

# U.S. Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects

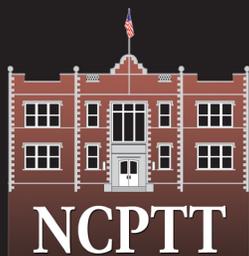
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## US protection of underwater cultural heritage beyond the territorial sea: problems and prospects

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Current US treatment of underwater cultural heritage beyond the territorial sea is analysed in light of Law of the Sea principles and the UNESCO Draft Convention on the Protection of the Underwater Cultural Heritage.

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*Key words:* underwater cultural heritage, treasure salvage.

### Introduction

Most nations have laws regulating the treatment of submerged cultural resources, including shipwrecks, within their territorial seas. In the vast ocean space beyond the territorial seas, however, legal protection of underwater cultural heritage is virtually non-existent, and the current international legal regime for the protection and management of submerged shipwrecks and other archaeological sites is confused and controversial (O'Keefe & Prout, 1983: 92–107; Nafziger, 1998).

In the United States, discussion of the protection and management of underwater cultural heritage has been dominated by the Abandoned Shipwreck Act (ASA) of 1987. Among American archaeologists, the long struggle to obtain passage of the ASA seems to have resulted in a belief that effective preservation of underwater sites has now been successfully achieved. The ASA, however, only covers certain categories of abandoned, historic shipwrecks within a 3-mile territorial sea (except in the waters of the Gulf of Mexico, where a 9-mile limit is historically observed). Beyond 3 miles, even though the United States has exercised some jurisdiction within an area extending 200 miles outward from the coast, there is still no comprehensive system of protection for submerged cultural resources; in fact, most of this vast ocean realm is wide open for unregulated treasure hunting.

This paper reviews current US practice regarding the protection and management of submerged cultural resources beyond the territorial sea. This review is particularly appropriate at the present time, in the light of ongoing international deliberations on the Draft Convention on the Protection of the Underwater Cultural Heritage, sponsored by the United Nations Educational, Scientific, and Cultural Organization (UNESCO). The United States, as a major maritime power with both a strong underwater archaeology community and a vigorous commercial salvage industry, is likely to play an influential role in the development of a new, comprehensive international legal regime concerning underwater cultural heritage. A consideration of the US experience in treating submerged cultural resources, both within and beyond the territorial sea, will highlight some of the problems and prospects that confront the international community as it attempts to fashion a new underwater cultural heritage agreement.

### Law of the sea and maritime zones

Since 1884 there have been more than 60 international agreements dealing with the law of the sea. Early concerns included rights of navigation, sailors' working conditions, shipping, and the slave trade. In recent decades the focus has shifted to fisheries conservation and management, environmental protection, and commercial

exploitation of seabed natural resources (Wang, 1992: 19). The most important recent multi-lateral efforts have been three United Nations Conferences on the Law of the Sea, held in 1958, 1960, and 1974–1982. The third Law of the Sea Convention (LOS), adopted in 1982 (United Nations, 1983), went into force in 1994; there are currently 130 parties to the convention. The United States did not ratify LOS because of a disagreement over its deep seabed mining provisions, but supports most of its other provisions as reflecting customary international law. Following a 1994 agreement to modify the deep-sea mining provisions, the United States has moved to accede to the agreement, but has not yet done so (Elia, 1994).

LOS recognizes several maritime zones that are subject to varying degrees of jurisdiction by coastal states. The ability of coastal states to control the disposition of underwater cultural heritage under existing international law is directly related to the maritime zone in which it is located; likewise, future efforts to protect submerged sites, whether enacted through national laws or by international agreement, must fit into the framework of these existing maritime zones and be consistent with established law of the sea principles.

LOS is the first major international maritime agreement to deal specifically with underwater cultural resources. Unfortunately, cultural heritage was considered only incidentally, and the topic was introduced quite late in the deliberations. The original concern was what to do in the case of archaeological objects found in the subsoil of the high seas, presumably during deep-sea mining of minerals. Later, a few countries proposed extending the jurisdiction of coastal states to include protection of archaeological material on the continental shelf. The United States led the opposition to this notion, concerned about ‘creeping jurisdiction’ in the maritime zones; it proposed, instead, that states be allowed to exercise control over archaeological objects within their contiguous zone (Strati, 1995: 162–165). This proposal was adopted as Article 303 (2) of LOS (see below).

Article 303 (1) of LOS, entitled ‘Archaeological and historical objects found at sea’, articulates a general obligation of states to protect the archaeological heritage: ‘States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose’. Article 303 (3) states that nothing in the

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’. Finally, Article 303 (4) allows for the development of future international agreements regarding archaeological objects (Strati, 1995: 175–176).

The LOS provisions relating to underwater cultural heritage fall far short of providing a viable, coherent legal regime for the protection and management of submerged archaeological resources. They betray both a lack of serious concern for the subject as well as some fundamental misunderstandings of the nature and scope of underwater archaeology and preservation. For example, the term ‘archaeological and historical objects’ is unnecessarily vague, was never defined, and unfortunately emphasizes objects instead of archaeological sites and their contexts. In addition, LOS never identifies an authority that would have responsibility for regulating the treatment of underwater cultural heritage. Despite these problems, LOS clearly imposes on states a positive duty to protect archaeological resources and to co-operate in that effort; moreover, as Article 149 states (see below), the underwater cultural heritage should be managed in the public interest (‘for the benefit of mankind as a whole’).

The following are the principal maritime jurisdictional zones recognized by LOS with reference to cultural heritage.

