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The underwater cultural heritage regime: some problems and possible solutions

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The underwater cultural heritage regime: some problems and possible solutions*

Patrimônio Cultural Subaquático - Problemas e Soluções

Elina Moustaira**

Abstract

The development of modern survey, navigation, diving and remotely operated vehicle technologies contributed to the development of maritime archaeology and exploration and protection of shipwrecks by the official domestic authorities, but also to accessibility of the underwater world by private persons and enterprises. The regime of the 1982 UNCLOS III has been proved absolutely counterproductive for the protection of the underwater cultural objects. The 2001 UNESCO Convention is an improvement, being though a compromise – as is every international instrument. It states that "the protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option". Its opponents, though, argue that it does not give the speedy response that would be needed in order to repress "the international industry of treasure hunters". Various countries have enacted laws on the protection of underwater cultural heritage. Obviously, differences in legal systems are reflected in said national laws. Undoubtedly, problems are much more difficult to resolve in areas that are disputed between the various littoral States. Famous cases show that agreements between the States can play a crucial role to the resolving of complicated situations. In any case, protection of the underwater cultural heritage should always be the target.

Keywords: Shipwrecks. Cultural heritage. Underwater archaeology. In situ preservation. Coastal State jurisdiction. Flag State jurisdiction. 2001 UNESCO Convention.

Resumo

O desenvolvimento de tecnologias modernas de pesquisa, navegação, mergulho e veículos operados remotamente contribuíram para o desenvolvimento da arqueologia marítima e a exploração e proteção de naufrágios pelas autoridades oficiais dos países, mas também para a acessibilidade do mundo subaquático por particulares e empresas . O regime da UNCLOS III de 1982 provou-se absolutamente contraproducente para a proteção dos objetos culturais subaquáticos. A Convenção da UNESCO de 2001 é uma melhoria, embora seja um compromisso - como todo instrumento internacional. Afirma que "a proteção do patrimônio cultural subaquático por meio da preservação in situ deve ser considerada como a primeira opção". Seus oponentes, porém, argumentam que ela não dá a resposta rápida que

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seria necessária para colocar obstáculos à "indústria internacional de caçadores de tesouros". Vários países promulgaram leis sobre a proteção do patrimônio cultural subaquático. Obviamente, as diferenças de mentalidades jurídicas refletem-se nessas legislações nacionais. Sem dúvida, os problemas são muito mais difíceis de resolver, em áreas disputadas entre os vários Estados do litoral. Casos famosos mostram que os acordos entre os Estados podem desempenhar um papel crucial na resolução de situações complicadas. Em qualquer caso, a proteção do patrimônio cultural subaquático deve ser sempre o objetivo.

Palavras-chave: Naufrágios, patrimônio cultural, arqueologia subaquática, preservação in situ, jurisdição do estado costeiro, jurisdição do Estado de bandeira, Convenção da UNESCO de 2001.

1 Introductory remarks

It is estimated that there are almost 3 million non--discovered shipwrecks in the oceans and that about 300.000 ships were sunk each century.[1]

When divers first started searching about them, the target was the discovery of lost cargos from known shipwrecks, in order to reintroduce them in the commerce – especially in Northern Europe, where the diving technology was used uniquely for this purpose and where the law of salvage was used. There was no interest there, about the historical and archaeological value of the shipwrecks.

On the contrary, in the Mediterranean Sea, the diving technology was used both for the recovery of shipwrecks cargos and for the gathering of useful underwater resources, such as sponges. Thus, since 1800, Greek sponge divers and fishermen, searching for sponges, started finding precious archaeological items too - for example the Adolescent of Antikythera.

It was only natural that Mediterranean countries were the first to enact and apply rules for the recovery of underwater cultural objects, analogous to those that were applied to the cultural objects that were found in the earth[2]. It was the beginning of the creation of a legal regime that was based on estimations different from those made on the economic value of the historical archaeological finds.[3]

As time went by, more and more countries were faced with the dangers of losing their underwater cultural property, and, therefore, with the need to protect and preserve it. The development of modern survey, navigation, diving and remotely operated vehicle technologies contributed to the development of the maritime archaeology and the exploration and protection of shipwrecks by the official authorities of the countries but also to the accessibility of the underwater world by private persons and enterprises[4]. The latter, professional treasure hunters and recreational scuba divers, often destroyed the cultural sites, trying to extract objects for their own or others' collections. Measures had to be taken.[5]

2 General Issues

Some countries had laws protecting their cultural heritage – some (a minority) even had specific legislation on underwater cultural heritage[6]. Common law coun-

1 CHENG, A. C. All in the same boat? Indigenous property rights in underwater cultural heritage. *Houston Journal of International Law*, v. 32, p. 695, 2010.

