Journal of Liberal Arts and Humanities (JLAH)
Issue: Vol. 2; No. 11; November 2021 (pp. 11-19)
ISSN 2690-070X (Print) 2690-0718 (Online)
Website: www.jlahnet.com
E-mail: editor@jlahnet.com
Doi: 10.48150/jlah.v2no11.2021.a2

Contemporary Challenges Relating to the Protection of Underwater Cultural Heritage: A Consideration of Portuguese and Brazilian Law

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Abstract:

The theme of underwater cultural heritage is of special importance and current. Thus, after the approval and ratification of the UNESCO Convention, in addition to delving into extremely relevant issues such as in situ protection, sovereign immunity or agreements between States, it is important to assess the consequences of this convention in the internal law of States. In the present case, in portuguese and brazilian domestic law. Now, as we can see, for various reasons, the result is neither edifying nor in line with the guidelines of a Convention that deserved praise and formal acceptance. While the brazilian order, for other reasons, also highlights aspects that deserve special concern.

Keywords: underwater cultural heritage, UNESCO Convention 2001, SCUBA, preservation in situ, sovereign immunity**,** agreements between states; sunken ship, wrecks.

1. General Considerations

First of all, a word on the theme - Contemporary Challenges to Protecting Underwater Cultural Heritage. When seeking a Law of Culture subject in the Portuguese and Brazilian legal systems for cultural heritage, I decided to select underwater cultural heritage. The subject is both topical and imposes serious reflection for legal experts as regards the public powers of our two countries and, at least in Portugal I may be sure, they generally seem to disregard this subject. Furthermore, while the Portuguese and Brazilian legal systems lay down rules on issues around underwater cultural heritage, these require re-examination especially when, in my opinion, both laws differ significantly from the current trends in underwater cultural heritage protection.

2. The Concept and Current Problematics of Underwater Cultural Heritage

The underwater cultural asset is a sub-species of cultural asset or heritage[1]. It is the underwater environment that bestows identity on this vast and complex sub-type of cultural assets. However, underwater cultural assets are not only those which are immersed in or even in contact with the aquatic environment. They should also include assets located in wetlands and even on dry land, taking into account the current or past instability of the marine environment[2].

[1] We advocate full equivalence between the terms *cultural heritage* and *cultural asset*. Cf. JL Bonifácio Ramos, *Achamento de Bens Culturais Subaquáticos*, Lisbon, p. 346. In a similar vein, José Carlos Vieira de Andrade, "Rapport Portugais" in *La Protection des Biens Culturels: Journées Polonaises, Travaux de l' Association Henri Capitant*, Vol XL, Paris, 1989, pp. 473 et seq.; António Marques dos Santos "Projecto de Convenção do UNIDROIT sobre a restituição internacional dos bens culturais roubados ou ilicitamente exportados" in *Estudos de Direito Internacional Privado e de Direito Processual Civil Internacional*, Coimbra, 1998, pp. 221 et seq.; José Casalta Nabais, *Introdução ao Direito do Património Cultural*, 2nd ed., Coimbra, 2010, pp. 11 et seq..

[2] Expression by Christian Lavialle to illustrate the need to understand the assets located underwater and others that, due to the inconstancy of the aquatic environment, are located in submerged areas. Cf. "La loi du 1er décembre 1989 relative aux biens culturels maritimes" in *La Semaine Juridique*, no. 3489, 1991, pp. 65.

In this regard, it suffices to recall the Convention on the Protection of the Underwater Cultural Heritage, approved in Paris in 2001, with 87 votes in favour, 4 against[3] and 15 abstentions[4]. This Convention, which entered into force on 2 January 2009 and has hitherto been ratified by over 50 countries, spans vessels which have been partially or totally submerged for longer than 100 years. This results from the replacement of the term *wreck*, used in the project, by *vessel*. Actually, this also does not even provide the most appropriate designation[5]. Whereas, after any shipwreck or sinking, ships cease to exist legally, their wrecks represent an important source of underwater cultural heritage[6]. The one-century timeframe is also questionable as this does not correspond in fact to any archaeological or cultural rule but rather derives from an administrative, pragmatic and somewhat arbitrary determination[7] aimed at facilitating the enforcement of regulatory requirements[8]. Consequently, while recognising that some chronological limitation may be justified[9], a limit of fifty years or even a specific historical moment, such as 1945 and the end of the Second World War, might be considered as more appropriate[10].

