relevant traditional knowledge of indigenous and local communities.”

This definition tries to simplify and adapt to human remains and cultural heritage the term “Best environmental practices” already included in the Regulations, underlying the need to refer to authoritative and relevant tools for the best archaeological approach to underwater human and cultural remains.

18. Spain proposes that the term of art adopted —“Human remains and cultural heritage”— should be included throughout the Regulations besides the reference to the term of art “marine environment” or “environment” when contextually necessary. The same should be done with the terms “environmental baselines data”, which should read “environmental and archaeological baselines data”, as appropriate.

19. In accordance with these proposals dealing only with the term of art and definitions, Spain shall submit for discussion in this WG its proposals for regulation 35 and other regulations governing the exploration and exploitation activities incidentally affecting human remains and cultural heritage in the Area.