#### *Territorial sea*

States exert sovereign control over a belt of sea extending out from the coast. By the late 18th century, a 3-mile territorial sea was becoming standard in Europe (Brownlie, 1990: 188). LOS, reflecting a modern trend among nations to extend their territorial seas, allows nations to declare a territorial sea with a breadth of 12 miles. By 1993, 80% of nations had 12-mile territorial seas (Brown, 1994: I, 50). Underwater cultural heritage within the territorial sea is subject to the coastal state’s laws and policies.

#### *Contiguous zone*

LOS permits nations to enforce their national customs, fiscal, immigration, or sanitary laws within a belt of sea extending from the seaward edge of the territorial sea to no more than 24 miles beyond the coast. Thus, a nation with a 12-mile territorial sea may declare a 12-mile contiguous

zone, while a nation with a 3-mile territorial sea may declare a 21-mile wide contiguous zone. Fifty-eight nations currently claim a contiguous zone (Roach, 1997: 433).

Article 303 (2) of LOS allows coastal states to regulate 'objects of an archaeological and historical nature found at sea' within the contiguous zone by treating the unauthorized removal of such objects as 'an infringement within its territory or territorial sea of the laws and regulations' (presumably customs and fiscal) pertaining to the contiguous zone. Several nations now have legislation controlling submerged archaeological sites within the contiguous zone, including Denmark, France, Tunisia, and China (Strati, 1995: 185-186).

#### *Continental shelf/exclusive economic zone (EEZ)*

Since 1945, many coastal nations have exerted sovereign rights to control, regulate, and manage natural resources within an expanse of sea and seabed of variable extent, comprising the continental shelf. LOS allows nations to establish exclusive economic zones (EEZ), extending beyond the territorial sea and up to 200 miles from the coast. Within the EEZ, nations have sovereign rights to control exploration, exploitation, management, and conservation of living and non-living natural resources. By 1996, 97 nations claimed an EEZ (Roach, 1997: 433).

LOS provides no explicit protection for submerged cultural heritage within the continental shelf or EEZ. A number of states, however, have expanded their cultural heritage authority to encompass the continental shelf, including Australia, Ireland, Portugal, Spain, and Jamaica (Strati, 1995: 269; O'Keefe, 1996b: 171).

#### *The high seas*

Traditionally comprising all the seas beyond the territorial sea (Brown, 1994: I, 277), since LOS the high seas effectively begin at the seaward boundary of coastal states' EEZ. The principle of freedom of the high seas prevails in this region, to the exclusion of state sovereignty. The seabed and ocean floor beneath the high seas is known as 'the Area' in LOS, and comprises about 56% of the earth's surface (Wang, 1992: 207).

Article 149 of LOS deals with cultural heritage found in the Area:

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.

Unfortunately, LOS offers no guidance in determining how this provision might be made operative, since no international authority is named. In addition, the terminology regarding preferential rights of states is hopelessly confusing.

### **US treatment of submerged cultural resources**

LOS is noteworthy in taking positive, if incomplete, steps towards international legal protection of the underwater cultural heritage. It establishes the duty of nations to protect archaeological resources in the public interest and to co-operate in that effort. It allows nations to control archaeological sites within a 24-mile coastal zone and, even though coastal states have no special prerogatives regarding cultural heritage within their continental shelf or EEZ, the general obligation to protect applies, and there is a growing trend among nations to expand their control over submerged cultural heritage in these areas.

This section analyses the current US treatment of underwater cultural heritage in the several zones recognized by maritime law. As will be seen, the United States has legislation specifically dealing with underwater cultural heritage only within a 3-mile territorial sea (Abandoned Shipwreck Act); in extraterritorial waters, there is sporadic coverage under various laws and regulations but no comprehensive legal protection. Protection is limited in terms of type of cultural resource and maritime zone, and commercial treasure hunting is permitted, even encouraged, in much of the area under US maritime jurisdiction, without a clear indication of how these commercial operations are consistent with the LOS duty to manage archaeological resources in the public interest.

#### *US maritime zones*

The United States has traditionally maintained a 3-mile territorial sea (Mangone, 1997: 69). In 1988, by proclamation, President Reagan extended the US territorial sea to 12 miles to advance national security and other interests (Brown, 1994: II, 64-65). This proclamation specified, however, that no existing federal or

state laws or rights would be altered or extended by this action. Thus the United States has a 12-mile territorial sea for the purposes of national security, but retains a 3-mile territorial sea for most other laws, including the Abandoned Shipwreck Act.

Until 1999, the United States also recognized a contiguous zone extending outward to 12 miles, beginning at the seaward limit of the 3-mile territorial sea. The extension of the territorial sea in 1988 thus created an anomalous situation—there existed both a 12-mile territorial sea (with limited jurisdiction) and an overlapping contiguous zone from 3–12 miles out from the coast. On 2 September 1999, President Clinton signed a proclamation extending the contiguous zone between 12 and 24 miles out from the coastline; this extension was described as, among other things, ‘an important step in preventing the removal of cultural heritage found within 24 nautical miles of the baseline’ (Federal Register, 1999).

Beyond the contiguous zone, the United States has declared its jurisdiction over both the continental shelf and an exclusive economic zone. President Truman asserted US control over the natural resources of the subsoil and seabed of the continental shelf in 1945 (Brown, 1994: II, 113–114). In 1983, President Reagan established an EEZ extending out 200 nautical miles from the coast (Brown, 1994: II, 137–139). Within the EEZ, the United States declared sovereign rights to explore, exploit, conserve, and manage the living and non-living resources of the seabed, subsoil, and waters above them; in addition, jurisdiction extended to artificial islands, installations and structures having economic purposes, and protection of the marine environment.