Regarding the challenges facing underwater cultural heritage, we should stress that, while underwater artefacts have been collected since ancient times, especially if taking into account how the sea would throw wrecks onto coastlines, it is no less true that it has been extremely difficult, if not impossible, to recover submerged assets at great depths. The lack of technical means greatly limited or entirely prevented such access. Hence, the assertion that assets belonging to wrecked ships, dragged down into the depths, have been lost forever[11].

However, with recent technological breakthroughs, in particular the self-contained underwater breathing apparatus (SCUBA) and other sophisticated inventions, mostly occurring during the 20th century, it has become possible to reach places previously totally inaccessible and located at enormous depths[12]. Such discoveries resulted in an increased concern for shipwreck remains which, over the course of time in aquatic environments, become underwater cultural assets. Furthermore, such cultural assets hold particular scientific and cultural importance. Such assets are found almost intact, even centuries after their submersion, demonstrating the enormous conservation capacity of the aquatic environment. In fact, they are commonly in a better state of preservation than land-based cultural assets dating from the same historical period. This arises, on the one hand, from the extraordinary conservation capacities of the underwater environment[13] and, on the other hand, from the fact its surroundings provided a closed site[14]. Hence the image of wrecks as time capsules[15] or, from another perspective, a new Pompeii[16].

[3] The following states voted against: Russia, Norway, Turkey and Venezuela.

[4] Abstentions came from Brazil, Czech Republic, Colombia, France, Germany, Greece, Guinea-Bissau, Iceland, Israel, the Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay.

[5] We have previously advocated this view. Cf. JL Bonifácio Ramos, "O Navio Afundado Como Património Cultural" in *O Navio: II Jornadas de Direito Marítimo*, Lisbon, 2010, p. 456. In the opposite direction, some accept eliminating the term wreck in view of the broad content to which such expressions correspond in the laws or Conventions specific to maritime salvation. Cf. Roberta Garabello, *La Convenzione UNESCO Sulla Protezione del Patrimonio Culturale Subacqueo*, Milan, 2004, pp. 82-3.

[6] On this point, Nadine Pallas emphasises estimates indicating the loss of tens or hundreds of thousands of ships at sea, on rivers and on lakes over the course of time. Cf. *Maritimer Kulturgüterschutz*, Berlin, 2004, pp. 136-7.

[7] In this regard, cf. Craig Forrest, "A New International Regime for the Protection of Underwater Cultural Heritage" in *International and Comparative Law Quaterly*, no. 51, 3, 2002, p. 524.

[8] In this sense, cf. Roberta Garabello, *La Convenzione*…op. cit., pp. 84-5.

[9] If there were no limit at all, this would incur the risk of including recently sunk objects, such as the Kursk submarine. Cf. Ronald Herzog, *Kulturgut*…op. cit., p. 46.

[10] Cf. Sarah Dromgoole and Nicholas Gaskell, "Draft UNESCO Convention on the Protection of the Protection of the Underwater Cultural Heritage 1998" in *International Journal of Marine and Coastal Law*, Vol. 14. No. 2, May, 1999, pp. 191-2.

[11] Cf. Jeffrey Scrimo, "Raising the Dead: Improving the Recovery and Management of Historic Shipwrecks" in *Ocean and Coastal Law Journal*, no. 5, 2000, p. 275.

[12] Sarah Dromgoole states that technological innovations have now made the seabed at least 98% accessible. Cf. "2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage" in *International Journal of Marine and Coastal Law*, Vol. 18, no. 1, 2003, p. 65.

[13] Ronald Herzog emphasises the special preservation capacity of shipwreck remains in an underwater environment. Cf. *Kulturgut unter Wasser: Schatztaucher, des Seevölkerrecht und der Schutz des kulturellen Erbes*, Aachen, 2001, p. 137.

[14] The underwater wreck is a closed site where time stopped when the vessel sank in contrast to the terrestrial archaeological site, located in an area of accumulation, where man makes, generation after generation, successive

3.3. Preservation *In Situ*

According to the aforementioned Convention, preservation *in situ* is a principle and a priority option prior to any underwater heritage intervention[17]. However, this principle is not compatible with responsible and non-intrusive access by the public for the purposes of observation and documentation, in order to raise awareness promoting and enhancing the value of that heritage[18]. In other words, the Convention does not seek to establish *in situ* preservation as an absolute principle, thereby ensuring the immutability of the location of underwater cultural assets. The aim rather becomes to reconcile preservation with enjoyment of the asset provided this does not prove incompatible with heritage management.

