

# OCEANS APART OVER SUNKEN SHIPS: IS THE UNDERWATER CULTURAL HERITAGE CONVENTION REALLY WRECKING ADMIRALTY LAW?<sup>©</sup>

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*A ship is the most living of inanimate things.*<sup>1</sup>

## I. INTRODUCTION

The law that governs the ownership and disposition of historic shipwrecks found in international waters remains uncertain.<sup>2</sup> Until recently, jurisdiction over title to discovered shipwrecks was not problematic, since international law has clearly recognized the sovereignty of the coastal state within its territorial waters. But with the advent of technology that makes salvage possible in the deepest waters,<sup>3</sup> it is necessary to adapt maritime law to deal with international disputes over wrecks.

Admiralty and property law, in the form of salvage law and the law of finds respectively, have been applied to settle disputes over shipwrecks and their cargoes for hundreds of years.<sup>4</sup> Under traditional salvage law and

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<sup>1</sup> Oliver Wendell Holmes, *Common Law* (Boston: Little, Brown, 1881) at 26.

<sup>2</sup> “International waters” are those beyond the territorial seas of states. See Patrick J. O’Keefe, “International Waters” in Sarah Dromgoode, ed., *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (London: Kluwer Law International, 1999) at 223 for this definition. “Territorial waters” refers to those waters over which a state exercises jurisdiction and control, *i.e.* internal waters, archipelagic waters (of an archipelagic state) and territorial sea. For a summary of these maritime zones, see *infra* note 102 and accompanying text.

<sup>3</sup> Technical advances include better deep-diving robots and manned submersibles, precise systems of magnetic and acoustic sensing and mapping, highly accurate positioning systems, and improved navigation and hydrographic software. This technology is capable of reaching 20,000 feet, enough to reach 98 per cent of all ocean floors. See James A.R. Nafziger, “The Titanic Revisited” (1999) 30 J. Mar. L. & Com. 311.

<sup>4</sup> Timothy J. Runyan, “Shipwreck Legislation and the Preservation of Submerged Artifacts” (1990) 22 Case W. Res. J. Int’l L. 31 at 33.

the law of finds, however, thousands of wreck sites have been plundered and destroyed. From a prehistoric canoe<sup>5</sup> to the R.M.S. *Titanic*,<sup>6</sup> finders and salvors have laid claim to wrecked vessels and appropriated at an alarming rate what is now recognized as the cultural heritage of humankind. In response to the need to protect this cultural property, the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the *Convention on the Protection of the Underwater Cultural Heritage*<sup>7</sup> on November 2, 2001. Despite its many proponents, the *Convention* has numerous detractors who believe that if it enters into force, it will nullify treasure salvage, an important part of our legal heritage.

In this paper I shall examine the relationship between salvage law and the underwater heritage law proposed by the *Convention*, and the sources of tension between them. A review of the traditional law governing shipwrecks, salvage law, and the law of finds highlights the problems that have arisen in respect of claims in both international and territorial waters. Most of the salvage cases are American, but a consideration of the Canadian cases illustrates how complex this area of law has become. Finally, I shall consider the *Convention* in respect of its purpose, the control it purports to exercise over underwater cultural heritage, its proposed methods of funding, and public awareness and training. By attempting to interpret the most controversial provisions in relation to the traditional law,

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<sup>5</sup> *Allred v. Biegel*, 219 S.W. 2d 665 (Mo. App. 1949). Although the canoe was found protruding from the banks of a river rather than underwater, the case was a seminal one in establishing the proposition that abandoned property that is “embedded in the soil” vests in the owner of the land where it is found. For discussion of a Canadian case in which a shipwreck was held to be so embedded, see text accompanying note 78.

<sup>6</sup> *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 9 F. Supp. 2d 624 (E.D. Va. 1998), *aff’d and rev’d in part, sub nom. R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999). In this case the salvor in possession of the wreck attempted to prohibit Deep Ocean Expeditions from giving tours of the site to the public for a fee. Shortly after the discovery of the R.M.S. *Titanic*, the U.S. Congress enacted the *R.M.S. Titanic Maritime Memorial Act of 1986*. See 16 U.S.C. §§ 450rr-450rr-6 (1994). This Act suggested the creation of an international treaty that would prevent unscientific and needlessly intrusive work on the wreck. This suggestion has not been acted upon. For a discussion of how the case of the R.M.S. *Titanic* illustrates the tension between attempts to encourage archaeological data preservation and the constraints imposed by traditional admiralty law (under which the case has been litigated), see Terence McQuown, “An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks” (2000) 26 Wm. Mitchell L. Rev. 289 at 320-22, n. 132.