#### *Underwater cultural heritage in the US territorial sea*

Following the passage of the Submerged Lands Act of 1953 (Speser & Reinburg, 1986: 23–25), several states enacted legislation asserting title to, and control of, historic shipwrecks on state submerged lands. At the same time, treasure hunters were regularly obtaining title or salvage rights to shipwrecks in coastal waters, asserting federal admiralty jurisdiction over the sites. Under the law of finds, commercial salvors in US waters were frequently able to gain title to shipwrecks and their contents if they were ruled to be aban-

doned; even if not abandoned, the law of salvage provided generous salvage awards to treasure hunters (Schoenbaum, 1994: 797–800). A series of notable court cases in the 1970s and 1980s, pitting states against salvors, demonstrated the need for comprehensive legislation. The result was the Abandoned Shipwreck Act of 1987, the only federal law dealing exclusively with submerged cultural resources.<sup>[1]</sup>

The ASA is a landmark piece of legislation. It asserts federal ownership over certain categories of abandoned shipwrecks, then transfers title of those shipwrecks to the states for management. It recognizes the interests of multiple constituencies in the shipwreck resources. Perhaps most importantly, the ASA specifically excludes the laws of salvage and finds. Despite its fundamental importance, however, the ASA is limited in the extent of its coverage and flawed in several key respects. First, the law only applies to the 3-mile territorial sea. Second, the statute applies only to shipwrecks (including their cargo and contents); other categories of cultural heritage, such as submerged buildings, ports, or prehistoric terrestrial sites, are not included. Moreover, the law is restricted to three specific categories of abandoned shipwreck: those embedded in submerged state lands; those embedded in coralline formations controlled by a state; and those located on state submerged lands and are either included in or determined eligible for inclusion in the National Register of Historic Places (a national inventory of significant cultural properties).

Also problematic is the fact that the ASA recognizes treasure salvors as a legitimate interest group, thereby elevating to the status of ‘stakeholder’ a group that would normally be regarded as ‘looters’ on land sites (for instance, Hutt *et al.*, 1999: 11, 396). The ASA urges partnerships between archaeologists and salvors, among other groups; this idealistic notion unrealistically promotes alliances between two groups with fundamentally opposed core values, goals, methods, and interests.

Another weakness of the ASA is the concept of abandonment, which is central to its viability: only abandoned shipwrecks are covered by the law. Unfortunately, the term ‘abandonment’ was never defined in the ASA, and in recent years the concept has been seized upon by treasure hunters eager to return to the jurisdiction of federal admiralty courts (Pelkofer, 1996; Giesecke, 1997). For years commercial salvors were happy to have historic shipwrecks regarded as abandoned,

because it meant that they could win title to the wrecks under the law of finds. American courts frequently ruled that long-lost shipwrecks were abandoned by virtue of the passage of time; in a famous decision involving the wreck of *Nuestra Señora de Atocha*, a Spanish galleon that sank in 1622, a US appellate judge in 1978 upheld the lower court's determination that the wreck was abandoned, ruling that 'disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths'.<sup>[2]</sup>

Recent treasure salvage cases have challenged the traditional notion that shipwrecks may be abandoned through the passage of time. In the case of the SS *Central America*, which sank in 1857, 160 miles off the South Carolina coast (and therefore not subject to ASA), the appeals court insisted on clear evidence of abandonment, such as an express statement to that effect by the insurance companies that had paid off claims following the disaster; without that, the court found that the law of salvage, not the law of finds, applied.<sup>[3]</sup> More recently, in the case of the *Brother Jonathan*, which sank in 1865 in California waters, a federal appeals court ruled that California had not proved that the ship had been abandoned, despite the fact that no salvage effort had been attempted for more than 100 years.<sup>[4]</sup> It could therefore not control the *Brother Jonathan* under the ASA. The case was appealed to the Supreme Court, which affirmed admiralty jurisdiction because the wreck was not in the state's possession; the high court declined to rule on the question of abandonment.<sup>[5]</sup> The case has since been settled, and salvage will continue under the regulatory authority of the state, which will obtain a share of the recovered finds (Rainey, 1999).

Although the ASA has withstood several legal challenges and has paved the way for considerable state control and management of shipwreck resources (Giesecke, 1999), rulings like those in the *Central America* and *Brother Jonathan* cases are eroding the decades-old admiralty notion that long-sunk ships are abandoned. In April 1999, a federal judge ruled that the Spanish vessel *Juno*, which sank in 1802 off the coast of Virginia, was not abandoned because there was no evidence that Spain had expressly abandoned the ship.<sup>[6]</sup> Other treasure hunters will doubtless continue to avoid the ASA by pressing this narrow definition of abandonment. Since

abandonment is the *sine qua non* of the ASA, this development may eventually prove to be the Achilles heel of that law; in any case there is an urgent need for an amendment of the ASA to clarify the issue.

#### *Underwater cultural heritage in the extraterritorial seas*

In the 1970s a few attempts were made to assert federal ownership and control of submerged cultural resources on the continental shelf beyond the 3-mile territorial sea. (US law generally refers to the submerged lands beyond the 3-mile territorial sea as the 'outer continental shelf'.) These efforts proved unsuccessful, however, and since then the United States has asserted jurisdiction over cultural resources beyond the 3-mile limit in only a limited number of areas designated either as marine sanctuaries or for mineral exploitation. Nevertheless, these cases provide a sound basis for future expansion of US protective measures in the extraterritorial seas.

