

10-1-1998

Historic Salvage and the Law of the Sea

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David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. Miami Inter-Am. L. Rev. 99 (2015)

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HISTORIC SALVAGE AND THE LAW OF THE SEA^{*}

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I.	INTRODUCTION	100
II.	THE U.S. HISTORIC SALVAGE INDUSTRY	102
	A. <i>Traditional U.S. Law of Shipwreck Salvage</i>	103
	B. <i>Modern U.S. Law of Shipwreck Salvage</i>	104
III.	THE 1982 U.N. LAW OF THE SEA CONVENTION	106
IV.	RECENT INITIATIVES TO REVISE ARTICLE 303	108
	A. <i>1984 Council of Europe Draft Convention</i>	108
	B. <i>1989 Salvage Convention</i>	110
	C. <i>Unilateral Assertions of Coastal State Control over Shipwrecks</i>	111
	D. <i>The International Law Association Draft Convention</i>	112
	1. <i>Definitional Problems</i>	113
	a. <i>Underwater Cultural Heritage</i>	114

^{*} The research assistance of Joshua K. Leader (Emory University School of Law, '95) is gratefully acknowledged.

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<i>b. Abandonment</i>	115
2. Scope of "Underwater Cultural Heritage".....	119
3. The Cultural Heritage Zone	120
4. Retroactivity and Extraterritorial Application	121
5. The Bar on Commercial Salvage of Historic Shipwrecks	123
<i>E. Pending Action by UNESCO</i>	125
V. A SALVAGE SOLUTION?.....	128

I. INTRODUCTION

The history of the law of the sea has been conditioned by conflicts over access to and control over the ocean's resources. Many believed that when the U.N. Convention on the Law of the Sea (UNCLOS) was adopted in 1982, a fifty-year battle between coastal State interests and those of maritime powers would be satisfactorily resolved. This prediction has, alas, not been fulfilled, as witnessed by renewed claims to resources located beyond the limits of national jurisdiction.

One such skirmish has emerged over the exploitation and recovery of objects from historic shipwrecks and other submerged sites, what has come to be called the "underwater cultural heritage." Those wanting to change the law of historic salvage have most clearly staked their positions. The nautical archaeology community has spoken eloquently of the need to protect historically significant shipwrecks from benign neglect by coastal States; from looting by negligent sports divers; and from, worst of all, unscrupulous and avaricious treasure hunters. A number of coastal States have recently gone on record as declaring title to shipwrecks located within two hundred miles of their shores or, in the alternative, assertions of regulatory authority over that underwater cultural heritage. Coastal States have thus discovered that there lies within their grasp a resource that international law has yet to allocate to governmental control: the historic salvage

industry. Taking advantage of a vacuum, coastal States have rushed in with their claims.

To date, however, no one from the private historic salvage sector in maritime commerce has yet spoken against the proposals of these coastal States. This is quite surprising since it appears that some coastal State authorities and many nautical archaeologists have expressed a desire to end the historical practice of salvaging property lost at sea and returning it to the stream of commerce. Many of the proposals that have been tendered to create a new international legal regime for underwater cultural heritage would all but abolish the private, commercial recovery of historic shipwrecks. They would also divest the claims of record owners of property more recently lost at sea, in essence expropriating that property in the service of historic preservation.

This Essay critiques these recent proposals and demonstrates that the traditional maritime law of salvage offers an instructive, private-law alternative to proposed regimes to regulate underwater cultural heritage through assertions of coastal State jurisdiction and the elimination of private enterprise. The traditional maritime law of salvage has evolved and has come to embrace and balance commercial incentives as well as historic preservation values.

This Essay will explore the connection between an emerging law of the sea for the underwater cultural heritage and the United States' law of shipwreck salvage. Part II of the Essay provides an overview of the U.S. historic salvage industry and charts the intersection of what many regard as two very different and distinct subjects: the international law of the sea (which regulates the use and governance of ocean spaces as between States) and admiralty law (the general maritime law which directs the private rights and interests of seafarers and of maritime commerce). Part III discusses Article 303 of the 1982 UNCLOS, which articulates coastal States' jurisdiction over historic salvage. Part IV critiques subsequent initiatives challenging Article 303 of UNCLOS, giving special attention to the International Law Association's Draft Convention on the Protection of the Underwater Cultural Heritage. Finally, Part V advocates a balanced approach to regulating the salvage of historic shipwrecks.

II. THE U.S. HISTORIC SALVAGE INDUSTRY

Historic salvage, also known as "treasure salvage," has become a multi-billion dollar activity for U.S. maritime interests, defying the overall trend diminishing the importance of the United States in the maritime sector.¹ Historic salvage, as the name suggests, is dedicated to the recovery and preservation of artifacts and valuable goods sunken on shipwrecks. It is an industry that combines sophisticated technology and concern for historic preservation values, all with an aim of returning long lost objects to public appreciation and to the stream of commerce. Historic salvage interests are often allied with those of the sport diving community, which adds tourism revenue and aesthetic values to many coastal regions around the United States and abroad.

Modern technology has made possible the recovery of long lost and forgotten historic shipwrecks.² The invention of SCUBA by Jacques Yves Cousteau in 1942 was the first development. Then followed the design of sophisticated side-scan sonar and other search techniques which make possible the location of finds and deposits on the ocean floor. Mixed-gas diving has permitted adventurous human beings to reach ocean depths that had previously been unimaginable. Finally, the use of submersibles and remote-robotic technologies has allowed recovery from wrecks at the very bottom of the ocean abyss. As one can imagine, diving technology has not come cheap. Vast investments of money, as well as the time, toil, and sacrifice of divers, have made it possible. In all of this, U.S. historic salvage firms have led the way.

Sparked by the epic efforts of Arthur McKee and Mel Fisher in locating Spanish galleons off the Florida coast during the 1950s and 1960s, American treasure salvors have been active in diving operations in all of the world's oceans. U.S. historic salvors have acquired the reputation of being the most technologically advanced, the most daring, and also the most concerned with preserving historical values of the items they recover. Most treasure salvors

1. See David Arnold, *Treasure Hunting Becoming a Growth Industry*, BOSTON GLOBE, Oct. 21, 1991, Health-Science Sec. at p. 27.

2. For more on this, see *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, UNESCO Doc. 146 EX/27, at 1-2, ¶¶ 7-10 (Mar. 23, 1995) [hereinafter *Feasibility Study*]; William J. Broad, *Deepest Wrecks Now Visible to Cameras*, N.Y. TIMES, Feb. 2, 1993, at C1.

recognize that certain objects they recover are not only priceless in a monetary sense, but also in an intangible way as part of national (or international) cultural patrimonies. Such items are routinely donated to museums or traveling cultural exhibitions.

A. *Traditional U.S. Law of Shipwreck Salvage*

Traditional rules of maritime law—observed by all seafaring nations in the world—provided the necessary legal security for those prepared to invest time and money in finding lost shipwrecks.³ The admiralty laws of salvage and finds grant to those who locate and save property lost at sea, either (1) a claim to a reward from the owner of the lost property, or (2) if the property is abandoned and has no owner, outright title to the find. The power to grant these incentives has, under the traditional maritime law, been left to the judges of courts exercising admiralty or maritime law jurisdiction. In the United States, these are the federal courts.

Salvage is a core subject of admiralty jurisdiction, which has always been the exclusive preserve of the federal courts. The law of salvage is of ancient vintage.⁴ Under the law of salvage,

compensation [is] allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of ship wreck, derelict or recapture.⁵

The original owner of the imperiled vessel retains title thereto, but the salvor is entitled to a very liberal salvage award from the *res* of the vessel.⁶ The courts have recognized that liberal salvage awards further the fundamental public policy of encouraging

3. For the application of the admiralty law doctrines of salvage and finds to historic shipwrecks, see Anne M. Cottrell, *The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks*, 17 *FORDHAM INT'L L.J.* 667 (1994); Douglas S. Cohen, *Should Noli Fodendi Apply to Sunken Ships?*, 73 *B.U. L. REV.* 193 (1993).

4. See GRANT GILMORE & CHARLES BLACK, *THE LAW OF ADMIRALTY* 532-33 (2d ed., 1975).

5. *The SABINE*, 101 U.S. 384, 384 (1880). See also *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, 459-60 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993) [hereinafter *CADG*].