Therefore, although this present preservation *in situ* as a priority, the Convention recognises that remaining in an underwater environment may not represent the best option in terms of protecting the cultural asset. In fact, while this environment may have undeniable qualities in terms of providing adequate conservation, it may on other occasions, due to environmental changes, cause erosive or destructive actions that justify different measures[19]. Furthermore, in view of technical and technological evolution, because the underwater environment no longer constitutes a closed space, the scope for activities aimed at clandestine recovery or even pillage has correspondingly increased[20].

Preservation *in situ* is also not absolute in underwater archaeological sites or parks. Despite prohibitions and administrative controls, this may be reassessed in archaeological parks and, should the situation so justify, give rise to a change in site or even the extraction of the cultural asset[21]. Therefore, rather than being a definitive impediment, *in situ* preservation represents a restriction on any immediate surveying in order to better safeguard studies and information gathering than insisting on immobilism that might compromise the underwater cultural asset.

3.4. Sovereign Immunity

As a general principle, the Convention stipulates the recognition of the practice of states and of international law, including the United Nations Convention on the Law of the Sea, concerning any immunities or rights of a state over its vessels and aircraft[22]. It further clarifies that the term *state ships and aircraft* is intended to mean warships and other ships or aircraft owned or operated by states and serving only public or non-commercial purposes, which are properly identified and classified as underwater cultural heritage[23].

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traces of his existence. Cf. Jean Yves Blot and Maria Luísa Blot, "O Passado Debaixo de Água" in *Oceanos*, no. 5, 1990, p. 107.

[15] Patrick O' Keefe justifies the use of the term *time capsule* by noting how the shipwreck drags to the bottom the objects on board as well as the ship itself. The particular conservation capacity of the environment and the inaccessibility of the site allow these objects from the same historical period to remain untouched until the moment of discovery. Cf. "Protecting the Underwater Cultural Heritage: The International Law Association Draft Convention on *Marine Policy*, vol. 20, no. 4, 1996, p. 297. Still in relation to this expression, Ole Varmer stresses the idea of a time capsule in relation to underwater wrecks as they contain reliable information about the time of their submersion in contrast to the terrestrial cultural heritage that has been in contact with successive civilisations and generations. In order to better illustrate his opinion, he highlights the case of a sunken ship in the James River, Virginia, which would have provided more information about the founding of Jamestown than any terrestrial archaeological finds from excavations carried out throughout the city. Cf. The Case Against the Salvage of the Cultural Heritage" in *Journal of Maritime Law and Commerce*, Vol. 30, no. 2, 1999, pp. 288-9.

[16] In his report accompanying the 1978 Council of Europe Recommendation, Ropper states the underwater cultural assets can perform the function of a new Pompeii. Cf. Relatório Ropper, doc. 4200, p. 7.

[17] Cf. no. 5 of article 2.

[18] Cf. No. 10 of article 2.

[19] Gwénaëlle Le Gurun recognises that underwater cultural assets may be affected by various erosive or destructive factors, such as maritime pollution, the laying of underwater cables or other public or private works. Cf. *La Métamorphose Encore Inachevée du Statut des Biens Culturelrs Sous Maris*, Nantes, 2000, pp. 18 et seq..

[20] This point was underlined by Luigi Migliorinoo, "In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation" in *International Journal of Marine and Coastal Law*, Vol. 10. No. 4, 1995, pp. 483 et seq..

[21] Cf. Christopher Bordelon, "Saving Salvage: Avoiding Misguided Changes to Salvage and Find Law" in *San Diego Law Review*, no. 7, 2005, pp. 191-2.

[22] Cf. article 2(8).

[23] Cf. article 1(8).

However, a precept under the heading "immunities" ascribes warships and other state vessels or military aircraft with immunity from the jurisdiction operating for non-commercial purposes but that shall still comply, as far as is reasonable and practicable, with the provisions of articles 9, 10, 11, and 12 of the Convention by taking appropriate measures not to impair the operations or operational capability of such vessels or aircraft[24].

In view of these contradictory tendencies, there was the need to find a compromise between these two opposing positions; attributing coastal states greater powers over property located in their territorial waters while concomitantly abolishing those powers as regards their exclusive economic zones and continental shelf areas. Therefore, as regards their territorial waters, in internal and archipelagic waters, coastal states assume the duty to inform flag states party to the Convention and, where appropriate, any other state with a legitimate interest, whenever discovering the wreck of a warship or state vessel[25]. On the contrary, as regards wrecks located in the exclusive economic zone or on the continental shelf, no intervention is permitted without the explicit agreement of the flag state[26].