In 1978, in the case of the *Atocha*, which sank in waters beyond the 3-mile territorial sea, the United States asserted federal ownership of the wreck by claiming that the Antiquities Act of 1906 applied to the lands of the outer continental shelf.<sup>[7]</sup> The court ruled, however, that US jurisdiction in this area was limited to control of the exploitation of natural resources of the continental shelf, which did not include shipwrecks or their cargoes. In 1979, a bill to protect historic shipwrecks was introduced in Congress; this measure would have made any abandoned historic shipwreck located on the outer continental shelf the property of the United States (Stevens, 1992: 593). However, this provision was later dropped; after 1983, the succession of bills that would culminate in the ASA applied only to the 3-mile territorial sea. It is noteworthy in this context that the Archaeological Resources Protection Act of 1979, which protects archaeological resources on public lands in the United States, specifically excludes lands on the outer continental shelf.<sup>[8]</sup>

As noted above, Article 303 (2) of the 1982 LOS allows nations to control archaeological objects within the contiguous zone. Some commentators interpret this provision as permitting the creation of, in effect, a 24-mile archaeological zone regardless of whether or not the coastal state has formally declared a contiguous zone (Strati, 1995: 167-170). In the 18 years since the LOS treaty was

finalized, the United States has shown no apparent interest in extending the ASA regime to the contiguous zone, despite the general duty imposed by LOS to 'protect objects of an archaeological and historical nature found at sea' [LOS Article 303 (1)].

Beyond the narrow 3-mile belt of sea covered by the ASA, submerged cultural resources are unprotected unless they fall within the boundaries of marine sanctuaries or mineral-extraction sites controlled by a federal agency. They are essentially in a free-for-all zone, exposed to admiralty claims by treasure hunters and subject to damage from activities affecting the continental shelf. The vulnerability of underwater sites in the extra-territorial seas is tellingly underscored by the fate of the 1733 Spanish plate fleet. In 1733 a convoy of Spanish treasure ships on its way from Havana to Spain was destroyed by a hurricane in the Florida Keys (Smith, 1988: 96–99). Most of these ships lay beyond the 3-mile limit, but were subject to Florida's jurisdiction until a 1975 Supreme Court decision changed the boundary between the Atlantic Ocean and Gulf of Mexico. That decision effectively removed the sunken plate fleet from Florida waters and placed it in federal waters; the resulting frenzy of unregulated treasure hunting led to massive looting of the ships. By 1980, Florida's state underwater archaeologist reported that 'all known sites in the Florida keys previously protected by state law were destroyed' by treasure hunters (Cockrell, 1980: 339). Ironically, historical records showed that most of the ships of the 1733 plate fleet had been effectively salvaged by the Spanish in the years after the disaster, so that the modern salvage efforts, for all their destructiveness, produced very little actual treasure. They also produced little public benefit, since none of the ships were excavated archaeologically or published in a scientific manner (Smith, 1988: 99).

Although the extraterritorial seas are essentially unregulated in terms of cultural heritage, the United States does exert jurisdiction over submerged cultural resources beyond the territorial sea in its management of the National Marine Sanctuaries program. Created in 1972 by the Marine Protection, Research, and Sanctuaries Act (MPRSA),<sup>[9]</sup> the program authorizes specially designated areas of the marine environment to be set aside as National Marine Sanctuaries in order to preserve the 'conservation, recreational, ecological, historical, research, educational, or esthetic qualities which give them national sig-

nificance'. In designating a National Marine Sanctuary, the Secretary of Commerce is directed to consider, among other factors, 'the area's historical, cultural, archaeological, or paleontological significance'; this description broadens the scope of cultural resources covered by the law to more than shipwrecks. The first sanctuary to be designated preserves the archaeological site of the USS *Monitor*, the famous Civil War ironclad, located some 16 miles out from the coast of North Carolina (i.e., beyond the territorial sea and, at the time of designation, the contiguous zone). There are currently 12 National Marine Sanctuaries.

The 1992 amendments to Title III of MPRSA, known by the brief title National Marine Sanctuaries Act (NMSA), extend the jurisdiction of the law to include both the 12-mile territorial sea declared by President Reagan in 1988 and the exclusive economic zone. Covering out to 200 miles from the coastline, this provision gives the NMSA the most extensive reach of any US cultural heritage law (Hutt *et al.*, 1999: 495). In asserting jurisdiction over submerged cultural resources in the EEZ, even if limited to designated marine areas, the United States joins a growing number of nations, such as Australia, Ireland, Portugal, and Spain, that have taken positive steps to protect the underwater cultural heritage in this zone, consistent with the duties expressed in LOS.

Resources within National Marine Sanctuaries, including submerged cultural resources, are managed under a multiple-use scheme that places priority on the protection of sanctuary resources (Hutt *et al.*, 1999: 470–476). Regulations and management plans are developed for each of the 12 marine sanctuaries. Public access to the *Monitor* Sanctuary, because of the fragile nature of that site, is strictly limited, but in the other sanctuaries access is permitted as long as it is not detrimental to archaeological or natural resources. The only sanctuary that allows some form of private commercial salvage of archaeological resources is the Florida Keys Sanctuary, where there is a large, local treasure salvage industry (NOAA, 1996: 171–191).

Another federal programme that affects submerged cultural heritage beyond the territorial sea should be mentioned here. The Minerals Management Service (MMS), a unit of the Department of Interior, regulates a variety of resource-related activities on the outer continental shelf. It controls, leases, and regulates oil and gas exploration

and drilling sites, oil and gas pipelines, and sand, gravel, and shell extraction areas. As a federal agency, MMS is subject to the National Historic Preservation Act of 1966 (NHPA), as amended, and other federal laws and regulations. Section 106 of NHPA requires that federal agencies take into account the effect of their activities on significant, or potentially significant, cultural resources.<sup>[10]</sup>

In order to fulfil its obligations under NHPA and related laws, MMS has developed a set of procedures for evaluating effects of its activities on cultural resources on the outer continental shelf (Minerals Management Service, 1996). Archaeological surveys of potential mineral extraction sites are regularly conducted under their authority.<sup>[11]</sup> Unlike the ASA, which considers only historic shipwrecks, MMS procedures require consideration of a full range of archaeological resources, which are broadly defined as 'any material remains of human life or activities that are at least 50 years of age and that are of archaeological interest'. Archaeological resources may include submerged prehistoric sites on relict Pleistocene landforms as well as historic shipwrecks. One example of a site managed by MMS is Ray Hole Spring, an 8,000-year old Palaeo-Indian site located in a sinkhole more than 20 miles out from the Florida coast (Dunbar, 1996).