6. See *CADG*, 974 F.2d at 459.

salvage and recovery efforts and reward those who engage in laborious, costly, and potentially dangerous undertakings.⁷

By operation of law, the salvor has a maritime lien against the *res* of the recovered vessel and its cargo.⁸ The salvor enforces the lien by bringing an *in rem* action in federal court against the vessel and its cargo.⁹ As explained by Chief Justice Taney in the case of *Houseman v. The Cargo of The SCHOONER NORTH CAROLINA*,¹⁰ *in rem* salvage actions against vessels fall squarely within the *exclusive* admiralty jurisdiction of the federal courts conferred under Article III, Section 2, of the U.S. Constitution:

Now, the matter in dispute, is merely a question of salvage.... Upon such questions, there can be no doubt of the jurisdiction of a court of admiralty; nor of its authority to proceed *in rem*, and attach the property detained. The admiralty is the only court where such a question can be tried; for what other court, but a court of admiralty, has jurisdiction to try a question of salvage?¹¹

B. *Modern U.S. Law of Shipwreck Salvage*

Despite its historic origins, the law of salvage has readily evolved to meet modern concerns regarding historic preservation of shipwrecks. Because the salvor essentially acts as an agent of the district court in recovering the wreck and bringing it into the jurisdiction of the court, judges have broad discretion both in the initial selection and appointment of the salvor, and later, in deciding the amount of the salvor's award. The federal courts have exercised that discretion to ensure that the historical values of antiquated shipwrecks are preserved in the salvage process.

7. See GILMORE & BLACK, *supra* note 4, at 532 (citing numerous cases).

8. See *id.* at 628.

9. See FED. R. CIV. P., Supp. Adm. R. C (1)(a).

10. 40 U.S. (15 Pet.) 40 (1841).

11. *Id.* at 48. See also *Madruga v. Superior Court of California*, 346 U.S. 556 (1954); *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1063-64 (1st Cir. 1987) (*in rem* action for salvage award against artifacts recovered from antiquated shipwreck is governed by general federal maritime law and is within the federal courts' exclusive jurisdiction); *Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540, 548 (S.D. Fla. 1982) (same). See also *The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1866) (state courts may not provide *in rem* remedies); *The HINE v. Trevor*, 71 U.S. (4 Wall.) 555 (1866) (same).

It has been suggested that ancient and modern salvage laws have developed over centuries without any regard for archaeology. The underlying policy thrust of the assertion is that the hoary admiralty law of salvage is totally unsuited to the "modern" problem of managing historic shipwrecks as a cultural resource. The policy alternative advocated by many historic preservationists is that salvage law be replaced by further governmental regulation of shipwrecks, regulation that will uniquely privilege decision-making by nautical archaeologists. The clear message is that shipwrecks should, under no circumstances, be considered an economic resource, as lost property to be restored to the "stream of commerce."

Indeed, it has been suggested that wreck salvage has never been part of admiralty jurisdiction. This is utterly fallacious. All salvage of property lost at sea implicates maritime commerce, a central concern of admiralty law.¹² And the power to regulate such activities was specifically reserved by Congress in the Submerged Lands Act.¹³ Courts have consistently held that salvage of wrecked vessels is within the scope of traditional admiralty jurisdiction.¹⁴ Wrecked vessels are still subject to marine peril, under the traditional rule of *The SABINE*.¹⁵

It might be helpful to the debate to realize that the admiralty law of salvage is not as rigid or as single-focused as has been supposed. At least as applied in admiralty courts in the United States, historic preservation values have been merged with "traditional" salvage law. It has become the consistent practice of U.S. courts that the granting or denial of exclusive salvage rights over an historic shipwreck to a commercial recovery outfit is at least partially contingent on salvors' observing archaeological protocols that protect evidence for future study and research about the wreck and its contents. For example, in the *MDM Salvage* case,¹⁶ the District Court denied the applications of two different

12. See *Insurance Co. v. Dunham*, 78 U.S. 1 (1871); *DeLovio v. Boit*, 7 F. Cas. 418, 444 (C.C.D. Mass. 1815) (No. 3776).

13. See 43 U.S.C. § 1314(a) (1988) (expressly retained for the United States "all its . . . powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce [and] navigation. . .").

14. *North Pacific S.S. Co. v. Hall Bros. Co.*, 249 U.S. 119 (1919); *The George W. Elder*, 206 F. 268 (9th Cir. 1913).

15. 101 U.S. 384 (1880). See also *Treasure Salvors, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978); *Cobb Coin*, 549 F. Supp. at 557.

16. 631 F. Supp. 308, 310-11 (S.D. Fla. 1986).

sets of commercial salvors to recover property from a Spanish galleon, noting that neither firm had attempted to preserve the "archaeological integrity" of the wreck. The Court noted that:

Archaeological preservation, onsite photography, and the marking of sites are particularly important...as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time[,] provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.¹⁷

Thus, U.S. courts have made express that the potential salvor's fidelity to archaeological values is among the elements to be considered in granting a salvage award.¹⁸ This is not to say, of course, that commercial salvors have been held to exactly the same technical standards as adopted by nautical archaeologists. Under special circumstances, U.S. courts have allowed for some modest deviations from these protocols.¹⁹

III. THE 1982 U.N. LAW OF THE SEA CONVENTION

Prior to the 1980s, no coastal nation purported to exercise regulatory jurisdiction over historic shipwrecks, except for those located within its "territorial sea," originally set at three nautical miles and later expanded to twelve.²⁰ Even with the development of the regime of the continental shelf, historic shipwrecks were explicitly not included—only "natural" resources (such as oil, gas,

17. *Id.* at 310.

18. See *CADG*, 974 F.2d 450, 468 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993); *Deep Sea Research, Inc. v. The BROTHER JONATHAN*, 883 F. Supp. 1343, 1362 (N.D. Cal. 1995), *aff'd*, 102 F.3d 379 (9th Cir. 1996), *aff'd in part, vacated in part, and remanded*, 118 S.Ct. 1484 (1998).

19. See *Moyer v. The ANDREA DORIA*, 836 F. Supp. 1099, 1107 (D.N.J. 1993) (where the Court noted that because the ocean liner was of "decidedly modern vintage, [t]here exist extensive photographs, deck plans, models, and other documentation"); *Platoro Limited, Inc. v. Unidentified Remains of a Vessel*, 518 F. Supp. 816, 822 (W.D. Tex. 1981).

20. *But see* Treaty Between Australia and the Independent State of Papua New Guinea Concerning Sovereignty and Maritime Boundaries in the Area Between the Two Countries, including the Area Known as Torres Strait, and Related Matters, Dec. 18, 1978, Austl.-Papua New Guinea, art. 9, 18 I.L.M. 291, 298 (apparently claiming general jurisdiction over shipwrecks located on mutual continental shelves). Australian legislation appeared to make this claim, as well. See *Historic Shipwrecks Act, 1976*, ch. 190 (Austl.). See also *Agreement on Old Dutch Shipwrecks*, Austl.-Neth., 1972 Austl. T.S. No. 18.

or shellfish) were included.²¹ U.S. law reflects this rule.²² Under the Outer Continental Shelf Lands Act,²³ the United States takes title only to natural resources of the seabed or subsoil. Jurisdiction over shipwrecks remains in the hands of the admiralty courts, applying the traditional maritime law of salvage or finds.

UNCLOS was negotiated between 1973 and 1982. Questions of coastal State jurisdiction over historic shipwrecks were never problematic,²⁴ being raised for the first time only in the 1980 session of the negotiations. It was quickly agreed that the absolute limit of coastal State authority over "archaeological and historical objects found at sea" was twenty-four nautical miles, the outer limit of the contiguous zone, established under Article 33 of the Convention. Article 303, paragraph 2, codifies this understanding:

In order to control traffic in such objects [archaeological and historic objects found at sea], the coastal State may, in applying article 33 [on Contiguous Zones], presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement [of its laws].²⁵

The United States, despite the demands of a group of Mediterranean countries (which wanted a 200-mile zone for regulatory control over shipwrecks), insisted that twenty-four miles should be the outward limit of such jurisdiction. Happily, the United States' position prevailed. Moreover, Article 303,

21. See Convention on the Continental Shelf, Apr. 29, 1958, art. 2, para. 1, 499 U.N.T.S. 312 ("The coastal state exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its *natural resources*." (emphasis added). "Natural resources" are defined as "the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species. . . ." *Id.* art. 2, para. 4. In the deliberations of the International Law Commission, leading up to the drafting of the 1958 Convention, coastal State jurisdiction over shipwrecks located on continental shelves was explicitly considered and rejected. See U.N. GAOR, 11th Sess., Supp. No. 9, at 42, U.N. Doc. A/3159 (1956) ("It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil."). See also Anthony Clark Arend, *Archaeological and Historical Objects: The International Implications of UNCLOS III*, 22 VA. J. INT'L L. 777, 784-86 (1982).

22. See *Treasure Salvors v. Unidentified Wreck*, 569 F.2d 330, 337-40 (5th Cir. 1978).

23. 43 U.S.C. §§ 1331 *et seq.* (1988).