2 MAARLEVELD, T. J. Ethics, underwater cultural heritage, and international law. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 917-924, distinguishes between four different traditions of maritime archaeology and management of underwater sites: the Mediterranean or "classical" tradition, the northern European or "prehistoric" tradition, the "cultural resource management" tradition, and the tradition of maritime historical exploration that was followed in major projects, "such as those relating to the wrecks of *Vasa*, *Mary Rose*, *H. L. Hunley*, or *La Bellè*".

3 COHN, A. B.; DENNIS, J. M. Maritime archaeology, the dive community, and heritage tourism. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 1055.

4 See LESHIKAR-DENTON, M. Caribbean maritime archaeology. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 629-630: "While appreciation of this finite cultural heritage exists, a dominant problem, especially for shipwrecks, is the perceived commercial value of real and imagined treasure cargoes".

5 COHN, A. B.; DENNIS, J. M. Maritime archaeology, the dive community, and heritage tourism. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 1055.

6 Most of the national laws on the protection of underwater cultural heritage were enacted during the last decades, "driven by the preservation communities", see RUNYAN, T. Management of maritime cultural resources: an American perspective. *In:* CATSAMBIS,

tries were applying – some still do – maritime law (admiralty law) to underwater cultural heritage, that is, the law of salvage and the law of derelict (Australia, United Kingdom) or finds (USA). A primary goal of underwater cultural heritage protection is the *in situ* protection of the relevant items. The laws of salvage and derelict (finds) do not deal with advancing that protection.[7]

As it is quoted in U.S. courts' judgments, under the law of finds,

> persons who actually reduce lost or abandoned objects to possession and persons who are actively and ably engaged in efforts to do so are legally protected against interference from others, whereas persons who simply discover or locate such property, but do not undertake to reduce it to possession, are not.[8]

The law of finds "is applied to previously owned sunken property only when that property has been abandoned by its previous owners."[9] The law of salvage

> specifies the circumstances under which a party may be said to have acquired, not title, but the right to take possession of property (e.g. vessels, equipment, and cargo) for the purpose of saving it from destruction, damage, or loss, and to retain it until proper compensation has been paid.[10]

Big, conflicting, interests are often at stake. However, preservation of the underwater cultural heritage is more important than "treasure hunting even under the auspices of traditional maritime salvage law"[11].

A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 942-945.

7 DWYER, G. J. Ship shape or all at sea? A preliminary assessment of Australia's recent legislative reforms concerning underwater cultural heritage. *Australia & New Zealand Maritime Law Journal*, v. 32, p. 71-75, 2018.

8 Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560, 572-73 (5th Cir. 1981).

9 Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 461 (4th Cir. 1992).

10 Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450, 460 (4th Cir. 1992).

11 BARBASH-RILEY, L. Using a community-based strategy to address the impacts of globalization on underwater cultural heritage management in the Dominican Republic. *Indiana Journal of Global Legal Studies*, v. 22, p. 203, 2015.

3 1982 Third United Nations Convention on the Law of the Sea (UNCLOS III)

This Convention imposes on salvors of shipwrecks in international waters the duty to protect the historical nature of the shipwrecks (art. 303 par. 1).[12]

It seems that the regime of UNCLOS III has been proved absolutely counterproductive for the protection of the underwater cultural objects.

According to article 149 of the Convention,

> 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.

The article does not clear out, though, the relationship between the various preferential rights nor does it say who would be the adjudicator of those.

Article 303 of the Convention establishes that the States have a duty to protect the objects of an archaeological and historical nature found at sea and shall cooperate for this purpose (par. 1), and expands the jurisdiction of the coastal State to these objects found in the territorial sea and the contiguous zone (par. 2). The fact that there is no regulation about the underwater cultural objects found in the continental shelf is problematic, especially given the fact that researches (by divers) show that this area is very rich in such objects.[13]

In paragraph 3, the Convention states that "[n]othing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges". This regulation is particularly disconcerting, since it gives the lead to the law of salvage and to the other rules of maritime/admiralty law, before any other rule, the obligation of protection and cooperation of paragraph 1, included. As it is pointed out, this is a clear invitation to looting of the underwater cultural treasure.[14]

12 HALLWOOD, P.; MICELI, T. J. Murky waters: the law and economics of salvaging historic shipwrecks. *Journal of Legal Studies*, v. 35, p. 285-286, 2006.