<sup>7</sup> UNESCO, 31st Sess., U.N. Doc. 31 C/24 (2001) [the *Convention*]. Eighty-seven states voted in favour of the *Convention*. Four states voted against (Norway, Russian Federation, Turkey and Venezuela) and fifteen abstained from voting (Brazil, Columbia, Czech Republic, France, Germany, Greece, Guinea-Bissau, Iceland, Israel, Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay). Under Article 27, the *Convention* will enter into force three months after the deposit of the twentieth instrument of ratification, acceptance, approval or accession with the Director-General of UNESCO.

I shall demonstrate that salvage is not completely incompatible with the preservation of the cultural heritage. Indeed, these laws are interdependent, each requiring the other to remedy serious deficiencies and to render the legal protection of historic shipwrecks more effective for all parties involved.

## II. THE TRADITIONAL LAW

### A. *The Law of Salvage*

Salvage is the rescue of any vessel, cargo, freight or other recognized subject of salvage from danger at sea. Salvage services can be either contractual or voluntary. A salvage award is given to the person who has salvaged the property as compensation for the salvor's efforts. There are three areas of civil salvage:<sup>8</sup> property salvage, life salvage,<sup>9</sup> and treasure salvage. The origins of the law of marine salvage are ancient and can be traced back to the sea laws of Byzantium and the Mediterranean seaport cities.<sup>10</sup> The Rhodian Sea Laws, which may have originated from as early as 900 B.C., allowed a volunteer salvor to claim a reward based on a percentage of the salvaged property and the danger involved in the operation.

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<sup>8</sup> Civil salvage can be distinguished from military or prize salvage as follows:

The Admiralty Court recognises two kinds of salvage, *viz.*, military salvage and civil salvage. Military salvage is such a service as may become the ground of a demand for reward in a court sitting as a Prize Court and consists of the rescue of property from the enemy in time of war. Civil salvage is such a service as may become the ground of a demand for reward in the court on the civil side of its jurisdiction; it includes the preservation of life or property from dangers which may be encountered in times of peace and war.

See Francis D. Rose, *Kennedy and Rose: The Law of Salvage*, 6th ed. (London: Sweet & Maxwell, 2002) at 10. A discussion of prize salvage, which dates back before Roman times but is described by Rose as "of virtually no practical importance today," is beyond the scope of this article.

<sup>9</sup> Life salvage is the act of saving human lives at sea. Under the general maritime law, a life salvor has no claim against the person saved, and a salvor who has saved life but no property has no right to compensation from the owner of the ship or its cargo. This rule has been modified by international conventions, statutes and case law. Article 16(1) of the *1989 Salvage Convention*, see *infra* note 13 and accompanying text, precludes any life salvage reward *per se*, but permits such compensation under national legislation. Article 16(2) lays down the basic rule that a life salvor who has taken part in rendering the salvage services is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property or for preventing or minimizing damage to the environment. See generally Geoffrey Brice, *Maritime Law of Salvage*, 3d ed. (London: Sweet & Maxwell, 1999) at 195-201; William Tetley, *International Maritime and Admiralty Law* (Cowansville, Qc.: Yvon Blais, 2002) at 353-56; Thomas J. Schoenbaum, *Admiralty and Maritime Law*, 3d ed. (St. Paul, Minn.: West Group, 2001) at 860-62; and M. McInnes, "Life Rescue in Maritime Law" (1994) 25 J. Mar. L. & Com. 451.

<sup>10</sup> Schoenbaum, *ibid.* at 834.

The laws of Oléron, which provided that wrecks, broken parts of ships, and their lading were to be kept safe for the people who owned them before the shipwreck, influenced the development of English and other national maritime laws.<sup>11</sup> No unified law of salvage was applied uniformly and internationally until 1910, when the first international salvage convention was adopted.<sup>12</sup> Today, salvage is regulated by the 1910 and 1989 salvage conventions,<sup>13</sup> the common law, statute law, and industry practices, such as Lloyd's Open Forms.