24. Beyond the scope of this Article is a consideration of the 1982 Law of the Sea Convention's provisions allowing coastal State regulation of marine scientific research in various maritime zones. See United Nations Convention on the Law of the Sea, part XIII, U.N. Doc. A/CONF.62/122 (1982), 21 I.L.M. 1261, 1316-20 [hereinafter UNCLOS].

25. *Id.* art. 303, para. 2, 21 I.L.M. at 1326.

paragraph 3, explicitly reserved the rights of salvage or finds under traditional maritime law.²⁶ "Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty (*"règles du droit maritime"* in French), or laws or practices with respect to cultural exchanges."²⁷ Article 303 was a full and complete vindication of the United States' negotiating strategy at UNCLOS III to limit inappropriate claims of coastal State jurisdiction, especially where such claims interfere with vested rights or free enterprise exploitation of ocean resources.²⁸

IV. RECENT INITIATIVES TO REVISE ARTICLE 303

Article 303 of the 1982 UNCLOS was intended to be the definitive word on coastal State jurisdiction over shipwrecks. But no sooner had the ink dried on the treaty, than initiatives began to promote further, creeping jurisdiction over underwater cultural heritage located beyond twenty-four nautical miles from shore.

A. 1984 Council of Europe Draft Convention

The first such move was the Council of Europe's 1984 Draft Convention on the Underwater Cultural Heritage (Council of Europe Draft).²⁹ This instrument acknowledged the twenty-four-nautical mile limit on coastal State jurisdiction reflected in Article 303 of UNCLOS.³⁰ It nevertheless purported to suggest that

26. For a complete description of the negotiating history of Article 303, consult 5 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 158-62 (Myron H. Nordquist ed. 1989).

27. UNCLOS, *supra* note 24, art. 303, para. 3, 21 I.L.M. at 1326.

28. See Bruce E. Alexander, *Treasure Salvage Beyond the Territorial Sea: An Assessment and Recommendations*, 20 J. MAR. L. & COM. 1 (1989); Arend, *supra* note 21 at 787-91, 793-99; Jean-Pierre Beurier, *Pour un droit international de l'archéologie sous-marine*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 45 (1989); Lucius Cafilisch, *Submarine Antiquities and the International Law of the Sea*, 13 NETHERLANDS Y.B. INT'L L. 3 (1982); John P. Fry, *The Treasure Below: Jurisdiction over Salvaging Operations in International Waters*, 88 COLUM. L. REV. 863 (1988).

29. Draft Convention on the Protection of the Underwater Cultural Heritage, DIR/JUR (84) 1 (1984) [hereinafter Council of Europe Draft]; Final Activity Report of the Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Doc. No. CAHAQ (85) 5 (1985) (on file with author); Council of Europe, Parliamentary Assembly Recommendation No. 848, 30th Sess., 2d part (Oct. 4, 1978). This instrument was modeled on a Report prepared by Lyndell V. Prott & P.J. O'Keefe, *Final Report on Legal Protection of Underwater Cultural Heritage*, Appendix II to Council of Europe, in THE UNDERWATER CULTURAL HERITAGE 45 (1978).

30. See Council of Europe Draft, *supra* note 29, art. 2, para. 2.

coastal States could exercise such power on their respective continental shelves,³¹ a result that had been explicitly rejected in Article 303 and the earlier 1958 Convention on the Continental Shelf.³² Rather mysteriously, the Council of Europe Draft allowed a “[c]ontracting State to apply, in conformity with international law, its laws and regulations relating to the protection of underwater cultural property within an area beyond its territorial sea,”³³ thus seemingly encouraging the expansion of coastal State authority. Moreover, the Council of Europe Draft called upon a party to “require its nationals to report to its competent authorities any discovery of underwater cultural property outside the jurisdiction of any State.”³⁴

The Council of Europe Draft also evidenced some ambivalence towards commercial salvage of historic shipwrecks. While the Draft allowed Contracting States to grant “authorisations to carry out survey, excavation or recovery operations...to private persons,”³⁵ such “authorisations may be granted only on the basis of scientific considerations. . . .”³⁶ What such considerations might be is not elaborated in the Draft, but the clear implication is that commercial recovery of artifacts from historic shipwrecks may never be justified by “scientific considerations.” Finally, the Council of Europe Draft called upon Contracting Parties to take steps to identify underwater cultural property that had been illegally recovered in, or illegally exported from, a coastal State’s area of jurisdiction (including its territorial sea, contiguous zone or beyond),³⁷ to restore it to the proper State,³⁸ and to facilitate recovery for damages to that cultural property.³⁹

Despite some promising aspects of the Council of Europe Draft, objections to its increased scope of coastal State jurisdiction

31. *Id.* art. 2, para. 5 (“Each Contracting State, in the exercise of its jurisdiction over the exploration for and exploitation of the natural resources of its continental shelf, shall take appropriate measures for the protection of underwater cultural property. . . .”).

32. *See supra* text accompanying note 21.

33. Council of Europe Draft, *supra* note 29, art. 2, para. 6.

34. *Id.* art. 15.

35. *Id.* art. 5, para. 1.

36. *Id.* art. 5, para. 2.

37. *See id.* art. 12.

38. *See id.* art. 13.

39. *See id.* art. 14.

doomed it to failure.⁴⁰ No final version of that instrument was ever opened for signature.

B. 1989 Salvage Convention

In 1989, the International Maritime Organization, a specialized agency of the United Nations charged with the regulation of shipping, concluded an International Convention on Salvage.⁴¹ The 1989 Salvage Convention replaced the 1910 Brussels Convention on Salvage, which did not contain any provisions on historic shipwrecks. It has been argued that the 1989 Salvage Convention impliedly excluded historic shipwrecks from its application.⁴² The Convention defines "salvage operations" as "any act or activity to assist a vessel or any other property in danger in navigable waters or in any waters whatsoever."⁴³ The argument would run that because shipwrecks are not "in danger," they would not qualify for salvage. But, as already mentioned,⁴⁴ shipwrecks are often characterized as being in marine peril under the general maritime law, and thus do qualify for salvage.⁴⁵ So this purported exclusion of shipwreck salvage from the 1989 Salvage Convention appears doubtful or, at best, ineffective.⁴⁶

More pertinently, the 1989 Salvage Convention allows a State, upon ratification, to make a reservation "not to apply the provisions of th[e] Convention. . . when the property involved is maritime cultural property of prehistoric, archeological or historic interest and is situated on the sea-bed."⁴⁷ This obviously means

40. See Patrick J. O'Keefe & James A.R. Nafziger, *Report: The Draft Convention on the Underwater Cultural Heritage*, 25 OCEAN DEV. & INT'L L. 391, 397 (1994).

41. International Convention on Salvage, IMO Doc. LEG/CONF.7/27 (May 2, 1989), [hereinafter 1989 Salvage Convention]. For more background on the 1989 Convention, see Geoffrey Brice, *Salvage and the Marine Environment*, 70 TUL. L. REV. 669 (1995); Nicholas J.J. Gaskell, *The International Salvage Convention of 1989*, 4 INT'L J. ESTUARINE & COASTAL L. 268 (1989); Brian F. Binney, *Protecting the Environment with Salvage Law: Risks, Rewards, and the 1989 Salvage Convention*, 65 WASH. L. REV. 639 (1990).

42. See O'Keefe & Nafziger, *supra* note 40, at 393.

43. 1989 Salvage Convention, *supra* note 41, art. 1, para. 1.

44. See *supra* text accompanying note 15.

45. This matter was discussed extensively in the International Maritime Organization (IMO) Legal Committee deliberation on the 1989 Salvage Convention. See IMO Docs. LEG/56/4/5; LEG 56/WP.14.

46. See also *Feasibility Study*, *supra* note 2, at 3, ¶ 19 (incorrectly suggesting that French and Spanish efforts to exclude historic shipwrecks from salvage under 1989 Convention were "accepted").