Despite the extreme difficulty in reconciling the claims of coastal states and states with some ownership over underwater wrecks[27], we may point out how the UNESCO Convention recognises immunity for warships and state vessels wrecked at least one century ago. However, this must also recognise that immunity is more attenuated in the case of wrecks located in the territorial waters of another state than in their Economic Zone or Continental Shelf areas. However, taking into account the requirements to recognise such immunity under other Conventions, we need to consider what practice provides as regards underwater cultural heritage and the implementation of the UNESCO Convention of 2001.

4. Agreements between States

As a result of coastal state claims over underwater wrecks, without overlooking the sovereign immunity of warships and other state ships, agreements have been concluded within the scope of harmonising these claims and to a certain extent protecting such wrecks as underwater cultural heritage. Therefore, while these agreements between states have included various aspects, for example related to maritime salvage, we may state that since the 6 November 1972 agreement between Australia and the Netherlands, issues around sovereign immunity and the protection of underwater possessions have taken on a predominant role[28]. Thus, in the 1989 agreement on the Alabama wreck between the French Republic and the United States of America, there was a clear desire to settle conflicting claims regarding ownership and to preserve the wreck by strengthening the powers of a joint scientific commission[29]. A similar procedure arises from the agreement, also in this same year, over HMS Birkenhead in which the South African government undertakes to allow access to British military historians as well as an equitable division of any coinage discovered in the wreck[30].

The UNESCO Convention states it does not alter the rights and obligations of signatory states regarding the protection of underwater wrecks deriving from previously concluded bilateral, regional or multilateral agreements provided they do not undermine the Convention's principles and objectives[31]. In addition, signatory states are encouraged to conclude bilateral and regional agreements and to further develop existing agreements as well as adopting rules and regulations to ensure better protection than that provided for under the Convention itself[32]. Still furthermore, parties may also invite states with legitimate interests, especially of a cultural, historical or archaeological nature, to adhere to already agreed bilateral or multilateral agreements[33].

[24] Cf. article 13.
[25] Cf. article 7(3).
[26] Cf. article 10(7)
[27] On this subject, cf. Tullio Scovazzi, "The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage" in *Italian Yearbook of International Law*, no. 11, 2001, pp. 21-2.
[28] The Netherlands hereby agreed to transfer ownership of the wrecks to Australia while the latter acknowledged the former's archaeological and cultural claims on the wrecks. In addition, a Commission was set up with representatives from both parties to cooperate in preserving the wrecks. See articles 4 et seq. of the agreement.
[29] Cf. articles 1 et seq. of the agreement.
[30] Cf. paragraph 1 of the exchange of notes.
[31] Cf. article 6(3) of the Convention.
[32] Cf. article 6(1) of the Convention.
[33] Cf. article 6(2) of the Convention

This thus conveys the unsurprising expectation about a future proliferation of new bilateral[34] or even multilateral and regional[35] agreements. Indeed, these may adopt and adapt the Convention's guidelines in order to pursue their objectives and thereby representing an important instrument for the preservation of underwater cultural heritage. This emerges clearly in the agreement over the La Belle wreck[36], concluded in 2003 between the French Republic and the United States of America, as this agreement does recognise French ownership of the wreck while also stipulating the wreck remains in the custody of a Commission that shall oversee matters relating to its preservation and conservation[37].

A similar approach is adopted in the Titanic wreck agreement[38]. Indeed, while the need to protect the wreck had been highlighted earlier in American law, through the *RMS Titanic Maritime Memorial Act*[39], it should be stressed that this wreck is located in international waters[40]. Hence, the agreement between states pursues those same objectives in a more efficient way. Thus, although it acknowledged the status quo, somehow validating the previously committed heritage violations, the clearly protective orientation of the agreement's text must be acknowledged. Not only does it proclaim that the wreck is of exceptional historical importance but it also emphasises preservation *in situ* and non-intrusive public access[41]. Furthermore, this provides for the holding of consultations among the signatory states in order to harmonise the agreement with the contents of the UNESCO Convention[42].

5. Consequences of Adopting the UNESCO Convention

5.1. General Framework

After the significant level of approval in Paris, a large number of the member states that voted in favour of the 2001 UNESCO Convention were expected to adhere to it. However, this did not happen. Not a single ratification took place in the following year with just two ratifications in the year after that. Only as from 2006 did the numbers begin increasing. The Convention only came into effect on 2 January 2009, three months after the submission of the 20th instrument of ratification or acceptance[43]. Today, the scenario has advanced with over 50 accessions or ratifications thus far.