### **The Draft Convention on the Protection of the Underwater Convention**

The international community is currently considering a new convention that would create a uniform legal regime for the protection of underwater cultural heritage in extraterritorial waters (Strati, 1999). The Draft Convention on the Protection of the Underwater Convention is sponsored by UNESCO and is based on a draft completed in 1994 by the International Law Association (ILA) (O'Keefe & Nafziger, 1994; O'Keefe, 1996a: 299-300; 1996b; 1999).

The Draft Convention attempts to fashion a coherent protective regime consistent with the principles of LOS. It stresses the importance of protecting and managing underwater cultural heritage in the public interest, and notes the increasing threats to that heritage from unregulated treasure hunting as well as from various development activities, including construction projects and the exploitation of natural resources.

To date, two meetings of governmental experts have been held, in June 1998 and April 1999 (UNESCO, 1998; 1999). Specific provisions of the Draft Convention are likely to change, as deliberations among nations continue; the provisions considered below are particularly important for the present discussion.

A general principle of the Draft Convention, evoking Articles 149 and 303 of LOS, asserts that 'States parties shall preserve the underwater cultural heritage for the benefit of humankind' (Article 3). Underwater cultural heritage is defined broadly; it includes not only vessels, aircraft, and other vehicles, together with their contents and archaeological and natural contexts, but also 'all traces of human existence' that have been underwater for at least 100 years (Article 1). The applicability of the convention to warships and other naval vessels, which under maritime law are traditionally entitled to sovereign immunity, remains unsettled (Article 2).

With respect to the controversial issue of abandonment, an early version of the Draft Convention attempted to create a presumption of abandonment in terms of available technology and action on the part of the owner to attempt to recover the cultural heritage (UNESCO, 1998). In the most recent meeting of governmental experts, however, there was a general consensus to drop the issue of abandonment entirely (UNESCO, 1999: 3).

Recognizing that commercial salvage operations are fundamentally at odds with preservation, the ILA draft removed the applicability of salvage law to underwater cultural heritage covered by the convention (O'Keefe, 1996b: 303, 306). The UNESCO Draft Convention has now dropped that provision as a compromise measure, replacing it with one that would enjoin states to 'provide for the non-application of any internal law or regulation having the effect of providing commercial incentives or any other reward for the excavation and removal of underwater cultural heritage' [currently in Article 12 (2)].

A particularly noteworthy aspect of the Draft Convention is its incorporation in an Annex of the operative provisions of the 'Charter for the Protection and Management of the Underwater Cultural Heritage', adopted by the International Council on Monuments and Sites in 1996 (ICOMOS, 1997). The Charter articulates international standards for the treatment of underwater cultural heritage, stressing the public interest in its protection and management, and highlighting the

need for professional standards, including research design, adequate funding, qualifications, documentation, conservation, site management, reporting, and curation. Fundamental principles enunciated by the Charter include the desirability of *in-situ* preservation; the encouragement of public access; the use of non-intrusive investigations; and adequate documentation. Also of special concern is the disposition of material recovered from underwater investigations (Article 13):

The project archive, which includes underwater cultural heritage removed during investigation and a copy of all supporting documentation, must be deposited in an institution that can provide for public access and permanent curation of the archive . . . Underwater cultural heritage is not to be traded as items of commercial value.

Many provisions of the Draft Convention require compliance or consistency with the Rules of the Annex, based on the Charter. The methods that may be employed in this effort are wide-ranging. Coastal states may expand their jurisdiction to control underwater cultural heritage on the continental shelf and exclusive economic zone (Article 5). They may also counter activities relating to the underwater cultural heritage that are carried out with means inconsistent with the annexed rules, for example, by restricting the use of their territory, including maritime ports (Article 6); prohibiting certain activities of its nationals and flag (Article 7); and seizing underwater cultural heritage brought to its territory (Article 9). States may also issue permits to allow the entry of underwater cultural heritage into their territory provided that the material was recovered in a manner consistent with the annexed rules (Article 8).

One of the most important, and certainly the most controversial, of these provisions is Article 5, which would allow coastal states to regulate all activities pertaining to underwater cultural heritage within their continental shelf and EEZ. This extension of coastal state jurisdiction over the continental shelf/EEZ replaces a previous provision in the ILA draft that would have allowed states to create a 'cultural heritage zone'. The assumption by coastal states of competence for cultural heritage on the continental shelf/EEZ is a logical development of maritime law; it is consistent with LOS and offers the most practical hope of ensuring adequate protection of underwater cultural heritage in these maritime zones. Moreover, as we have seen, several nations have already asserted jurisdiction over cultural heritage

in these areas, so the provision may be regarded as a positive evolution of law that takes into account modern principles of heritage management. Article 5 has been vigorously opposed by some governmental delegations, who view the provision as a form of 'creeping jurisdiction' that would subvert basic LOS principles (USA, 1998; Strati, 1999: 32–38).