13 MOUSTAIRA, E. N. Underwater cultural objects and private international law. [in Greek]. *Elliniki Dikaiosyni,* v. 36, p. 1024-1037, 1995.

14 SCOVAZZI, T. Dal Melquart di Sciacca all'atleta di Lisippo. *Riv-*

The real problem of UNCLOS III is the absence of a clear definition of the jurisdictional limits of each State, and the evident preference shown to the rules of the common law countries, especially of the USA.

The U.S. Court of Appeals for the 4th Circuit, in its judgment of March 24, 1999, concerning the shipwreck of the Titanic[15], declared that the law of salvage and finds is a "venerable law of the sea", that is supposedly applicable to all the seas of the world. The court also stated that said law was based on a custom that had its origin in the ancient Rhodes (900 B.C.), Rome (Justinian Corpus Juris Civilis, 533 A.D.), the Italian city Trani (1063), England (law of Oleron, 1189), Hanseatic Union (1597) and France (1681).

As it is poignantly stated, it seems that some U.S. judges are "much better than normal people", being able to understand all languages in which this "venerable law of the sea is written" and interpret those rules. But in reality, it is argued, these arrogant and somewhat theological expressions are euphemisms of doubtful worth, that cover approaches that favor the trade of the underwater cultural objects, being indifferent to concepts like those of the non-commercial value of those objects or their use for the common benefit[16].

4 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage

The 2001 UNESCO Convention is a product of compromise, as is every multilateral Convention[17]. In the framework of the law of the sea, it can be said that the 1982 Convention is a *lex generalis*, while the 2001 Convention is a *lex specialis* for the underwater cultural heritage and its protection.[18]

The final text of the Convention was the result of 4 years of official negotiations at UNESCO, based on proposals and a draft Convention prepared by the International Law Association in 1994.[19] The Convention was adopted on November 2, 2001, without consensus. 87 States voted in favor, 4 voted against, and there were 15 abstentions.

Among the States that abstained from voting were France, Greece and the United Kingdom. On February 2, 2013, France deposited the instrument of ratification of the Convention. Most probably, France changed its stance because the private company Odyssey had started searching for shipwrecks, on behalf of the United Kingdom, in the Channel[20].

The United Kingdom is against the provisions of the 2001 Convention that concern immunity of shipwrecks, mainly because it considers war losses during the 20th century a delicate matter, and believes, as many other Western States do, that shipwrecks of State vessels are still entitled to immunity even when they are found in the territorial sea of other coastal States.[21]

Greece has not signed the 2001 Convention, not agreeing with the provisions about international jurisdiction of States.

An important advantage of the 2001 Convention is that, in case all the countries concerned are State Parties, the Convention is directly applicable at the moment someone would express his intention to exercise activities in regard to underwater cultural objects; that is, there is a concrete legal framework in place before any intervention of a third person, so that the management of the area can take place on the basis of the principles

ista di Diritto Internazionale Privato e Processuale, v. 5, n. 14, 2011.

15 R.M.S. Titanic, Inc. v. Haver, International Legal Materials 1999, 807.

16 SCOVAZZI, T. The protection of the underwater cultural heritage: an Italian perspective. *In:* VRDOLJAK, A. F.; FRANCIONI, F. (eds.). *The illicit traffic of cultural objects in the Mediterranean*. Fiesole: European University Institute, 2009. p. 75-81.

17 CARDUCCI, G. Current status and future prospects for the 2001 Convention: the UNESCO perspective. *In:* THE UNESCO CONVENTION FOR THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE. *Proceedings of the Burlington House Seminar*, Oct. 2005. Portsmouth: Nautical Archaeology Society, 2006. v. 1.

18 CARDUCCI, G. New developments in the law of the sea: the UNESCO Convention on the Protection of the Underwater Cultural Heritage. *American Journal of International Law*, v. 96, p. 419-420, 2002.

19 O'KEEFE, P. J.; NAFZIGER, J. A. R. Report: the draft convention on the UCH. *Ocean Development & International Law*, v. 25, p. 391, 1994.