The Convention constitutes a highly relevant instrument for bringing about the adequate preservation of underwater cultural heritage[44]. Moreover, although the respective provisions only bind those countries depositing instruments of ratification[45], we must recognise the influence on other states. In fact, they began to perceive the recovery and even the eventual exploitation of underwater wrecks differently[46].

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[34] Cf. Michail Risvas, "The Duty to Cooperate and the Protection of Underwater Cultural Heritage" in *Cambridge Journal of International and Comparative Law*, 2013, pp. 587 et seq..

[35] Regarding the Convention's encouragement of regional impact agreements, cf. Tullio Scovazzi, "The Entry Into Force of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage" in *Aegean Review Law Sea*, no. 1, 2010, pp. 31 et seq..

[36] The wreck of a French military ship, sunk in 1686, in a place which, at the time of its discovery in 1995, corresponded to American territorial waters.

[37] Cf. articles 1 et seq. of the agreement.

[38] Agreement signed, in 2004, by Canada (the country closest to the wreck), the United Kingdom (the flag country), the French Republic (the nationality of the discoverer of the wreck, Robert Ballard) and the United States of America.

[39] Cf. Section 2 of the *RMS Titanic Maritime Memorial Act* of 1986.

[40] Peter Hershey specifically emphasises the contingencies of American law in the light of locating the wreck of the Titanic. Cf. "RMS Titanic as National and World Heritage: Protecting the Wreck Site of the Titanic Pursuant to the National Historic Preservation Act and the World Heritage Convention" in *Florida Coastal Law Review*, no. 16, 2015, pp. 281 et seq..

[41] Cf. articles 2 et seq. of the agreement.

[42] Cf. articles 9(2) of the agreement

[43] Barbados became the twentieth state to approve the Convention when submitting its ratification instrument on 2 October 2008. Prior to this, in chronological order, the following countries had ratified the Convention: Panama and Bulgária (2003); Croatia and Spain (2004); Libya and Nigeria (2005); Lithuania, Mexico, Paraguay, Portugal, Ecuador and Ukraine (2006); Lebanon, Santa Lucia, Rumania and Cambodia (2007); Cuba, Montenegro and Slovenia (2008).

[44] On this matter, cf. Nadine Pallas, *Maritimer*…op. cit., pp. 360 et seq.. Mariano Aznar Gómez, *La Protección*…op. cit., pp. 212 et seq..

[45] Cf. article 27 of the Convention.

[46] Cf. Laura Gongaware, *Tulane Maritime Law Journal*, no. 37, 2012, pp. 213 et seq.; Adopting a similar stance, Ole Varmer declares that the United States of America enacts various policies compatible with the orientations of the

Seventeen years have now passed since the approval of the UNESCO Convention and almost ten years since it came into force. We believe this provides a relevant timeframe for assessing the actions of states ratifying the Convention as well as those opting not to do so. Furthermore, the choice of Portugal and Brazil is particularly appropriate as they took opposite paths on this issue even though, as we shall see, the consequences have not differed greatly in terms of the effective protection of their underwater cultural heritage.

5.3. The Portuguese Case

Although Portugal ratified the UNESCO Convention in 2006, it is curious to note that the previously existing legal system did not change in any way at all. While the Portuguese legislation, in particular Decree-Law 164/97 of 27 June 1997, on underwater archaeological activity, was already clearly antiquated and contradictory by that period in the late 1990s, as we have maintained demonstrated in a previous article[47], this merely worsened after the UNESCO Convention came into force. We here raise two types of questions.

The first approaches the surprising contents of article 2 of Decree-Law 164/97, under the heading "State Property". This precept determines that underwater cultural heritage with no known owner, or that which is not recovered by the respective owner within a period of five years, becomes state property. Without further consideration, we inquire into the following: is this compatible with the immunity of warships and state ships as recognised by international law and the UNESCO Convention? Moreover: how can such an emphatic declaration of state property be compatible with the wreck of *Nuestra Señora de las Mercedes*, located in waters under Portuguese jurisdiction? Is such a normative prescription some mere proclamation of no consequential effect, which the omissive attitude of the Portuguese state is responsible for issuing?