### The United States and the Draft Convention

Because it is not a member of UNESCO, the United States delegation has had only observer status in the meetings of governmental experts held in Paris in 1998 and 1999 to consider the Draft Convention. Nevertheless, it has participated actively in the deliberations. The US observer delegation, headed by legal experts from the Department of State, included other federal agency lawyers, a professional treasure hunter, a representative from the National Park Service, and, for the 1999 meeting, the executive director of the Institute for Nautical Archaeology. Surprisingly, no underwater archaeologist of the State Department Interagency Group, which meets regularly to discuss maritime heritage concerns, was included in the US delegation.

While expressing general support for the concept of an international agreement to protect the underwater cultural heritage, the United States has taken issue with many specifics of the Draft Convention and suggested alternate provisions for many of its articles (USA, 1998; 1999; Strati, 1999). Among its major concerns are consistency of the convention with existing LOS principles and the adoption of a 'multiple-use' approach to the underwater cultural heritage. In particular, the US delegation seems determined to ensure that private commercial recovery of the underwater cultural heritage will be permitted to continue under a new convention. As might be expected, the US perspective is firmly rooted in its previous participation in LOS issues and in its domestic experience in regulating submerged cultural resources, especially through the ASA.

In defining underwater cultural heritage, the United States favors restricting the term to 'objects of prehistoric, archaeological, historical or cultural significance found underwater on or under the seabed, and which have been underwater for at least 50 years' (USA, 1999). Such a definition, while consistent with US preservation

laws such as the National Historic Preservation Act, is likely to be unworkable in the international context, since it begs the question of precisely what 'significance' is and who would be responsible for determining it.

On the question of warships, naval vessels, and state-owned aircraft, the US delegation favours an affirmation of the traditional concept of sovereign immunity. At the same time, it supports the applicability of the convention to such state-owned vessels, rather than their exclusion, as some have proposed, in order to ensure their appropriate treatment.

The US delegation also favours removing any reference to the concept of abandonment, citing the different legal definitions of that term among nations and the ability to regulate the underwater cultural heritage without reference to ownership. Given the changing interpretations of abandonment over the years in US admiralty courts alone, and the resulting challenges to the ASA, dropping the notion of abandonment in the convention is probably prudent.

As noted above, although the ILA draft excluded the application of salvage law, the UNESCO Draft Convention replaces that provision with one that would remove commercial incentives for the removal of underwater cultural heritage [Article 12(2)]. The United States is still considering the exclusion of admiralty law from cultural heritage covered by the Draft Convention; hopefully an explicit statement to that effect will be included in the final document. As we have seen, the exclusion of salvage law from historic shipwrecks covered under the ASA was a momentous step forward for preservation. Treasure hunters prefer to leave the underwater cultural heritage firmly within the purview of admiralty law, where it is subject to unregulated salvage (Bederman, 1999). Salvors and their lawyers, who claim that they are fighting to preserve the venerable traditions of admiralty law, ignore the fact that the use of salvage law to promote treasure hunting rights is actually a recent phenomenon. Salvage law traditionally was applied to the rescue or recovery of vessels and cargo at imminent risk of loss or damage in a maritime context. This situation does not exist in the case of archaeological shipwrecks; as one authority on admiralty law notes, 'the concept of marine peril is stretched to its limit in the treasure salvage cases, where an ancient wreck has lain undisturbed on or in submerged lands for hundreds of years or more' (Schoenbaum, 1994: 785).

Article 5 of the Draft Convention, which would allow coastal states to assert jurisdiction over underwater cultural heritage on the continental shelf or EEZ, is vigorously opposed by the United States. According to the US position, such a provision would give coastal states significantly expanded control over the rights recognised by LOS, which are limited to jurisdiction over natural resources. Instead, the United States has proposed an article that would call on nations that claim a contiguous zone to 'adopt laws and regulations necessary to control all activities in that zone relating to the discovery and removal of underwater cultural heritage' (Strati, 1999: 32); such measures are already permitted under LOS.

The US opposition to Article 5 is curious and even contradictory. As noted above, the US currently requires compliance with federal preservation laws over submerged cultural resources in areas of the continental shelf under the control of the Minerals Management Service. In addition, it asserts jurisdiction of underwater cultural heritage in the EEZ in its National Marine Sanctuary Act. According to the NMSA, 'the area of application and enforceability of this title includes the territorial sea of the United States, as described in Presidential Proclamation 5928 of December 27, 1988, which is subject to the sovereignty of the United States, and the United States exclusive economic zone, consistent with international law'.

The US delegation interprets this provision as applying only to US citizens, but not to foreign nationals or foreign flag vessels (Hutt *et al.*, 1999: 496)—an absurd proposition that would protect US-designated sites from the activities of US citizens but leave them open to plunder from foreign treasure hunters. Under this interpretation, the only way underwater cultural sites in the EEZ beyond the contiguous zone could be protected from foreign nationals would be if the recovery operations threatened the seabed or other natural resources, since the regulation of activities affecting natural resources is permitted under LOS (Varmer & Blanco, 1999: 217).

The US proposal to limit coastal state jurisdiction over submerged cultural resources to the contiguous zone reflects an interest in avoiding what it perceives as 'creeping jurisdiction' (O'Keefe, 1999: 232). This view echoes the US position during the LOS deliberations prior to 1982, when Greece and other countries proposed that coastal states be permitted to exercise jurisdiction over underwater cultural heritage on the

continental shelf/EEZ, subject to certain preferential rights of states. The United States strongly opposed that proposal, and the resulting compromise was Article 303 (2), which gives states the right to control objects of an archaeological and historical nature within their contiguous zone (Strati, 1995: 162–165).