20 DROMGOOLE, S. Revisiting the relationship between marine scientific research and the underwater cultural heritage. *The International Journal of Marine and Coastal Law*, v. 25, p. 33-36, 2010.

21 WILLIAMS, M. V. UNESCO Convention on the Protection of the Underwater Cultural Heritage: an analysis of the United Kingdom's standpoint. *In:* The UNESCO CONVENTION FOR THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE. *Proceedings of the Burlington House Seminar*. Oct. 2005. Portsmouth: Nautical Archaeology Society, 2006. v. 2.

of archaeological research and not on the basis of the law of salvage[22].

The 2001 Convention states that “the protection of underwater cultural heritage through *in situ* preservation shall be considered as the first option”[23], and that acts of salvage are only applied if they have been permitted by the competent authorities and on the condition that they are compatible with the spirit of the Convention. Specific regimes of cooperation are established between coastal States and flag States, as well as other interested States, depending on the places where the underwater cultural objects are located.

Opponents to the 2001 Convention (?) argue that the treaty does not give the speedy response that would be needed in order to put obstacles to “the international industry of treasure hunters” (*la industria internacional de cazatesoros*).[24]

The advocates of the Convention believe that it contributes in many ways in the protection of the underwater cultural objects and that preservation, access and research are being done according to widely recognized guidelines[25]. They also point out that the Convention is not an obstacle if States want to adopt more developed measures of protection or expand the protection to cultural objects submerged for less than that of 100 years, as the Convention establishes[26].

The Convention entered into force on January 2, 2009, for those States that deposited their respective instruments of ratification, acceptance, approval or accession on or before October 2, 2008. It enters into force for any other State three months after the deposit by that State of its instrument of ratification, acceptance, approval or accession. So far (as of August 2020), the Convention has been ratified or accepted by 64 States[27]. The future will show whether its rules are capable to regulate the very complicated and delicate issues of underwater cultural objects’ protection.

5 Countries: National Laws

Archaeologists’ concerns regarding the historical and archaeological relics that are found in the seabed are three-pronged: they believe that these objects must be searched *in situ*, they are absolutely contrary to the trade of these objects, and they argue that there are moral issues as far as human relics are concerned[28]. Evidently, they consider shipwrecks as underwater cemeteries, that must be protected both from salvage and removal.[29]

National laws confer varying degrees of protection to these objects[30]. At the international level, discussions on issues of underwater historical and archaeological objects started mainly in 1970s. An important obstacle to the protection of these objects were activities aiming at the commercial exploitation of whatever remained from ancient shipwrecks. These activities have their origin in the law of the sea of the end of the 19th century, according to which every maritime vessel belonged to the finder, at the moment that the last agent of the shipowner was supposed to have abandoned it. Common law countries’ acts on vessels’ salvage are similar[31].

Underwater archaeology has several differences to land archaeology. There are innate difficulties in the process of excavation, that render adequate, *in situ* examination of underwater historical and archaeological objects almost impossible. The cost of underwater archaeology activities is high, and to this are added the

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22 DROMGOOLE, S. The international agreement for the protection of the Titanic: problems and prospects. *Ocean Development & International Law,* v. 37, n. 1, 2006.

23 The 1996 ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage uses a more permissive phrase: “should be considered as a first option”.

24 LANCHO, J. M. Hacia un patrimonio cultural subacuático común hispánico. *In:* IKUWA, V. Un patrimonio para la humanidad. CONGRESO INTERNACIONAL DE ARQUEOLOGÍA SUBACUÁTICA, 5. Cartagena, 15-18 oct. 2014. *Actas*… Madrid 2016. p. 37-38.

25 MAARLEVELD, T. J. How and why will underwater cultural heritage benefit from the 2001 Convention?. *Museum International*, v. 60, n. 4, n. 240, p. 50-60, 2008.

26 FRIGERIO, A. L’entrata in vigore in Italia della Convenzione UNESCO 2001 sulla protezione del patrimonio culturale subacqueo. *Aedon:* Rivista di arti e diritto on line, n. 2, 2010.

27 https://pax.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha

28 VARMER, O. The case against the “salvage” of the cultural heritage. *Journal of Maritime Law & Commerce*, v. 30, p. 279-293, 1999.