The second concerns the regime of rewards as foreseen in articles 16 and following of the aforementioned Decree-Law. Given that article 17 (1) awards a monetary amount to the discoverer, improperly called the finder, in relation to a cultural asset that is still to be inventoried. However, article 3, under the heading "inventorying", stipulates underwater cultural assets shall only be inventoried when their relevant historical, artistic or scientific interest deserves special protection. In other words, the award does not cover all underwater cultural assets but only those subsequently subject to inventorying. Therefore, quite understandably, another provision, article 14(3), recognises the eventuality of the Ministry of Culture neither deciding on the value of a particular underwater asset nor approving the inventory proposal. We must underline Decree-Law 164/97 only explicitly revokes Decree-Law 289/93 and coexists with other important pieces of legislation, such as the General Regulations for Captaincies[48] and the Customs Regulation[49] which, in turn, contain very antiquated precepts.

We therefore consider it important to approve a new protection regime on for underwater cultural heritage: a system able to reconcile conflicting provisions and, above all, adapts domestic law to the provisions of the UNESCO Convention, which was approved and ratified by Portugal. Is this really too much to expect? Especially when the debate and legislative work on the domestic legal consequences, following the ratification of the 2001 UNESCO Convention, is clearly on the agenda in other countries[50].

2001 UNESCO Convention. Cf. "Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf" in *Stanford Environmental Law Journal*, no. 33, 2014, pp. 261 et seq.. As regards the recovery of the Belitung in Indonesia, there was also an alteration in the paradigm. Cf. "UNESCO and the Belitung Shipwreck: The Need for a Permissive Definition of "Commercial Exploitation" in *George Washington International Law Review*, no. 45, 2013, pp. 860 et seq..

[47] JL Bonifácio Ramos, *O Achamento*…op. cit., pp. 785 et seq..

[48] Cf. Decree-Law no. 265/72 of 31 July, amended by Decree-Law no. 370/2007 of 6 November.

[49] Cf. Decree no. 31730 of 15 December 1941, amended by Law no. 66-B/2012 of 31 December.

[50] In Spain, the issue has been widely debated in legal theory. Cf. Elsa González, *La Protección*… op. cit., pp. 29 et seq.. In Italy, more progress has been made even though Italian ratification came later with legislative amendments following on from the approval of the UNESCO Convention. On the one hand, Legislative Decree no. 41 of 22 January 2004, which approved the *Codice dei Beni Culturali e del Paesaggio*, makes several references to underwater cultural heritage in a manner consistent with the requirements of the 2001 UNESCO Convention. Furthermore, Law no. 157 of 23 October 2009, which authorised the President of the Republic to ratify the UNESCO Convention, enshrines various provisions relating to the discovery and study of underwater cultural assets.

In addition to the legislative inaction, there is a shocking omission by the authorities as regards the protection of underwater cultural heritage. We may correspondingly simply highlight the case of the wreck of *Nuestra Señora de las Mercedes*, located in Portuguese territorial waters, claimed by the Kingdom of Spain against *Odyssey*. However, the legal proceedings brought by the Kingdom of Spain before the American courts were impassively silenced by the Portuguese authorities when it was after all realised the wreck was located in waters under the national jurisdiction. To add to the surrealism, we must underline that those responsible for Portuguese underwater archaeology even suggested a diplomatic move in the opposite direction following the American courts having ruled in favour of the Spanish initiative in the case of the wrecks of the frigates *La Galga* and *Juno*[51]. In fact, taking these positions into account, we can understand, even if not accept, the omission of the Portuguese authorities regarding *Nuestra Señora de las Mercedes.* Moreover, as a matter of curiosity, after extensive and damaging underwater recovery work ongoing between 2007 and 2015, the Spanish authorities submitted a request to the Portuguese Ministry of Foreign Affairs to access whatever remains of the wreck. We shall await the Ministry's response: in all likelihood a revisitation of the popular saying "locking the stable door after the horse has bolted"?

There is another facet that fits in with the trend of resignation detailed above. Without beginning to be exhaustive, we may cite other paradigmatic cases. In particular, there is the *S. Bartolomeu*, a vessel serving the Indian Route, that was wrecked in the Bay of Biscay, in French territorial waters, in 1627. After the discovery of the respective wreck, the ISEAM – the International Society of Engineering Asset Management – presented a request that deserved a competent answer from the Portuguese Ministry of Culture [52]. Subsequently, despite the French Republic expressing its willingness to conclude a bilateral agreement with the Portuguese Republic to help preserve the wreck and this being agreed to by the Ministry of Foreign Affairs[53], various difficulties were then raised by the Underwater Archaeology Department of the Ministry of Culture[54]. Indeed, in a subsequent memorandum, the Director of IGESPAR – the Institute for the Management of Architectural and Archaeological Heritage – stated that the wreck was only a "virtual reality" and searching for wrecks did not even constitute a national priority[55] although it was common knowledge that several private companies were interested in wrecks such as that of the *S. Bartolomeu*.