47. 1989 Salvage Convention, *supra* note 41, art. 30, para. 1(d).

that the 1989 Convention would, in the absence of a Contracting State making a reservation, apply to salvage of historic shipwrecks. Upon its ratification, the United States declined to reserve against the Convention's application to historic shipwrecks. As of 1996, only eight States had made the necessary reservation regarding the non-applicability of the Convention to historic salvage.⁴⁸ The Convention entered force of July 14, 1996, and as of January 1998 has twenty-five parties representing over a quarter of the world's ocean-going shipping tonnage.⁴⁹

As of this writing, it is uncertain whether the 1989 Salvage Convention will have any impact on the recovery of artifacts from historic shipwrecks. Arguably the 1989 Convention has no bearing on the question of coastal State authority to regulate shipwreck recovery, that matter having been presumably settled in the 1982 UNCLOS. Nevertheless, the provisions of the 1989 Salvage Convention lend credence to the principle that historic salvage is not to be presumptively excluded from the ambit of salvage operations and that the general maritime law of salvage continues to extend to recovery of historic wrecks.⁵⁰

C. Unilateral Assertions of Coastal State Control over Shipwrecks

Despite the 1982 Law of the Sea Convention's bar on coastal States' claiming title to or asserting regulatory authority over historic shipwrecks located beyond a State's contiguous zone (twenty-four nautical miles from shore), a handful of countries have done just that. As already noted,⁵¹ Australia was probably the first to do so in section 28 of its 1976 Historic Shipwrecks Act, although the provision is qualified by reference to international

48. See STATUS OF MULTILATERAL CONVENTIONS AND INSTRUMENTS IN RESPECT OF WHICH THE INTERNATIONAL MARITIME ORGANIZATION OR ITS SECRETARY GENERAL PERFORMS DEPOSITORY OR OTHER FUNCTIONS 458 (Dec. 31, 1993) (reservations of Mexico, Saudi Arabia, and Spain); See also *Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, UNESCO Doc. CLT-96/CONF.605/6, at 12, ¶ 48 (May 22-24, 1996) [hereinafter *Report of the Meeting of Experts*].

49. See IMO, Summary of Status of Conventions as of Jan. 5, 1998, <<http://www.imo.org/convent/summary.htm>> (visited Feb. 10, 1998).

50. But see *Report of the Meeting of Experts*, *supra* note 48, at 12, ¶ 48 (where an expert from the IMO, Mr. Augustín Blanco-Bazán, opined that "because of the private-law, non-mandatory character of the Convention, the right to exclude the application of salvage law existed even without express reservation.").

51. See *supra* note 20.

law. So, at least one commentator has suggested that Australia's claim to shipwrecks located on its continental shelf may, on its own terms, be ineffective.⁵²

Other countries—including China, Cyprus, Ireland, Norway, Portugal, Spain, and the former Yugoslavia—have made claims to shipwrecks situated on their respective continental shelves.⁵³ Yet other nations have linked their claim to historic shipwrecks to the Exclusive Economic Zone (EEZ) regime. These include Cape Verde, Denmark, Jamaica, Morocco, and Romania,⁵⁴ although quite a number of States have asserted sovereign rights over “all resources” of the EEZ, and not just the “natural resources” of the Zone as permitted by Article 56(1) of the 1982 Law of the Sea Convention.⁵⁵ None of these claims appears to be qualified by reference to international law.

Nevertheless, some writers have concluded that “[t]he limited number of States . . . which have expanded their jurisdiction over underwater cultural property on the continental shelf, cannot provide the basis for the creation of a customary rule. . . . The same would seem to apply to cultural property found in the EEZ.”⁵⁶ Other scholars appear to disagree.⁵⁷ As has been aptly described, the situation for cultural property located beyond the territorial sea is in “confusion.”⁵⁸

D. *The International Law Association Draft Convention*

The last major challenge to the 1982 UNCLOS's settlement of coastal States' rights to historic shipwrecks was the fashioning of a Draft Convention on the Protection of the Underwater Cultural Heritage by the International Law Association (ILA Draft).⁵⁹ The

52. ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA* 259 (1995).

53. *See id.* 289-90 n.95. *See also Feasibility Study, supra* note 2, at 4, ¶ 23.

54. *See* STRATI, *supra* note 52, at 292 n.100.

55. For a list of these nations, *see id.* at 292 n.101 (including North Korea, Mauritius, Pakistan, Seychelles, Vanuatu, Barbados, Grenada, Guyana, Philippines, and Tanzania).

56. *Id.* at 269.

57. *See, e.g.,* Janet Blake, *The Protection of Underwater Cultural Heritage*, 45 INT'L & COMP. L. Q. 819 (1996). *See also Feasibility Study, supra* note 2, at 5, ¶ 24 (suggesting that coastal States have recognized customary international law extending jurisdiction over shipwrecks beyond contiguous zone).

58. *See* O'Keefe & Nafziger, *supra* note 40, at 394.

59. For the purposes of the discussion here, I refer to the version of the ILA Draft

ILA is an international organization of academic international law specialists, acting in their individual capacities. The ILA Draft was under consideration for a few years, but no input was invited from any person or entity other than those concerned with historic preservation values. The final product of the ILA's work was adopted at Buenos Aires in 1994.

While a treaty of the sort proposed by the ILA certainly benefits the public by promoting the educational, cultural, and recreational value represented by underwater cultural heritage, this particular draft is problematic at best. At worst, it damages the very interests it purports to serve. The ILA Draft would have sounded the death knell for the international community of sports and treasure divers, and consequently, whatever gains it would have achieved would only have been pyrrhic. The ILA Draft, as written, strikes a Faustian bargain in which the delineated protections of the underwater cultural heritage would eventually herald that very heritage's doom. The ILA Draft features definitional ambiguities, novel maritime zones that violate (or dramatically alter) pre-existing international treaty regimes, and anarchical retroactive enforcement. All of these problems will certainly vitiate any positive steps made by the ILA Draft.

In fact, the ILA Draft threatens to put an end to all but the most disreputable operations for the salvage and recovery of shipwrecks (among other underwater artifacts). The increased expense for such excavation will drastically lower profitability margins, and the inapplicability of salvage law will nearly eliminate any commercial interest in such activity. Not surprisingly, the ILA Draft was unacceptable to the international diving and historic salvage communities, and, paradoxically, it should be opposed for the very reasons that the treaty enlists in support of its goals.

1. Definitional Problems

The definitions set out in Article 1 of the ILA Draft are over-inclusive and ambiguous. As such, they are prone to misinterpretation or confusion, as the following examples will show.

a. Underwater Cultural Heritage

The term "underwater cultural heritage" itself is problematic. It is so broadly inclusive that it stretches to "all underwater traces of human existence."⁶⁰ Does this mean that pieces of a splintered surfboard or even a soda can thrown overboard on a fishing outing should be countenanced by the ILA Draft? Certainly not, but the definition would seem to cover such items. The term, which is defined to include "sites, structures, buildings,"⁶¹ could easily be read also to include support beams of piers, lobster traps, and oil rig platforms.

Article 1, paragraph 1, further confuses matters with the definition of "wreck" in paragraph 1(b) as including "a vessel, aircraft, or other vehicle or any part thereof, its cargo or other contents,"⁶² and the official commentary amplifies the inclusion of the cargo and other contents of the wreck.⁶³ Does this mean that the ship's cargo is covered by the ILA Draft even if it has drifted off or has washed ashore? The commentary to these definitions points out that "[c]ontext is one of the most essential aspects of archaeological heritage in providing knowledge of life during a particular era,"⁶⁴ but despite the inclusion of the archaeological and natural contexts in the definition of "underwater cultural heritage," there is no definition of the scope of such contexts.

Furthermore, the definitions of "underwater cultural heritage" are so expansive as to be outlandish. The commentary states that "[t]his is likely to include all aspects of the underwater cultural heritage of significance to the history of humanity."⁶⁵ This over-inclusive definition ignores the necessity for a requirement of significance, whether cultural or historical. In order to create both a manageable regime and one worthy of international treaty, only wrecks of significance should be included in the definition.

These definitions, in tandem with the commentary provided by the drafters, seem to falsely equate age with historical significance. Under the ILA Draft, cargo could be considered "underwater cultural heritage" because of its contents but then be denied

60. ILA Draft, art. 1, para. 1, *reprinted in* O'Keefe & Nafziger, *supra* note 40, at 405.

61. *Id.* art. 1, para. 1(a).

62. *Id.* art. 1, para. 1(b).

63. *See* O'Keefe & Nafziger, *supra* note 40, at 406 (cmt. 1).