29 BRYANT, C. R. The archaeological duty of care: the legal, professional, and cultural struggle over salvaging historic shipwrecks. *Albany Law Review*, v. 65, p. 97-101, 2001; STEWART, D. J. Gravestones and monuments in the maritime cultural landscape: research potential and preliminary interpretations. *International Journal of Nautical Archaeology*, v. 36, p. 112, 2007.

30 MOUSTAIRA, E. N. Legal protection of underwater cultural objects. [in Greek]. *In: Studies in memoriam of Prof. A.M. Antapassis*, 2013. p. 683-684.

31 RAMBELLI, G.; FUNARI, P. P. A. Patrimonio cultural subacuático en Brasil: pensamientos varios. *Memorias:* Revista Digital de Historia y Arqueología desde el Caribe, año 4, n. 7, 2007.

inevitable legal costs of the trials on conflicting claims between commercial salvors, owners of the shipwrecks, governments, insurance officers and heirs of the persons that were lost in shipwrecks. In case, also, of salvage by private companies, private investors who finance the salvage, are in favor of the recovered objects' sale, in order to pursue financial gains[32].

These differences were (and probably still are) leading to differences in the legal treatment of the underwater cultural objects from that of the other cultural objects. Some consider that as reasonable, some others, though, do not[33].

Since the adoption of the 2001 UNESCO Convention, several countries considered signing and ratifying it, but not all of them decided to do so. Nevertheless, some of the countries that did not sign and ratify it, either enacted laws with the aim to protect the underwater cultural heritage, or tried to improve their laws, if they had already such. These laws were and are very much influenced by the 2001 Convention. Such an example is Australia's recent legislative reforms: the *Underwater Cultural Heritage Act 2018*. It is a significant improvement of the *Historic Shipwrecks Act 1976*.[34]

On November 24, 2015, the Republic of China (Taiwan)'s Legislative Yuan adopted the Underwater Cultural Heritage Preservation (UCHP) Act. As it is mentioned, the UCHP Act incorporates the 2001 Convention's major principles. It is even more interesting, since the 2001 Convention has not been signed and ratified by the country. Following the 2001 Convention's major principles, the Act does not permit commercial exploitation of the underwater cultural heritage and it does create rules of preservation *in situ*. Among the latter is the designation of protection zones (articles 28-33).[35]

Problems are much more difficult to solve in areas that are disputed between the various littoral States. One such area is the South China Sea (SCS). The SCS littoral States are: Brunei, Cambodia, China, Indonesia, Malaysia, the Philippines, Thailand, Singapore, and Vietnam. All SCS littoral States have ratified the 1982 United Nations Convention on the Law of the Sea (UNCLOS), except Cambodia, which has signed but not ratified the Convention. Cambodia is the only SCS littoral State that has ratified the 2001 Convention (in 2007).[36]

The area contains more than 2.000 sunken ships. It connects the Andaman Sea with the Pacific Ocean. It has long been used as a trade route and is also called "Maritime Silk Road".[37] The fact that there are many territorial disputes between the SCS littoral States[38] is a hindrance to exercise jurisdiction for the protection of underwater cultural heritage in these areas.

In Greece's first archaeological law, enacted in 1834, there was a reference to underwater antiquities (art. 62), which – exactly like all the other antiquities – were considered property of the State. Law 3028/2002 "For the protection of Antiquities and of the Cultural Heritage in general", contains, for the first time, provisions that cover all issues of underwater antiquities' protection and management. As it was mentioned above, Greece abstained from voting for the adoption of the 2001 UNESCO Convention.

Spain has a rather well-organized system of underwater cultural objects' protection. This system is not set specifically for those objects; it is deduced from the law 16/1985, on the Spanish Historical Heritage (*Patrimonio Histórico Español*), the laws on cultural heritage that have been enacted by the Autonomous Communities, as well as the laws that have been enacted in order to develop and complete the above mentioned ones. During the last years, there are also voices supporting the opinion

[32] COHAN, J. A. An examination of archaeological ethics and the repatriation movement respecting cultural property: part one. *Environs:* Environmental Law & Policy Journal, v. 27, p. 349-363, 2004.

[33] RAMBELLI, G. Safeguarding the underwater cultural heritage of Brazil: legal protection and public archaeology. *Museum International,* v. 60, n. 4, n. 240, p. 70, 2008.

[34] Which had already "fundamentally changed the management of historic shipwrecks, and consequently the nature of maritime archaeology, in Australia", see STANIFORTH, M. M. Australian maritime archaeology. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 561-564.