The US position regards any expansion of jurisdiction over cultural resources in the continental shelf/EEZ as giving coastal states ‘significantly expanded control’ in those zones beyond what is allowed by LOS (USA, 1999). As noted above, however, coastal states already have sovereign rights to explore, exploit, conserve, and manage natural resources in these zones under LOS, as well as rights relating to marine scientific research and environmental protection (Roach, 1997: 433). It is difficult to understand how the United States can maintain that affording similar rights to cultural resources—which are, after all, inextricably linked to their environmental context, and whose heritage values are accessed only through scientific research—would constitute a significant expansion of coastal state rights.

The United States is also actively promoting a ‘multiple-use’ approach to the underwater cultural heritage, and has recommended an amended Article 3 of the Draft Convention that would state that ‘States Parties shall facilitate multiple use of underwater cultural heritage, including research, education, public and private access and, where appropriate, recovery, consistent with this Convention’ (USA, 1998; 1999; Strati, 1999: 24). Such an approach, which recognizes the diversity of interests and rights to submerged cultural resources, is an important characteristic of recent US law and practice in the field of preservation. The multiple-use concept also provides an overarching framework for managing cultural resources in the National Marine Sanctuaries (Varmer, 1999).

The principal concern here, however, is whether or not the US delegation regards commercial salvage and treasure hunting as ‘appropriate recovery’ of underwater cultural heritage. Treasure salvage and professional archaeology are fundamentally at odds in terms of goals, methods, consequences, and public benefit. For this reason, as Paul Johnston (1997: 425) has noted, ‘virtually every professional archaeological and museum association with published ethical guidelines throughout the globe has condemned treasure hunting and issued ethical policies for the treatment of submerged cultural

resources’. Yet despite abundant evidence of the irreconcilable differences between archaeology and treasure salvage (for example Elia, 1992; 1997; Johnston, 1993; Conlin & Lubkemann, 1999), many persist in the belief that somehow the two fields can work in harmony, a view promoted by some treasure hunters (for instance Stemm, 1998).

The fascination with ever-improving technology for underwater exploration and recovery often blinds people to the fact that treasure hunting projects are not scientific archaeological expeditions, with appropriate research designs, recovery methods, and public-minded goals that include permanent curation of recovered materials and documentation. This problem is particularly apparent in attitudes towards the deep-water projects, such as the *Titanic* and *Central America*, where sophisticated equipment makes possible the recovery of objects from miles beneath the ocean’s surface (Delgado, 1996; Nafziger, 1999). Admiralty courts in particular seem to be dazzled by the technology, equating the recovery of well-preserved objects with the preservation of archaeological information. In the *Central America* case, for example, the judge added a new factor to be considered in determining salvage award, ‘the salvor’s preservation of the historical and archaeological value of the wreck and cargo’, a criterion that is now becoming established in admiralty law.<sup>[12]</sup> Treasure salvors argue that this case demonstrates that admiralty courts are capable of ensuring the preservation of archaeological values.

Unfortunately, admiralty court is probably the worst venue to determine how well a salvor is preserving archaeological and historical values. Salvage law privileges private ownership and commercial values over the public interest and preservation values of modern archaeology. The appellate judge in the *Central America* case, for instance, could not contain his admiration for the treasure hunters; their story, he said, ‘is a paradigm of American initiative, ingenuity, and determination’.<sup>[13]</sup> But what the judge meant by the ‘preservation of the historical and archaeological value’ of the site appears to be limited to the recovery and conservation of individual artefacts, which is, after all, in the salvors’ commercial interest. He repeated the district court’s description of ‘the particular care exercised in recovering and handling delicate items such as jewelry, china, cloth, papers, and so on. One of the items was a cigar, which appeared in perfect condition’.<sup>[14]</sup>

But the careful recovery of marketable objects by private salvage interests has nothing to do with archaeology, the practice of which entails a systematic, scientific research design developed and implemented for benefit of the public interest. Despite the court's assertions, no archaeologist was apparently involved in the *Central America* salvage, and 'no overall site photographs, a site map, or any other archaeological information has been released' (Delgado, 1997: 93). As the first of the gold from the *Central America* has already come onto the market (Reif, 1999), one might well wonder what the long-term public benefits from this project will be.

The US delegation has even suggested that the current RMS *Titanic* salvage project might be an example of appropriate recovery of underwater cultural heritage under a new convention (USA, 1998), a project that many have regarded as 'plunder' (for instance, Nafziger, 1988: 341) and the desecration of a grave site. The US delegation apparently believes that the unregulated removal of thousands of artefacts from the *Titanic* wreck, including the sale of coal from the site, by a private company with no obligation to curate the material permanently, is the kind of activity that should be permissible under the new underwater convention. Remarkably, the US delegation's comment disregards even the view of the US Congress in the RMS *Titanic* Maritime Memorial Act of 1986,<sup>[15]</sup> which urged that, pending international agreement for the management of the site, 'no person should conduct any such research or exploration activity which would physically alter, disturb, or salvage the RMS *Titanic*'.

A recent change in the management of the salvage company, RMS *Titanic*, intended to maximise profits, is likely to increase the pace of artefact removals from the site. According to one of the shareholders, 'if we can pull up \$1 billion worth of stuff, we are going to figure out how to get \$1 billion out of it' (*New York Times*, 1999). Ironically, it was precisely the kind of unregulated salvage efforts as seen in the *Titanic* case that inspired the International Law Association to develop a draft international convention.

If the unregulated, commercial salvage of the *Titanic* is to serve as a model for 'appropriate recovery' under a new convention, one may wonder what the US delegation considers would constitute inappropriate recovery. Equally ominous is the US delegation's efforts to make the prohibition against commercial trading of underwater cultural heritage, currently in the annexed

rules, discretionary rather than obligatory, a change that would leave the world's oceans wide open for treasure hunting.