The *1989 Salvage Convention* replaced the *1910 Salvage Convention* for states that are parties to both conventions to the extent that their provisions were incompatible. The *1989 Salvage Convention* has the force of law in several states, including the United Kingdom, Canada, and the United States.<sup>14</sup> Among the goals of the *1989 Salvage Convention* was to update the *1910 Salvage Convention* rules and in particular address the problem of marine pollution. The most significant provision in this regard is Article 14, which recognizes that a salvor can receive "special compensation" if the salvor attempts to save a ship or cargo that threatens damage to the marine environment. The salvor will receive such compensation, which is equivalent to the salvor's costs, only if the salvor failed to earn a reward by means of successfully saving the property. The traditional rule that a salvor will receive remuneration only if the ship is saved is known as the "no cure, no pay" principle. Where the salvor is actually successful in preventing or minimizing environmental damage, a tribunal may allow the special compensation to be increased by up to 30 per

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<sup>11</sup> Brice, *supra* note 9 at 5.

<sup>12</sup> *The Convention for the Unification of Certain Rules of Law respecting Assistance and Salvage at Sea*, 23 September 1910, 212 Cons. T.S. 187 [*1910 Salvage Convention*] came into force on 1 March 1913. It remains in force for some seventy states.

<sup>13</sup> *International Convention on Salvage*, 2 May 1989, IMO Doc. LEG/CONF. 7/27 [*1989 Salvage Convention*], reprinted in [1990] 1 L. M.C.L.Q. 54 (adopted on 28 April 1989 at London, England, and entered into force as of 14 July 1996).

<sup>14</sup> For the United Kingdom, see the *Merchant Shipping Act 1995* (U.K.), 1995, c. 21, ss. 224(1) and Sch. 11, Part I; for Canada, see the *Canada Shipping Act*, R.S.C. 1985, c. S-9, as am. by S.C. 1993, c. 36, s. 449. 1 [*Canada Shipping Act*]; see also the *Canada Shipping Act, 2001*, S.C. 2001, c. 26, s. 142(1) and Sch. 3, Parts 1 and 2 [*Canada Shipping Act, 2001*]. The *Canada Shipping Act, 2001* is not yet in force. The new Act received Royal Assent on 1 November 2001. However, only a few of its provisions, such as the amendments made to the *Shipping Conferences Exemption Act, 1987*, R.S.C. 1985 (3d Supp.), c. 17, have come into force. The majority of provisions of the *Canada Shipping Act, 2001* will come into force when the Regulations have been developed and put in place. The United States ratified the *1989 Salvage Convention* on 31 October 1991, and deposited its instrument of ratification with the International Maritime Organization on 27 March 1992. However, the *1989 Salvage Convention* did not come into force in the U.S. until 14 July 1996, when it came into force internationally. See Tetley, *supra* note 9 at 326, n. 23.

cent, or even 100 per cent in exceptional cases. Article 14 has thus created an incentive for salvors to attempt salvage of vessels that threaten to pollute the marine environment even where success is unlikely.

The *1989 Salvage Convention* recognizes that most salvage services today are performed under a contract.<sup>15</sup> Lloyd's Standard Form of Salvage Agreement, prepared by the Council of Lloyd's and known as Lloyd's Open Form (LOF), is the most common form of salvage contract in use around the world. This agreement has also made an exception to the "no cure, no pay" doctrine in the interest of preventing marine pollution. The most recent versions of the form take into account Article 14 of the *1989 Salvage Convention* and entitle salvors to some compensation if they have used their "best endeavours" to prevent or minimize environmental damage, regardless of whether they have saved the ship or cargo, or both. LOF 2000 deviates even further from the "no cure, no pay" principle. The parties to a LOF 2000 salvage contract can invoke a "Special Compensation Protection and Indemnity Clause." "SCOPIC 2000," as this clause has come to be known, guarantees remuneration for salvors' exertions, including a margin of profit, whether or not the vessel poses any threat to the environment, and whether or not their exertions prove successful in preserving any property.<sup>16</sup>

In the absence of a binding agreement fixing the amount of remuneration,<sup>17</sup> the salvor is entitled to monetary compensation once the

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<sup>15</sup> *Supra* note 13, Article 6(1). See also Tetley, *supra* note 9 at 334, n. 55 and accompanying text.