[35] CHEN-JU, C. State practice of Taiwan regarding underwater cultural heritage preservation. *Asia-Pacific Journal of Ocean Law and Policy,* v. 1, p. 251-253, 2016.

[36] NITIRUCHIROT, Y. Drafting a cooperative agreement for the protection of underwater cultural heritage in the South China Sea. *China Oceans Law Review*, p. 49-53, 2018.

[37] NITIRUCHIROT, Y. The challenges of underwater cultural heritage protection in the South China Sea. *China Oceans Law Review,* p. 244-246, 2016.

[38] For example: over Xisha Islands between China and Vietnam, over the Nansha Islands between China, Malaysia, the Philippines, and Vietnam, over Scarborough Shoal between China and the Philippines, and over Sabah between Malaysia and the Philippines, see NITIRUCHIROT, Y. Drafting a cooperative agreement for the protection of underwater cultural heritage in the South China Sea. *China Oceans Law Review*, p. 49-53, 2018.

that the establishment of a specific legal regime of underwater cultural heritage protection would be appropriate.[39]

The US, under the Abandoned Shipwreck Act of 1987, claimed title to any abandoned shipwreck within three miles of the coast (43 U.S.C. § 2105(a)(1) and simultaneously transferred title to the respective States (43 U.S.C. § 2105(c)).[40]

Interestingly, the US has not ratified neither UNCLOS III nor the 2001 UNESCO Convention. It seems that among the reasons for that negative stance, were "concerns over creeping jurisdiction (*horror jurisdictionis*) by coastal states"[41] and the treatment of warships within territorial sea[42]. Nevertheless, although the US is not a party to the 2001 UNESCO Convention, it complies with the terms of its Annex Rules, accepting them as a matter of custom.[43]

6 Disputed Ownership: The Case of the Galleon San José

It is sometimes argued that the Spanish Empire´s principal aim, while expanding to the West Indies, was to find and carry back home spices and various raw materials, such as tobacco, sugar, cacao. History shows that, although raw materials were really needed, the aim of the Spanish Empire (and of every Empire) was power, and the establishment and preservation of power need resources. Thus, very soon, in order to finance the Empire and the inevitable wars, precious metals and gems of the New World as well as colonial land taxes became the real target[44].

In 1706, when the Spanish Empire was in war with other European countries/empires (War of the Spanish Succession), the *San José* galleon, together with 2 more warships, left Cadiz, heading toward the Caribbean. In 1708, loaded with goods,[45] was heading toward Cartagena, Colombia, when the fleet was hit by English warships, which had chased the Spanish ship for months. On June 8, 1708, *San José* was exploded and sunk, with almost 600 persons that were aboard.

In December 2015, the Colombian President claimed on social media that the galleon *San José* had been found in Colombia's territorial waters, 1.000 feet below the surface, 16 miles from Cartagena. In 1981, the Glocca Morra Company, a U.S. salvage firm (which was later acquired by Sea Search Armada - SSA), had claimed to have found the same shipwreck, 800 feet below the surface, at an undisclosed location near Colombia's coast.[46] Since then (the first "discovery"), legal rights to the shipwreck and its property have been litigated before U.S. and Colombian courts, between SSA and Colombia. After 2015, Spain and Peru have also staked claims to the property.

The Colombian Supreme Court, in 2007, ruled that SSA had the right to half of any treasure at the shipwreck site that was not considered "national patrimony". In one of many lawsuits, SSA estimated the value of the cargo at between $4 billion and $17 billion. The Colombian government did not proceed to a payment to SSA, therefore SSA turned to US courts, which largely decided that ownership of the *San José* remains with Colombia.[47]

In April 2019, the Superior Tribunal of Barran-

[39] ÁLVAREZ GONZÁLEZ, E. M. *La protección jurídica del patrimonio cultural subacuático en España.* Valencia: Tirant Lo Blanch, 2012. p. 144.

[40] OCHOA, T. T. Copyright and underwater cultural heritage. *Journal of Maritime Law & Commerce*, v. 49, p. 441-445, 2018.

[41] RUNYAN, T. Management of maritime cultural resources: an American perspective. *In:* CATSAMBIS, A.; FORD, B.; HAMILTON, D. L. (eds.). *The Oxford handbook of maritime archaeology*. Oxford: Oxford University Press, 2011. p. 942-949. As he mentions, U.S. "has asserted sovereign rights in its territorial sea and jurisdiction over the contiguous zone, the continental shelf, and the Exclusive Economic Zone".