64. *Id.*

65. *Id.*

protection of this definition if that cargo lacks "historical significance." For example, if a cargo ship loaded with simple raw materials sank, its contents would be considered "underwater cultural heritage." But, in this situation, the cargo has no independent historical significance and thus would not be considered "underwater cultural heritage." The glaring absence in paragraph 1 of an additional provision which would remedy the problem of the faulty assumption that age equals significance is a tremendous failing of the ILA Draft. A provision to the effect that the treaty shall apply to those articles that have historical significance and substantively add to historical understanding would be a start for focusing perhaps the most important definition of the treaty.⁶⁶

Concomitant with the limited definition of "underwater cultural heritage," the ILA Draft needs to adopt some sort of tentative list (albeit a list that is not exclusive) that would identify the types of historically significant items that would be granted the protection of the ILA Draft. A listing approach, such as the National Register system in the United States,⁶⁷ might be a suitable vehicle for such identification.⁶⁸ This process would enable each State Party to an international regime to create a list of "significant" wrecks, thereby giving full information to divers. This definition would also create a rebuttable presumption and allow for continued exploration of shipwrecks and the recovery of property lost at sea.

b. Abandonment

Article 1, paragraph 2, indicates that the ILA Draft only applies to underwater cultural heritage that has been "abandoned."⁶⁹ The definition propounded in this paragraph, however, is unacceptable due to confusing and unrealistic time constraints. This definition allows a period of twenty-five years

66. This formulation would be consistent with the view taken by UNESCO on such issues. See, e.g., *Feasibility Study*, *supra* note 2 at 1, ¶ 4; *Report of the Meeting of Experts*, *supra* note 48, at 3-5, ¶¶ 10, 13, 14, 19.

67. As referenced in The Abandoned Shipwreck Act, 43 U.S.C. §§ 2102(b), 2105 ((a)(3) (1988); see also National Historic Preservation Act, 16 U.S.C. § 470a (1988).

68. *But see Feasibility Study*, *supra* note 2 at 8, ¶ 42 (doubting whether the 1972 UNESCO Convention on the Protection of the World Cultural and Natural Heritage could be applied to shipwreck sites offshore or the artifacts recovered therefrom).

69. ILA Draft, art. 1, para. 2, reprinted in O'Keefe & Nafziger, *supra* note 40, at 405.

from the discovery of technology sufficient to recover the heritage, or if no technology was available to permit recovery, fifty years from "the last assertion of interest by the owner" of the "underwater cultural heritage" before the heritage is deemed legally abandoned.⁷⁰ This is too short a time span to assume that the owner or interested party has abandoned all hope of ever locating the item. The ILA Draft creates a new international standard for abandonment that is quite inconsistent with the long-standing general maritime law.

In *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,⁷¹ the U.S. Court of Appeals for the Fourth Circuit held that a group of insurance companies which had assumed title to the *SS Central America* (which sank in 1857 off the coast of South Carolina) but had failed to recover the wreck within the intervening 135 years was still the proper owner. Similarly lengthy time frames were at issue in negotiations between Australia and the Netherlands over the ownership of wrecks of vessels that had belonged to the Dutch East India Company.⁷²

The general maritime law has, moreover, consistently held that currently identifiable owners of property unwillingly lost at sea are presumed not to have abandoned their rights and interests.⁷³ That is why the legal test for abandonment (whether on land or at sea) has always required two elements: (1) an intent to abandon; and (2) an act carrying that intent into effect.⁷⁴ Indeed, some courts have required "strong and convincing evidence" for proof of abandonment.⁷⁵ Presumptive periods for abandonment

70. *See id.*

71. 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993).

72. *See supra* text accompanying note 20; *see also* *Robinson v. Western Australian Museum*, [1977] 16 A.L.R. 623, 647-48, 654, 663, 671-74 (Austl.) (holding that original owner retained title); *Simon v. Taylor*, [1975] 2 Lloyd's Rep. 338 (Sing. Ct. 1974) (same).

73. *The AKABA*, 54 F. 197, 200 (4th Cir. 1893); *Wilkie v. 250 Boxes of Sugar*, 29 F. Cas. 1247 (D.S.C. 1796) (No. 17,662).

74. *See CADG*, 974 F.2d 450, 461 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993); *Friedman v. United States*, 347 F.2d 697, 704 (8th Cir. 1965) (abandonment is an ultimate fact or conclusion based upon a combination of act and intent); *Morrisette v. United States*, 187 F.2d 427, 430 (6th Cir. 1951), *rev'd on other grounds*, 342 U.S. 246 (1952) (same).

75. *See CADG*, 974 F.2d at 461-65; *Zych v. The LADY ELGIN*, 755 F. Supp. 213, 214-16 (N.D. Ill. 1990). I should not be seen as suggesting that wrecks of truly "ancient" vintage are never deemed abandoned. The general maritime law's requirement of a currently identifiable owner resolves this concern. Many courts have required an authentic chain-of-title from the original hull or cargo owner to the current salvor-claimant. *See Bemis v. The RMS LUSITANIA*, 884 F. Supp. 1042 (E.D. Va. 1995), *aff'd*, 99 F.3d 1129 (4th Cir. 1996).

have thus been disfavored in the general maritime law.⁷⁶

In passing U.S. legislation known as the Abandoned Shipwreck Act of 1987 (ASA),⁷⁷ Congress intended that courts apply the general maritime law's presumption against abandonment of property involuntarily lost at sea.⁷⁸ Indeed, the ASA does not directly define the term abandonment. However, Congress desired that the Act apply to "certain abandoned shipwrecks, which have been deserted and to which the owner has relinquished ownership rights with no retention."⁷⁹ Congress' use of the terms "deserted" and "relinquished" require, at a bare minimum, a strongly evinced intent to abandon. These words may even be regarded as terms-of-art, a congressional recognition that the maritime law applies a strong presumption against abandonment.⁸⁰ Congress obviously had the opportunity to establish a statutory presumption of abandonment and did not do so.

In cases of involuntary loss at sea, the consistent standard used by admiralty courts has been to ascertain whether the owner had the knowledge and means to recover the property. If the owner knew of the location of the wreck and had the technical means to economically recover the wreck, but failed to do so, that constitutes an abandonment. If not, then the wreck cannot be deemed to be abandoned by inference.⁸¹ This is utterly consistent with the intent of Congress as expressed in the ASA's legislative history: "[T]he term abandoned does not require the original owner to actively disclaim title or ownership. The abandonment or relinquishment of ownership rights may be implied or otherwise inferred, as by an owner never asserting any control over or

76. *But see* Abandoned Wreck Law (Revised), 1977, §§ 2, 3, 12 (Cayman Is.); Historic Shipwrecks Act, 1976, § 4A (Austl.), both abstracted in O'Keefe & Nafziger, *supra* note 40, at 395.

77. 43 U.S.C. §§ 2101-2106 (1988).

78. This result was confirmed in the U.S. Supreme Court's decision in *California v. Deep Sea Research, Inc.*, 118 S.Ct. 1464, 1473 (1998) (indicating that the definition of "abandonment" in Abandoned Shipwreck Act of 1987 should follow that in admiralty law).

79. 43 U.S.C. § 2101(b) (1988).

80. *See* Nunley v. M/V DAUNTLESS COLOCOTRONIS, 863 F.2d 1190, 1198 (5th Cir. 1989) (valid abandonment occurs through act of "deserting" property); *Katsaris v. United States*, 684 F.2d 758, 762 (11th Cir. 1982) (abandonment does not occur unless there is a "total desertion" by the owner); *Everhart v. State Life Ins. Co.*, 154 F.2d 347, 356 (6th Cir. 1946) (abandonment is an "absolute relinquishment or renunciation" of a right).

81. *See* CADG, 974 F.2d 450, 461 4th Cir. 1992, *cert. denied*, 507 U.S. 1000 (1993); *Zych v. The LADY ELGIN*, 755 F. Supp. 213, 217 (N.D. Ill. 1990).

otherwise indicating his claim of possession of the shipwreck."⁸² Rather, following from the suggestive language in the ASA legislative history, a court can infer abandonment, but only when the owner has failed to "assert control" or "otherwise indicat[ed] [a] claim of possession."⁸³

While the ILA Draft claims to "stabilize expectations" and to preserve the reasonable rights of owners,⁸⁴ the fifty-year limit does no such thing. The provisions regarding the availability of technology suitable to recovery of cultural heritage are convoluted and obtuse. It is unclear whether the two clauses⁸⁵ are contradictory or merely alternatives. Clause 2(a) leaves open the possibility of reading an indefinite time period into the ILA Draft such as a twenty-five-year span following the discovery of technology that would make recovery feasible. However, clause 2(b) allows only fifty years following an assertion of the owner's rights if no technology suitable to the task was available.

The ambiguity resulting from these definitions leaves much to be desired and will certainly cause the ILA Draft to falter. At a minimum, these provisions appear to shift the burden from a presumption of ownership to one of abandonment. Not only does this conflict with the general maritime law, it will necessitate a case-by-case analysis to determine whether an item was truly abandoned by the rightful owner.