<sup>16</sup> See Tetley, *ibid.* at 342-45; and Geoffrey Brice, "Salvage and the Role of the Insurer" (2000) L.M.C.L.Q. 26 at 30. Marine insurance plays an important role in determining proprietary rights to wrecks, especially more recent ones. In the case of a constructive total loss of a ship or of goods, the insured may give up or "abandon" proprietary rights in the property to the insurer, treating the loss as an actual total loss. The insurer thereby assumes proprietary rights. In the case of a total loss of the whole ship or an "apportionable part" of the goods, the insurer becomes entitled to take over the insured's interest in whatever may remain of the subject matter paid for. The insurer is then subrogated to all the insured's rights and remedies in respect of the subject matter, from the time of the casualty. See Tetley, *supra* note 9 at 612, 615-16. This will depend on specific circumstances, as an insurer may not want to risk assuming more liabilities by exercising such rights. Once the original owners are indemnified, however, they cease to retain proprietary rights in competition with the insurer. See Tetley, *supra* note 9 at 591-92. As the international dimensions of treasure salvage increase, so too do the insurance implications. Wrecks and their cargoes may be insured in different parts of the world, giving rise to difficult legal questions. Brice, *supra* note 9 at 269, provides the example of the direct effect of American concepts of the retention or abandonment of title on London underwriters claiming title to submerged vessels.

<sup>17</sup> Such agreements are rare. See Rose, *supra* note 8 at 642. An example of a salvage operation with a predetermined fee negotiated is the *Irving Whale*, an oil barge that sank in 1970 in the Gulf of St. Lawrence while on its way from Halifax, Nova Scotia to Bathurst, New Brunswick. In June, 1995, the federal government of Canada awarded a contract to Donjon McAllister Joint Venture to lift the *Irving Whale* for an estimated \$12.1 million. The barge, which attracted widespread media attention

property has been salvaged and brought to a place of safety. Traditionally, several factors have been taken into account in determining the amount of a reward. Regarding the salvaged property, the factors are the danger to life, danger to property, and the value of the property salvaged; regarding the salvors, the factors include the danger to and value of property used in the salvage service, time spent and the extent and skill of the work done, and the risks of liability. These factors are now enumerated by statute<sup>18</sup> along with others such as the promptness of the services rendered and the availability and efficiency of equipment for salvage operations.<sup>19</sup> If the parties cannot agree on the quantum of the salvage reward, then it is decided by a court or arbitral tribunal.<sup>20</sup>

Voluntary salvage occurs less often than contractual salvage, but has nevertheless given rise to intriguing treasure salvage cases. “Pure” salvage, as it is called, involves the salvor assuming the risk of his operation with no guarantee of a reward. The amount of the award, if any, is determined by future legal proceedings. There are three criteria required for a salvor to establish a valid “pure” salvage claim. First, the services rendered must have been voluntary. This means that the salvor cannot have been under any legal obligation to render assistance. Second, the salvor must have been successful in salvaging some of the property. The saving of property is the benefit conferred upon the owner of the vessel. Third, the property must have been in peril. The first and second criteria for a valid salvage claim are fairly straightforward. The third criterion, that the property must be in marine peril, is by contrast highly controversial.

The controversy lies in whether a sunken ship should be the object of salvage. In contemporary salvage, a ship in distress is usually considered to be one that is not yet lost. There is a wide variety of items that qualify as salvable property.<sup>21</sup> As the law stands, any vessel, whether it be stranded,

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due to its leakage of oil and PCBs, was successfully lifted and transported to Halifax in 1996. See Environment Canada, *Du Contrat Pour Renflouer L'Irving Whale* (9 June 1995), online: <<http://www.ns.ec.gc.ca/whale2/jun9.html>> (date accessed: 14 November 2003), announcing the awarding of the contract.

<sup>18</sup> See e.g. *Canada Shipping Act*, *supra* note 14, Sch. V, Art. 13(1).

<sup>19</sup> Tetley, *supra* note 9 at 338-41.

<sup>20</sup> In the majority of cases, salvage awards are assessed by arbitrators. LOF provides for arbitral awards: Rose, *supra* note 8 at 643. Insurers, desperate for an increase in their own business as underwriters and arbitrators of salvage cases, have tried to reduce the dependence of salvors worldwide on Lloyd's of London for arbitration, but with limited success. See Gerard J. Mangone, *United States Admiralty Law* (Boston: Kluwer Law International, 1997) at 208.

<sup>21</sup> See generally Brice, *supra* note 9 at 209-10, and Rose, *supra* note 8 at 78-158. The type of property that may be salvaged can vary from jurisdiction to jurisdiction. See William Tetley, *Maritime Liens and Claims*, 2d ed. (Montreal: International Shipping Publications, 1998) at 355-69 for a helpful

sunken, or otherwise imperilled in navigable waters, is held to be a proper object for salvage, as well as her apparel, stores, bunkers, cargo or freight (including passage money).<sup>22</sup> Aircraft, hovercraft, and their cargo are recognized subjects of salvage by international convention and statute. Under English law, royal fish such as whales and sturgeon also qualify. Among the property that is exempt are the personal effects of the master and crew, the wearing apparel of passengers and other effects carried by them for their daily personal use. Many believe that this doctrine should not apply to underwater cultural heritage, especially historic shipwrecks.<sup>23</sup>