[42] VARMER, O.; GRAY, J.; ALBERG, D. United States: responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. *Journal of Maritime Archaeology*, v. 5, p. 129-131, 2010.

[43] GONGAWARE, L. To exhibit or not to exhibit?: establishing a middle ground for commercially exploited underwater cultural heritage under the 2001 UNESCO Convention. *Tulane Maritime Law Journal*, v. 37, p. 203-206, 2012.

[44] HAYNES, C. Decolonizing shipwrecks through considerations of indigeneity in underwater cultural property decisions. *Florida Journal of International Law*, v. 30, n. 111, p. 124, 2018.

[45] "Nearly all of its 1066 tons were loaded with pearls from Panama, gold from the mines of Peru, and emeralds, amethysts, and diamonds from the Andes mountains", see LANG, J. Disaster, deceit, and treasure: why the UNCLOS Resolution on Possession of Salvaged Wrecks is doing more harm than good. *Drexel Law Review*, v. 11, p. 383-385, 2018.

[46] HAYNES, C. Decolonizing shipwrecks through considerations of indigeneity in underwater cultural property decisions. *Florida Journal of International Law*, v. 30, n. 111, p. 124-126, 2018.

[47] HAYNES, C. Decolonizing shipwrecks through considerations of indigeneity in underwater cultural property decisions. *Florida Journal of International Law*, v. 30, n. 111, p. 140-144, 2018, for a detailed description of the litigation before Colombian and U.S. courts.

quilla (Colombia) issued an embargo on salvaging the shipwreck site, while the claims to ownership have not been decided by the courts. In October 2019, the Vice President of Colombia, Marta Lucía Ramírez, stated that the Colombian Government would not share the treasure from the shipwreck to finance the salvage operation, stressing the fact that all the pieces that would be rescued are of enormous and incomparable cultural value for Colombia and for the world.[48]

7 Sunken State Vessels: to whom do they belong?

A big number, if not the majority, of archaeological, historical or culturally important shipwrecks, are warships. These warship wrecks, even of the 20th century, are often considered as incorporating historical and cultural elements worthy of protection[49].

Obviously, the role of the flag State of sunken warships is very important[50]. In some cases, though, it is difficult to determine the flag State of ancient shipwrecks, many of which may be considered as sunken warships. Examples of those are the shipwrecks of Khmer, that are sunken in the delta of the river Mekong. Will those sunken warships be considered as belonging to Vietnam, Laos, Cambodia or Thailand? Likewise, will shipwrecks of the Phoenician fleet be considered as belonging to Lebanon, Syria or Tunisia? [51]

Furthermore, there are sunken warships whose flag States are easily determined, but about which there is a heated discussion among scholars, about whether state jurisdiction and sovereign immunity extend to ships which sink outside of the flag State territory.

However, the States practice and the International Conventions that are in force confirm the (majority) opinion that the immunity rule continues to be applied to sunken State ships, both because they are State ships, sunken or not, and because they are considered public property.[52] The States keep having ownership title on their sunken ships, even when they are in the territorial sea of some other State. Therefore, every action related to the shipwreck, salvage included, must have the express authorization of the ship's flag State[53].

8 Co-ownership of a State and Indigenous People?: The Case of Franklin Expedition Shipwrecks

In 2014 and in 2016, the Franklin Expedition shipwrecks HMS *Erebus* and HMS *Terror* were discovered in the Canadian Arctic. They had sunk in 1845, when Sir John Franklin had departed from England, on an expedition with the goal of finding the Northwest Passage. All 129 men that were on board died – not all of them sunk with the ships, some of them survived but eventually starved to death. Inuit people, who had seen men of the crew, told stories about them and the ships.