Ironically, the ILA Draft does assume that one class of underwater cultural heritage is never abandoned: "any warship, military aircraft, naval auxiliary or other vessels or aircraft owned

82. Abandoned Shipwreck Act of 1987, Pub. L. No. 100-298, 1988 U.S.C.C.A.N. (102 Stat.) 365, 366.

83. According to well established precedent, a cargo insurer who declares a total loss and pays the full policy limits takes title of the property via subrogation. This can be accomplished through a formal tender of abandonment or by simply paying the full claims. See *Great Western Ins. Co. v. Fogarty*, 86 U.S. 640 (1873); *Patapso Ins. Co. v. Southgate*, 30 U.S. (5 Pet.) 604, 622-23 (1831); *CADG*, 974 F.2d at 457 ("Under applicable law, then and now, once the underwriters paid the claims made upon them by the owners of the gold, the treasure became theirs."); *The TASHMOO*, 1937 A.M.C. 1536, 1539-1541 (Arb. 1937) ("an underwriter who has fully reimbursed his insured in respect to a loss is entitled to any salvage that results in respect to such loss. . ."). Insurers do not lightly declare total losses and pay full policy limits. When they do so, they expect to take title and to acquire the benefits of any subsequent salvage. Marine insurers have led in the recovery of valuable property from shipwrecks, and its return to the stream of commerce, precisely because they have invested in that property when they paid on the loss policies.

84. ILA Draft, reprinted in O'Keefe & Nafziger, *supra* note 40, at 406 cmt. 2.

85. See *id.* art. 1, ¶¶ 2 (a) & (b) reprinted in O'Keefe & Nafziger, *supra* note 40, at 405.

or operated by a State....⁸⁶ According to the ILA Commentary, “[t]he mere passage of time should not be interpreted to establish abandonment of such material.”⁸⁷ Although this is not the place to consider whether sovereign vessels or aircraft lost at sea can be abandoned,⁸⁸ it is interesting to note that the ILA Draft resolves this issue in favor of States, thus removing a possible ground for objection to the Draft.⁸⁹

2. Scope of “Underwater Cultural Heritage”

Regarding the general scope of the ILA Draft, Article 2 provides that it only applies to “underwater cultural heritage” that has been abandoned and has also been submerged for at least 100 years (with the caveat that “[a]ny State Party may, however, protect underwater cultural heritage which has been submerged underwater for less than 100 years”).⁹⁰ This article creates some interesting problems.

First, it creates an unusual effect on the laws of finds and salvage. Article 2 creates at least a fifty-year window in which a wreck is deemed abandoned (it could be after twenty-five years under Art. 1, paragraph 2 (a)), but a wreck is not covered by the ILA Draft until it has been submerged for at least 100 years. This could result in circumstances in which a finder/salvor of such a

86. *Id.* art. 2, para. 2, reprinted in O’Keefe & Nafziger, *supra* note 40, at 407.

87. *Id.* cmt. 2, reprinted in O’Keefe & Nafziger, *supra* note 40, at 407.

88. I have previously advocated this position. See *Steinmetz v. United States*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). I believe the “custom” that sovereigns never abandon their vessels is actually of very recent origin. The United States has admitted that until quite recently it was generally acknowledged that nations could be divested of title to their sunken warships under the admiralty law of finds. See 1980 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 999, 1003-05 (M.N. Leich ed.) (Opinion of State Dep’t Legal Advisor, Dec. 30, 1980) (collecting authorities). Prior to the 1960s, the decisions of courts in this country clearly evinced the position that a State could abandon title in its sunken warships. See, e.g., *Baltimore, Crisfield & Onancock Line, Inc. v. United States*, 140 F.2d 230, 234 (4th Cir. 1944) (U.S. battleship sunk as target practice in 1911); *State ex rel. Bruton v. Flying “W” Enters., Inc.*, 160 S.E.2d 482 (N.C. 1968) (Confederate blockade runners and other vessels); *State by Ervin v. Massachusetts Co.*, 95 So. 2d 902, 903 (Fla. 1956), *cert. denied*, 355 U.S. 881 (1957) (U.S. battleship sunk as target practice in 1922, found in 1952); *Deklyn v. Davis*, 1 Hopk. Ch. 154 (N.Y. 1824) (British frigate sunk in 1781 or 1782, found 30 years later).

89. See *Report of the Meeting of Experts*, *supra* note 48, at 5-7, ¶¶ 22-26 (confirming the need to exclude warships from the provisions of any draft convention).

90. ILA Draft, art. 2, reprinted in O’Keefe & Nafziger, *supra* note 40, at 407. See also *Report of the Meeting of Experts*, *supra* note 48, at 4-5, ¶¶ 16-18.

wreck would gain title to the item due to the true owner's legal inability to maintain title after the fifty-year period has lapsed.

Second, the caveat allowing a State Party to the ILA Draft to alter the requirements and, in effect, to apply the Convention to "underwater cultural heritage" that has been submerged for less than 100 years (presumably a State could do away with this provision entirely) could lead to inconsistent application of the Convention and conflicts with owners' rights over their property. The intent of Article 2 is simply unclear. By countenancing a patch-work of national regulations, the goal of uniformity sought by the Draft Convention will certainly be destroyed.

3. The Cultural Heritage Zone

As defined in Article 1, paragraph 3, the "cultural heritage zone" means all the area beyond the territorial sea of the State up to the outer limit of its continental shelf as defined in accordance with relevant rules and principles of international law.⁹¹ Article 5 outlines the establishment of the "cultural heritage zone" in which "the State Party shall have jurisdiction over activities affecting the underwater cultural heritage."⁹²

The participants at the Third United Nations Law of the Sea Conference (UNCLOS III) will immediately realize that such a novel maritime zone is not in accordance with the relevant rules and principles of international law. This expansion of coastal State jurisdiction is certainly beyond the scope of the EEZ and Continental Shelf regimes. The provisions establishing the "cultural heritage zone" seek to alter those compromises reached in Article 303 of the 1982 UNCLOS.

While some states at UNCLOS III lobbied for complete coastal State control and authority over archaeological and historical objects found on their continental shelves, the United States and other nations resisted this proposal on account of a fear of upsetting the already delicate balance of interests in the continental shelf. The compromise allows coastal States to completely regulate the removal of "underwater cultural heritage" in their territorial seas and contiguous zones.

91. ILA Draft, art. 1, para. 3, reprinted in O'Keefe & Nafziger, *supra* note 40, at 405.

92. *Id.* art. 5, para. 1, reprinted in O'Keefe & Nafziger, *supra* note 41, at 409; see also STRATI, *supra* note 52, at 359.

The ILA Draft, then, seeks to modify the 1982 UNCLOS in a few material respects. It allows the creation of a "cultural heritage zone" that is coextensive with the entire breadth of coastal State authority out to 200 nautical miles (or beyond). However, within that zone, the coastal State must observe the international guidelines for the proper removal and recovery of archaeological and historical objects as outlined in the "Charter for the Protection and Management of the Underwater Cultural Heritage" prepared by the International Council for Monuments and Sites (ICOMOS Charter).⁹³ Although the ILA Draft expands jurisdiction in some ways, the coastal States will, in essence, be abdicating any right of unilateral control over the cultural resources of the sea bed.

A further ambiguity remains. UNCLOS Article 303(2) explicitly grants coastal State control over cultural property found in the contiguous zone. Will this be altered by the ILA Draft? It seems likely, as the "cultural heritage zone" is defined as "all the area beyond the territorial sea of the state."⁹⁴ UNCLOS Article 303(4) references future agreements on this point, but the possible withdrawal of competence from the coastal State needs to be made clear. Coastal nations may be unwilling to trade unilateral authority over cultural property in the contiguous zone for a right to enforce international recovery guidelines out to 200 nautical miles. This implicates the issue of the actual allocation of title to the historic wrecks and monuments under the ILA Draft, an issue studiously avoided by UNCLOS Article 303.

4. Retroactivity and Extraterritorial Application

Articles 4, 7, 8, 10 and 11 pose genuine retroactivity problems insofar as they will require States Party to the ILA Draft to regulate wrecks that were previously excavated, or in the process of excavation, prior to the ratification of the treaty. This will adversely affect the interests of those involved in the excavation of such wrecks, as well as those recreational divers who simply want access to them.

93. See ILA Draft, art. 5, para. 2, *reprinted in* O'Keefe & Nafziger, *supra* note 40, at 409. See also ICOMOS Charter for the Protection of the Underwater Cultural Heritage (Oct. 9, 1995) [hereinafter ICOMOS Charter] *construed in* Ricardo J. Elia, *ICOMOS Adopts Archaeological Heritage Charter: Text and Commentary*, J. FIELD ARCHAEOLOGY, Spring 1993, at 97.

94. ILA Draft, art. 1, para. 3, *reprinted in* O'Keefe & Nafziger, *supra* note 40, at 405.

Article 4 provides that the law of salvage is inapplicable to "underwater cultural heritage" covered by the ILA Draft. As Article 303(3) of UNCLOS did not purport to modify the application of the law of salvage with regard to cultural heritage, the ILA Draft provision in Article 4 changes accepted international law and, as such, poses retroactivity problems for the enforcement of the treaty since salvors carrying on activity before its effective date could be left without an avenue for compensation after the treaty comes into force.