The United States should give careful consideration to the fact that major organizations like the Archaeological Institute of America (AIA, 1998), US/ICOMOS, and the Society for Historical Archaeology have all supported the essential provisions of the Draft Convention regarding the protection and management of the underwater cultural heritage, and specifically the inappropriateness of treasure salvage. Although a multiple-use approach may be appropriate, not all uses are appropriate, and not all interest groups should carry the same weight. Preservation of the underwater cultural heritage must be the primary consideration, not the preservation of the treasure salvage industry or the adventurous lifestyle of salvors (Giesecke, 1999: 173).

## Conclusion

The United States has no coherent policy regarding the protection and management of underwater cultural heritage. Although it exercises maritime jurisdiction outward from the coast to 200 nautical miles, protection of submerged cultural resources within this area is sporadic, limited, and variable. Specific legislation pertaining to submerged cultural resources (the ASA) is restricted to certain abandoned, historic shipwrecks located within the narrowest of the maritime zones—the old 3-mile territorial sea. Except for designated marine sanctuaries or mineral-extraction sites, no specific protection is afforded to underwater cultural heritage beyond the 3-mile limit, including the additional 9 miles of the recently expanded 12-mile territorial sea; the new expansion of the contiguous zone to 24 miles; and the continental shelf or EEZ, which extends out to 200 nautical miles. At least in the case of the National Marine Sanctuaries and Minerals Management Service locations, the coverage extends to a broad range of cultural resources, not just historic shipwrecks. But for most of this watery realm, submerged archaeological sites are vulnerable to unregulated salvage and other forms of disturbance or destruction.

Effective protection and management of cultural resources, whether on land or beneath the sea, requires consistent, specific heritage legislation supported by adequate regulations and the allocation of sufficient resources. The United

States, while moving in the right direction, clearly has a long way to go before such a level of protection is achieved. The current practice is neither logical nor consistent. Why should submerged prehistoric sites 25 miles offshore be protected in an oil-drilling lease area, when no protection exists for similar sites 2 miles from the coast? Why should an 18th-century shipwreck in a marine sanctuary 30 miles from shore receive the benefit of protection and management, when salvage rights to the *Central America* 160 miles offshore are awarded to a private consortium of treasure hunters?

To an outside observer it may seem strange that the United States—neither a state party to the LOS convention nor a member of UNESCO—should be so strenuously opposed to some of the key provisions of the Draft Convention, so much so that the basic preservation philosophy of the convention is in danger of being abandoned. It is difficult to understand why the United States considers the proposed extension of coastal jurisdiction for underwater cultural heritage to the continental shelf/EEZ a substantial violation of the jurisdictional balance established by LOS, considering the fact that the US has already exerted some, albeit limited, control over submerged cultural resources in this zone. It also seems odd that the United States prefers, as an alternative, that nations adopt regulations to control underwater cultural heritage within their contiguous zones, despite the fact that it has not done so within its own contiguous zone. Most disturbing is what appears to be an effort on the part of the US delegation to ensure that treasure hunters will continue to have access to the underwater cultural heritage, a prospect that can only result in the continuing consumption of this precious resource.

As a major maritime power, the United States has every right to be concerned about the Draft Convention and to make its opinions heard. No nation has a perfect record in protecting the underwater cultural heritage, and the current US practice has developed over many years for a variety of historical, legal, and social reasons. The important thing now is to embrace an overarching preservation ethic and move forward so that the surviving submerged cultural heritage is preserved and managed for future generations. On a national level, that means amending the ASA or replacing it with a consistent, comprehensive legal regime to control the underwater cultural heritage, broadly defined, in an area co-extensive with the EEZ; excluding the application of salvage law to underwater cultural heritage within that area; and developing a new federal preservation authority to manage submerged cultural resources. Internationally, the United States should take the lead in supporting a strong international underwater convention that makes preservation the top priority, excludes salvage law, and sanctions expanded coastal state jurisdiction over cultural resources in the continental shelf/EEZ.

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### Notes

- [1] 43 USC 2101 ff. See, for example, Giesecke, 1988, 1999; Owen, 1988; Stevens, 1992; Cottrell, 1994; Zander & Varmer, 1996.
- [2] *Treasure Salvors, Inc. versus Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).
- [3] *Columbus-America Discovery Group versus Atlantic Mutual Insurance Co.*, 974 F.2d 450 (4th Cir. 1992).
- [4] *Deep Sea Research, Inc. versus The Brother Jonathan & Cal.*, 102 F.3d 379 (9th Cir. 1999); analysis of the case in Shapreau, 1998; Jones, 1999; Varmer & Blanco, 1999.
- [5] *California et al. versus Deep Sea Research, Inc. (The Brother Jonathan)*, 118 S. Ct. 1464 (1998).
- [6] *Sea Hunt, Inc. et al. versus The Unidentified, Shipwrecked, Vessel or Vessels, etc.*, 47 F.Supp.2d 678 (E.D.Va. 1999).
- [7] 16 USC 431 ff. The Antiquities Act may also be used to protect sites under federal ownership or control (Varmer & Blanco, 1999: 219).
- [8] 16 USC 470aa–470mm. This law does apply to archaeological resources in national parks and other designated areas on national lands (Varmer & Blanco, 1999: 219).
- [9] 16 USC 1431 ff.
- [10] 16 USC 470 f.
- [11] See, for instance, Garrison *et al.*, 1989.

- [12] *Ibid.*, note 3. See Schoenbaum, 1994: 806; Mangone, 1997: 236.  
 [13] Columbus-America Discovery Group versus Atlantic Mutual Insurance Co., 56 F.3d (4th Cir. 1995).  
 [14] *Ibid.*, note 3.  
 [15] 16 USC 450rr.

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