We may also point to the case of the wreck of ship *Bom Jesus*, sunk off the African coast in 1530, with the remains subsequently found by chance, buried in sand, in Namibian territorial waters in 2008. In that same year, a South African archaeologist informed the Portuguese Consulate in Cape Town of the discovery of the wreck identified by the unusual quantity of coins, astrolabes and cannons that undoubtedly illustrated its origins. Subsequently, given the public repercussions the issue generated, as it was perhaps the most relevant archaeological discovery made in Sub-Saharan Africa or even the most important treasure ever found in Africa outside of the *Valley of the Kings* (Egypt), Portuguese representatives were understandably dispatched to Namibia to participate in a stakeholder meeting.[56]. However, the corresponding attitude may neither be accepted nor even understood. In fact, even prior to the meeting, the Namibian authorities had described the wrecks discovered as the common property of the two countries [57]. However, surprisingly, or perhaps unsurprisingly, the Portuguese representation stated that the Portuguese state interest lies not in possession of the remains, as a flag state, but only in collaborating in safeguarding those objects[58].

[51] In a statement regarding a galleon discovered in Brazil under Portuguese immunity, Francisco Alves, the Director of CNANS (National Centre of Nautical and Underwater Archaeology), cites the case of the wrecks of Juno and La Galga to infer that initiatives related to the principle of sovereign immunity of warships and state vessels should be "begrudgingly" accepted. He even suggests that the Portuguese state should proclaim its intention to "offer" the spoils to the coastal states where the discovery has occurred while "only demanding the sharing of their study". Cf. Information CNANS 2002/241, of 23 August.

[52] For further details, cf. JL Bonifácio Ramos, "O Navio…" in op. cit., p. 477.

[53] Cf. Opinion of the Department of Legal Affairs of the Ministry of Foreign Affairs of 7 July 2008, sent by the Cabinet of the Minister to the Ministry of Culture on the following day.

[54] Cf. CNANS information 2003/314 of 29 October.

[55] Cf. Order of the IGESPAR Director, 4 August 2010.

[56] The stakeholder meeting was held in Oranjemund, Namibia, on 21 and 22 August 2008.

[57] Cf. Francisco Alves, O Navio Português do Século XVI de Oranjemund, Namíbia: Relatório das Missões de 2008 e 2009, Lisbon, 2009, p. 11

[58] Cf. Francisco Alves, O Navio…" in op. cit., pp. 14-5.

Moreover, even the Portuguese origin of the ship was unable to raise any doubts[59] neither did its classification as a warship or state vessel[60]. What is utterly incomprehensible is the omissive attitude of the Portuguese authorities in the face of the principles and rules of the UNESCO Convention on the preservation of underwater cultural heritage, which it had so faithfully approved and ratified.

5.4. The Brazilian Case

Brazil, in turn, has yet to ratify the UNESCO Convention and was one of the countries that abstained on its approval in 2001 along with Israel, Greece, the Netherlands and Sweden, among others.

As a country with an extensive maritime coastline, it would benefit greatly from such ratification, however, only provided this would not imply an eminently formal act without any consequences in terms of domestic law as happened in Portuguese law. In contrast, any such ratification would imply profound changes in the short term to domestic law. Indeed, if you might allow me an opinion: Brazilian Law no. 7542 of 26 September 1986, amended by Law 10.166 of 27 September 2000, seems more closely focused on maritime assistance and rescue operations as concluded by the reading of articles 3 and following of that law, consequently mitigating the problematics related to protecting underwater cultural heritage.

Only article 20 and following accept that underwater assets hold historical, artistic or archaeological value and therefore are of cultural value should we adopt current terminology. However, the content of these precepts raises serious concerns regarding the actual protection of underwater cultural heritage. Indeed, the legal framework authorises the concession of the exploitation of cultural assets to third parties through granting rewards to concessionaires for discovering or surveying the asset and thereby encouraging what is known as underwater treasure hunting.