Article 7 requires that a State Party to the ILA Draft prohibit the use of its territory or "any other areas over which it exercises jurisdiction... in support of any activity"⁹⁵ which will affect "underwater cultural heritage" in violation of the Charter even if that activity takes place outside of the State's jurisdiction as long as that activity does not occur within the "cultural heritage zone" or territorial sea of another State Party. Article 8 imposes a duty on parties to prohibit their nationals and ships from activities which affect underwater cultural heritage in violation of the ICOMOS Charter with the same proviso at issue in Article 7.⁹⁶

These articles raise two distinct problems. First, the retroactive application of Articles 7 and 8 could create quite a widespread concern within the commercial and recreational diving communities. In enforcing these articles, the State Party would have to restrict or even terminate access to certain wrecks that qualify for coverage under the ILA Draft despite the fact that the wrecks had been previously excavated, if such excavation does not conform to the requirements of the ICOMOS Charter. Further, the State Party would be called on to prohibit its nationals and ships from undertaking activities in violation of the Charter in areas beyond the jurisdiction of the State as long as the activity does not occur within the "cultural heritage zone" or territorial sea of another State Party.

Second, since the provisions calling for extraterritorial application of these articles only preclude applicability when the activity occurs within the territorial sea or "cultural heritage zone" of another State Party, it is unclear whether a State Party is obligated to prohibit the use of its territory in support of activity

95. *Id.* art. 7, reprinted in O'Keefe & Nafziger, *supra* note 40, at 410.

96. For more on this provision, see STRATI, *supra* note 52, at 359.

within the territorial sea or other jurisdiction of a non-party State or whether the State Party is obligated to prohibit its nationals and ships from such activity in territory under the control of non-party States. Certainly, this oversight will need clarification.

Article 10 allows a State Party to seize "underwater cultural heritage" which has been brought into the State's territory directly or indirectly "after having been excavated or retrieved in a manner not conforming with the Charter."⁹⁷ Article 11 calls for the imposition of penal sanctions upon those who import "underwater cultural heritage" into the State's territory in similar violation. These provisions must fall prey to problems of retroactive application. Individuals will be subject to the loss of salvaged property that may have been retrieved at great cost. States applying such provisions retroactively may be subject to charges of expropriation of property.

But of even greater concern is the possibility of subjecting salvors to arrest for activity that occurred prior to the ILA Draft's effective date, and which did not violate any law. Such retroactivity may, depending on the penal sanctions imposed, raise *ex post facto* issues and be deemed unconstitutional under American law or in violation of essential international human rights principles enshrined in the International Covenant on Civil and Political Rights.⁹⁸

A clause must be added to Articles 4, 7, 8, 10, and 11 stating that the applicability of these provisions is reserved for underwater cultural heritage excavated after the ILA Draft enters into force in order to rectify the problems created by retroactivity.

5. The Bar on Commercial Salvage of Historic Shipwrecks

The ideology underlying the ILA Draft was best explained in the 1995 ICOMOS Charter,⁹⁹ and incorporated by reference into the ILA Draft.¹⁰⁰ The Charter provides categorically that

97. See ILA Draft, art. 10, para. 1, *reprinted in* O'Keefe & Nafziger, *supra* note 40, at 411.

98. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 15, para. 1, 6 I.L.M. 368, 373 (entered into force Mar. 23, 1976) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.")

99. See ICOMOS Charter, *supra* note 93.

100. Interestingly, Article 15 of the ILA Draft allows that revisions in the Charter by

"[u]nderwater cultural heritage is not to be traded as items of commercial value."¹⁰¹ Moreover, "[p]roject funding must not require the sale of underwater cultural heritage. . . ."¹⁰²

In short, the entire purpose of the ICOMOS Charter and the ILA Draft is to bar the commercial exploitation of historic shipwrecks. Article 4 of the ILA Draft flatly directs that "[u]nderwater cultural heritage shall not be subject to the law of salvage."¹⁰³ The stated rationale for this provision is that historic shipwrecks are not in "marine peril," an assumption challenged above.¹⁰⁴ But, more honestly, the ILA Draft makes express its assumptions about historic salvage. "The major problem," the ILA commentary notes, "is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value."¹⁰⁵ Even more breath-taking is the ILA Draft's *ad hominem* attack on the entire historic salvage community, as "looters" and "destroyers of our past."¹⁰⁶

This disparagement and exclusion of salvage law for historic shipwrecks is in defiance of the traditional maritime law, which was intended to promote the responsible return of property lost at sea to the stream of commerce. The ILA Draft and ICOMOS Charter are, simply and categorically, anti-commerce and inalterably opposed to the role of free-enterprise in the recovery of property lost at sea.

It is also clear that the major thrust of the ILA Draft was to rewrite the provisions of Article 303 of the 1982 Law of the Sea Convention, by (1) extending coastal State jurisdiction to 200

ICOMOS will be deemed revisions to the annexed Charter, binding on all States Party except for those which notify their non-acceptance to the Director-General of UNESCO within six months after the effective date of the revision. The States Parties to the ILA Draft, therefore, do not seem to have any control over the provisions of the Charter (or revisions thereto) and the Charter will be the controlling instrument in regard to the obligations created by the ILA Draft. See ILA Draft, art. 15, reprinted in O'Keefe & Nafziger, *supra* note 40, at 415. See also *Report of the Meeting of Experts*, *supra* note 48, at 14-16, ¶¶ 57-66 (considering whether ICOMOS Charter could be incorporated into UNESCO proposal).

101. ICOMOS Charter, *supra* note 93, at 4 (Curation, ¶ 2).

102. *Id.* at 3 (Funding, ¶ 2).

103. ILA Draft, art. 4, reprinted in O'Keefe & Nafziger, *supra* note 40, at 408.

104. See *supra* text accompanying note 15; see also *Feasibility Study*, *supra* note 2, at 6, ¶¶ 29-30 (questioning whether shipwrecks are in marine peril).

105. ILA Draft, cmt. to art. 4, reprinted in O'Keefe & Nafziger, *supra* note 40, at 409.

106. *Id.* cmt. to art. 14, reprinted in O'Keefe & Nafziger, *supra* note 40, at 414.

nautical miles; (2) establishing a complex system of coastal State regulatory control over historic shipwreck recovery; and (3) abrogating the traditional maritime law of salvage and finds for historic shipwrecks.

The desire to protect our underwater cultural heritage, while praiseworthy, is not served by the ILA Draft as it stands. This ILA Draft will result in a potentially dramatic increase in the already high cost of underwater excavation. And because little or none of the excavation done presently is government-sponsored or financed, it is hard to believe that preservation of the underwater cultural heritage is likely to be an outcome of this ILA Draft coming into force. Rather, the more difficult it is for divers to obtain access to and to excavate wrecks, the more unlikely the goals of education and preservation will be attained and the more probable the underwater cultural heritage will remain unseen and unstudied.

The governments of the United States and the United Kingdom have gone on official record with their opposition to the ILA Draft Convention and its premises, which "were expressly considered and rejected at the Third United Nations Conference on the Law of the Sea."¹⁰⁷ Other commentators have called the ILA Draft "excessive in its depiction of coastal state rights" and "anemic in its elaboration of coastal state duties."¹⁰⁸ Another writer regards the ILA Draft as "an ambitious attempt to deal with the complex problems posed in the protection of underwater cultural property. . . ."¹⁰⁹

E. Pending Action by UNESCO

The ILA Draft was submitted for the consideration of the United Nations Educational, Scientific and Cultural Organization

107. See J. ASHLEY ROACH & ROBERT W. SMITH, *UNITED STATES RESPONSES TO EXCESSIVE MARITIME CLAIMS* 477 (2d ed. 1996) (both authors are attorneys with the State Department, and the volume originally appeared as a publication of the Naval War College's International Law Studies #66). See also Caroline M. Zander & Ole Varmer, *Closing the Gaps in Domestic and International Law: Achieving Comprehensive Protection of Submerged Resources*, COMMON GROUND, Fall/Winter 1996, at 60, 68.

108. Bernard H. Oxman, *Human Rights and the United Nations Convention on the Law of the Sea*, 36 COLUM. J. TRANSNAT'L L. 399, 407 n.28 (1997). See also *Report of the Meeting of Experts*, *supra* note 48, at 13-14, ¶¶ 53-56 (considering the suitability of the ILA Draft as a basis for a UNESCO Convention).