The United Kingdom had not given up hope that the shipwrecks would be found. In 1997, Canada and United Kingdom signed the "Memorandum of Understanding Between the Government of Great Britain and Canada Pertaining to the Shipwrecks *HMS Erebus* and *HMS Terror*". According to this Memorandum, United Kingdom would retain legal ownership and sovereign immunity over the wrecks and their contents (when they would be found), but Canada would exercise custody and control over the investigation, excavation, and recovery of the wrecks. The United Kingdom stated its intention to assign ownership of the wrecks and their contents to Canada, but would retain ownership rights over "any gold recovered from the wrecks", as well as "any recovered artifacts identified by Britain as being of

[48] https://thecitypaperbogota.com/news/galleon-san-joses-treasure-will-not-finance-salvage-claims-vp-ramirez/22910

[49] FORREST, C. J. S. Culturally and environmentally sensitive sunken warships. *Australia & New Zealand Maritime Law Journal*, v. 26, n. 80, 2012.

[50] UNCLOS articles 95 and 96 grant "complete immunity" to State vessels that are either "warships on the high seas" or ships that are owned by the State and that are "used only on government non-commercial seevice".

[51] In these cases, according to one opinion, the general principal of cooperation must reign, which principle gives absolute priority to the protection of the underwater cultural heritage, see AZNAR-GÓMEZ, M. J. Legal status of sunken warships "revisited". *Spanish Yearbook of International Law*, v. 9, p. 61-98, 2003.

[52] LABARGE, C. How two sunken ships caused a war: the legal and cultural battle between Great Britain, Canada, and the inuit over the Franklin Expedition shipwrecks. *Loyola Los Angeles International & Comparative Law Review*, v. 42, p. 79-84, 2019.

[53] AZNÁR-GÓMEZ, M. J. Treasure hunters, sunken state vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage. *The International Journal of Marine and Coastal Law,* v. 25, n. 209-223, 2010.

outstanding significance to the Royal Navy."[54]

The Canadian federal government has jurisdiction over shipwrecks within Canada, under the Canada Shipping Act of 2001, as amended (Dec. 12, 2017). The Act designates the Parks Canada Agency as the administrative body responsible for the protection of shipwrecks that have heritage value. In 1992, the Minister of Canadian Heritage declared that when the shipwrecks would be located, their locations would become National Historic Sites - under Parks Canada Agency jurisdiction.[55]

In 1999, a distinct Canadian territory, Nunavut, was officially formed out of the Northwest Territory. It includes the traditional lands of the Inuit, the indigenous people of Arctic Canada. Article 33 of the 1993 Nunavut Land Claims Agreement Act (which was the basis for the official formation of the territory) gives the Nunavut government jurisdiction over archaeological sites and artifacts found in its territory.

When the two shipwrecks were discovered, in 2014 and 2016, there were disputes among Parks Canada Agency and Nunavut in regard to jurisdiction over them. Finally, it was agreed that they would jointly manage the sites with the shipwrecks. On October 23, 2017, the United Kingdom formally stated its intention to assign ownership of the wrecks to Parks Canada Agency. Nunavut was not mentioned, probably because the United Kingdom considered it an internal Canadian issue. Nevertheless, Parks Canada Agency stated in its news release that there would be co-ownership of the Franklin artifacts with the Inuit.

On April 26, 2018, the United Kingdom officially assigned ownership of the shipwrecks to Canada. In the news release, the co-ownership of Canada and Inuit was confirmed:

> The United Kingdom will retain the 65 artifacts already recovered from HMS *Erebus* by Parks Canada's Underwater Archaeology Team as a representative sample of their importance and symbolism. All yet-to-be discovered artifacts from HMS *Erebus* and HMS *Terror* – along with the wrecks – will now be jointly owned by Canada and Inuit. This agreement ensures that these historic treasures will be available to Inuit, and the public and researchers in both Canada and the United Kingdom.[56]

9 Concluding Remarks

Are international instruments capable of solving all issues concerning underwater cultural heritage issues? Would it be possible for every State of the world to conform their rules to those of international instruments? Differences in national legal systems are an obstacle for establishing uniform protection on a State-by-State basis. Therefore, in the case of underwater cultural heritage - as in all cases of cultural heritage - diplomatic discussions and international agreements can play a crucial role to solve complex situations that may arise in that arena. In any case, adequate protection of the underwater cultural heritage should always be the means and the target.

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[55] See details about the case in: LABARGE, C. How two sunken ships caused a war: the legal and cultural battle between Great Britain, Canada, and the inuit over the Franklin Expedition shipwrecks. *Loyola Los Angeles International & Comparative Law Review*, v. 42, p. 79-86, 2019.

[56] https://www.canada.ca/en/parks-canada/news/2018/04/government-of-canada-receives-historic-gift-of-franklin-shipwrecks-from-united-kingdom.html

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