In fact, paragraph 2 of article 20 stipulates, *expressis verbis*, that the contract or act of authorisation may grant the payment of financial sums to concessionaires for the removal of property of artistic value, historical or archaeological interest, which may consist of awarding a sum calculated as up to a maximum limit of forty percent of the total value attributed to those assets. Moreover, to ensure the deviation extends still further, article 21 even provides the terms for the paying out up to a limit of sixty percent of the total value of the rescued property. In other words, explorers may appropriate over half the financial value of all the goods discovered.

Moreover, without claiming to be exhaustive as regards the perplexities potentially compromising the protection and safeguarding of underwater cultural heritage, we should reference paragraph 3 of article 29 that even allows for the disposal of underwater assets that are difficult to keep or preserve.

Under this legal regime, the discoverer or restorer of an underwater cultural asset may acquire title, ownership of part of that asset. This is reminiscent of the old-fashioned civilian treasure regime; long considered inadequate to protect underwater cultural heritage. In simple terms, this legal regime, clearly framed within the privatist model of finding[61], veers away from the effective protection of underwater cultural heritage in encouraging, as we may easily observe, the exploitation of cultural assets in return for a monetary prize or reward. Such reward may in some cases be the goods themselves. Therefore, we may well understand the reference Inês Virgínia Prado Soares make when pointing to the criticism this legal regime has been subject to by archaeologists and other defenders of cultural assets, furthermore emphatically alluding to the correlating absence of surveillance powers over the maritime environment by the official entities of the Union[62]. As such is the case, we must recognise how this system provides an ideal status quo for the lucrative activities of treasure hunters in the Brazilian territorial waters and exclusive economic zone; a reality that should clearly be immediately reversed for the effective preservation and protection of underwater cultural heritage.

[59] Cf. Shadreck Chirikure, Ashton Sinamai, Esther Goagoses, Marina Mubusisi, and W Ndoro "Maritime Archaeology and Trans-Oceanic Trade. A Case Study of the Oranjemund Shipwreck Cargo, Namibia" in *Journal of Maritime Archaeology*, no. 5, 2010, pp. 37 et seq..

[60] Francisco Alves himself acknowledges this in his report, cf. "O Navio…" in op. cit., p. 45.

[61] This was the opinion we expressed in Ouro Preto on the occasion of the 1st Luso-Brazilian Congress on Cultural Heritage Law, held in March 2011. Cf. "Novas Fronteiras do Património Cultural no Dealbar do Século XXI-Contribuição da UNESCO, Consequências no Direito Português e Brasileiro" in *Estudos em homenagem ao Prof. Doutor Jorge Miranda*, Coimbra, 2012, p. 223.

[62] Cf. Inês Virgínia Soares, *Direito ao (do) Património Cultural Brasileiro*, Belo Horizonte, 2009, p. 253.

6. Conclusions

In summary, in view of the extensive Brazilian coastline visible from Cabo Branco, well aware of the maritime battles and incidents that, down through time, have caused groundings and shipwrecks, it is important to emphatically underline the importance and prominence of underwater cultural heritage. There will certainly be shipwreck time capsules, several Pompeiis, very close to your coast. Very close to us.

Taking into account the entry into effect of the UNESCO Convention, it is important to highlight, above all, preservation in situ, sovereign immunity and the problems of agreements between states, which significantly predate the UNESCO Convention. This naturally raises the interest in assessing the actions of the various states: states that have and have not approved and ratified the Convention. However, given the extreme difficulty in assessing all the legal systems, the Portuguese and Brazilian cases represent paradigmatic examples of these options.

Thus, the Portuguese state continues to display a worrying attitude of apathy and neglect, characterised by omission and resignation. It is omissive as regards the failure to align domestic law after having ratified the Convention exactly ten years ago. It is resigned in regard to its inaction over signing agreements with third countries and, above all, in regard to the discovery of wrecks in all four corners of the world covered by Portuguese sovereign immunity.

In turn, the Brazilian state, which has extensive maritime coastlines, decided not to ratify the UNESCO Convention on the assumption that it had a legal system conducive to protecting underwater cultural heritage. However, this is clearly not at all the case. The legal situation would rather seem to encourage the criminal activities of underwater treasure hunters.

In short, we hope this status quo will soon change so that the current challenges facing cultural heritage in general, and underwater cultural heritage in particular, will receive more effective and proficient responses from the legislators in both countries as well as from administrative entities and the law-and-order authorities responsible for monitoring the maritime waters under the sovereignty of these two countries.