109. STRATI, *supra* note 52, at 361.

(UNESCO) in 1995. In a Report issued on March 23, 1995, UNESCO's Executive Board considered the feasibility of "drafting a new instrument for the protection of the underwater cultural heritage."¹¹⁰ The Feasibility Study concluded that Article 303 of UNCLOS was, "according to archaeologists and lawyers concerned with the preservation of the underwater cultural heritage, . . . insufficient for the protection of the cultural heritage."¹¹¹ The explicit reservation in Article 303(3) for the admiralty law governing salvage and finds was characterized by UNESCO as a "serious problem."¹¹²

UNESCO has gone on record as being implacably hostile to the interests of private salvors. One recent official UNESCO document criticized the 1982 Law of the Sea Convention's reservation of rights under "the law of salvage or other rules of admiralty"¹¹³ as "protect[ing] the commercial exploitation of historic shipwrecks, leading to the destruction of archaeological resources without their scientific examination."¹¹⁴ A Group of Experts assembled by UNESCO to consider the contours of a Draft Convention categorically concluded that "the recovery of archaeological material should not be governed by its commercial value."¹¹⁵ One expert at the meeting said that "the concept of being financially rewarded was fundamentally antithetical to archaeological and scientific research."¹¹⁶ The experts ultimately agreed that "incentives to salvage should not be included in the new international provisions on the protection of underwater cultural heritage."¹¹⁷ UNESCO has thus committed itself to the same anti-competitive, state regulatory approach embraced by the ILA Draft, as well as largely endorsing the expansion of coastal State jurisdiction offshore. As just one example, a recent UNESCO publication characterizes historic salvors as

110. See *Feasibility Study*, *supra* note 2, at 8-9.

111. *Id.* at 3, ¶ 14.

112. *Id.* at 3, ¶ 15. *But cf. Report of the Meeting of Experts*, *supra* note 48, at 7-10, ¶¶ 27-39 (concluding, in ¶ 39, that "it would be realistic for a future Convention to avoid referring to any new zone under coastal State jurisdiction. . . . It was generally agreed to speak rather of *rights and duties* of States beyond the territorial waters and of *jurisdiction* implying potential control but not control itself.").

113. UNCLOS, *supra* note 24, art. 303, para. 3, 21 I.L.M. at 1326.

114. *Feasibility Study*, *supra* note 2, at 3, ¶ 17.

115. *Report of the Meeting of Experts*, *supra* note 48, at 11, ¶ 45.

116. *Id.*

117. *Id.* at 13, ¶ 52.

pillage[rs], [who] are profiting from a less than watertight legal situation [as] they remove valuable artifacts and destroy evidence essential for the archaeologist to uncover history.... UNESCO has been called-upon by the archaeological and legal communities along with numerous Member States to help rectify this situation by preparing an international convention for the protection of this vast underwater treasure trove.¹¹⁸

As of this writing, further action is pending by UNESCO. Authorization to proceed on this drafting project was granted at the 1997 UNESCO General Conference. The stated objective was to have a draft convention submitted to the next General Conference of UNESCO in November 1999.¹¹⁹

Other organs of the United Nations have actively participated in the process of gutting Article 303 of the 1982 UNCLOS. In its 1996 Annual Report on the Law of the Sea,¹²⁰ the United Nations Secretariat seemed to concur that there was a need for a new international treaty, along the lines propounded by the ILA.¹²¹ Moreover, the United Nations Secretary General observed that "there was general agreement that the incentives regarding commercial value, contained in some national salvage law, should not be included in the future international instrument."¹²² So it appears that the United Nations has already reached the conclusion that any new regime for underwater cultural heritage should preclude private recovery of artifacts from shipwrecks.¹²³

118. Sue Williams, *Underwater Heritage, A Treasure Trove to Protect*, 87 UNESCO SOURCES 7 (Feb. 1997) (No. 87).

119. UNESCO Doc. 29 C/83, at 15, ¶ 18(c) (Nov. 12, 1997).

120. *Law of the Sea Report of the Secretary General*, U.N. Doc. A/51/645 (Nov. 1 1996) [hereinafter *Law of the Sea Report*].

121. *Id.* at 39-40, ¶¶ 142-44. The International Law Commission (ILC), the organ of the United Nations charged with the codification and progressive development of international law, has also expressed an interest in beginning research and drafting on a Treaty concerning shipwrecks. See U.N. Doc A/CN.4/454, at 9-16 (Nov. 9, 1993). To date, no action has been taken on this initiative. Moreover, on June 24, 1995, the International Institute for the Unification of Private Law (UNIDROIT) adopted a Convention on Stolen or Illegally Exported Cultural Objects. See International Institute for the Unification of Private Law (UNIDROIT): Final Act of the Diplomatic Conference for the Adoption of the Draft UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects, *opened for signature* June 24, 1995, 34 I.L.M. 1322. This treaty may not bear on underwater cultural heritage from shipwrecks located beyond a coastal State's territorial sea, since it is limited to objects "removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects. . . ." *Id.* art. 1(b), 34 I.L.M. at 1331 (emphasis added).

122. *Law of the Sea Report*, *supra* note 120, at 40, ¶ 143.

123. Cf. E.D. Brown, Protection of the Underwater Cultural Heritage: Draft Principles

V. A SALVAGE SOLUTION?

I am deeply troubled that this concerted effort by a handful of coastal States, the United Nations, and UNESCO could alter the 1982 UNCLOS provisions on salvage of historic shipwrecks. Each of these proposals proceeds from the assumption that Article 303 of the Convention should be revised to allow coastal state jurisdiction over shipwrecks located beyond twenty-four miles from shore and to otherwise restrict commercial salvage efforts.

These initiatives appear also to conflict with established U.S. policy for the law of the sea by (1) increasing coastal State control over activities that are traditionally high seas freedoms, and (2) by promoting foreign government regulation of economic activities by U.S. citizens. U.S. firms are among the leaders in historic salvage efforts, and this sector of the maritime industry has seen extraordinary financial investment, technological development, and operational success. These efforts to create a new, international regime for "underwater cultural heritage" management would thwart U.S. businesses working in this area.

The nautical archaeological community has, moreover, concluded that any commercial motive in recovering historic shipwrecks is antithetical to the protection and preservation of the underwater cultural heritage. The irony here is that most reputable historic salvors very much desire to collaborate with nautical archaeologists. Conducting high quality archaeological research and observing even the most stringent protocols for the recovery of artifacts are in the best interests of historic salvors. It is a material element in their entitlement, under the maritime law, to conduct recovery operations. Also, fully understanding the provenance of recovered artifacts increases their value. In short, embracing the values of historic preservation is good for business.

But it is not just that, of course. Most historic salvors believe that what they do expands human knowledge about the sunken past. Many salvors observe *in situ* site exploration and research techniques, recovering only those items which, while being materially valuable, do not add to the archaeological record. While

and Guidelines for Implementation of Article 303 of the U.N. Convention on the Law of the Sea (1982) (manuscript on file with author) (suggesting that a Resolution adopted by the U.N. General Assembly would be the best way to proceed and that such a resolution should not feature a cultural heritage zone nor should otherwise affect "the rights of identifiable owners, the laws of salvage or other rules of admiralty").

the first few gold bars or silver coins recovered from a wreck might yield important provenance data, it would be extravagant to suggest *no* item of value recovered from a wreck should be sold. Most salvors would, of course, prefer to maintain the cohesion and integrity of collections of artifacts recovered from shipwrecks, consistent with the necessity to recover their investment. Certainly with objects of unique historical or cultural value, these are routinely donated to museums or other collections.

Is compromise possible here? Is there any role to be played by salvage law in the recovery of historic shipwrecks? I believe there is hope, and I have argued here that the maritime law is sensitive to the concerns of historic preservation and archaeological research. The admiralty law of salvage has evolved to the point where historical preservation and commercial recovery can both be accommodated.¹²⁴ The maritime law of shipwrecks is not, therefore, an all or nothing proposition, a morality play of earnest archaeologists waged against greedy, despoiling salvors. Commercial interests can help nautical archaeologists get funding, technology, and access to wrecks hitherto unimaginable. So, let us remember that before we go ahead and commit the "ancient" salvage law to the deep.

The solution lies, I think, in properly marrying commercial incentives to invest vast amounts of money, time, and technology in the search for and recovery of the sunken past, with a commitment to quality nautical archaeology. I ultimately believe that admiralty tribunals, applying the now-evolved laws of salvage and finds, can achieve this balance. Moreover, I think that such an approach is vastly superior to a system of coastal State ownership or control over underwater cultural resources, a scheme that will simply frustrate efforts to locate, recover, conserve, and protect that heritage.

124. See also Geoffrey Brice, *Salvage and the Underwater Cultural Heritage*, MARINE POL'Y, July 1996, at 337, 342.