Wreck and derelict have long been common subjects of salvage.<sup>24</sup> The right to claim a ship as “wreck of the sea” has its roots in English law during the Anglo-Saxon era.<sup>25</sup> Wreck salvage refers to the salvage of property historically classified as either flotsam, jetsam, ligan (or lagan), or wreck. “Flotsam” is property found floating after a ship has sunk. “Jetsam” refers to property thrown overboard to lighten a ship that is in danger of sinking. “Ligan” (or “lagan”) is property on the sea that is attached to buoys. “Wreck” refers to goods that have come to land after shipwreck. Property in all four of these categories may be salvaged at common law.<sup>26</sup> For the purposes of statutory provisions relating to salvage and wreck, the modern definition of “wreck” has expanded to include jetsam, flotsam, ligan and derelict.<sup>27</sup> The *1989 Salvage Convention* does not mention wreck. However, it is assumed that the convention includes wrecks due to its

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outline of salvable property in the United States, United Kingdom, Canada, and France.

<sup>22</sup> Even money found floating on dead bodies has been held to be subject to a salvage award. See *Broere v. Two Thousand One Hundred Thirty-Three Dollars*, 72 F.Supp. 115 at 118 (E.D.N.Y. 1947), *aff'd*, 78 F.Supp. 635 at 637 (E.D.N.Y. 1948); *Gardner v. Ninety-Nine Gold Coins*, 111 F. 552 at 553 (D. Mass. 1899).

<sup>23</sup> See Anastasia Strati, *The Protection of Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea* (London: Kluwer Law International, 1995) at 48-49.

<sup>24</sup> A derelict vessel is one that has been abandoned at sea by its crew without hope of recovering or intention of returning to it. See *Halsbury's Laws of England*, 4th ed., vol. 43(1) (London: Butterworths, 1997) at 626.

<sup>25</sup> For a historical perspective, see Rose Melikan, “Shippers, Salvors, and Sovereigns: Competing Interests in the Medieval Law of Shipwreck” (1990) 11 J. Legal Hist. 163. One of the more interesting laws defining shipwrecks was the first *Statute of Westminster*, which provided that if a man, cat or dog escaped alive from a ship, it could not be considered a wreck by virtue of the fact that it was retained by its owners. See *The Statutes of Westminster*, 1272, 3 Edw., § 4.

<sup>26</sup> See Brice, *supra* note 9 at 278-79; Tetley, *supra* note 9 at 322, n. 7.

<sup>27</sup> *Halsbury's*, *supra* note 24 at 626.

generally inclusive nature.<sup>28</sup>

Commonwealth jurisdictions have the statutory institution of Receiver of Wreck, designed to prevent plundering of wrecked vessels and their cargoes while recognizing the rights of salvors. “Wreck” in this context primarily refers to contemporaneous wrecks, but it can also apply to archaeological or historical wrecks. Pursuant to Chapter 2 of Part IX of the *Merchant Shipping Act 1995*, for example, any person who finds or takes possession of a wreck in United Kingdom waters, regardless of whether or not he is the owner, must report his discovery to the Receiver of Wreck.<sup>29</sup> The Receiver is then responsible for the preservation of the wreck and the provision of an appropriate salvage award for the finder. Either the Crown or the owner of the property provides monetary award, or the property itself is awarded to the finder. The Receiver may have to locate the owner of the wreck so that this person can claim it. An owner of a find that is over one hundred years old will be advised as to its archaeological importance. Such property is usually sold to a museum and the proceeds of this sale will form the salvage payment.<sup>30</sup> If no one establishes a claim within one year from the time when the wreck came into the Receiver’s possession, the Receiver must dispose of the wreck. Unclaimed wreck found within the waters of the United Kingdom becomes the property of the Crown, and that found outside those waters is returned to the finder. Despite the protective nature of the Receiver’s work, however, many question whether a sunken ship or wreck is truly in danger for the purpose of a salvage claim.<sup>31</sup>

The degree of peril is important in determining the amount of the salvage award. Therefore, one of the most important elements for a court to consider in awarding salvage is whether a sunken ship or wreck is in *real*

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<sup>28</sup> Rose, *supra* note 8 at 106, explains that

[c]onsequently, if as a matter of construction wrecks fall within the terms of the [1989 Salvage] Convention, it will apply to them. The Convention applies generally to any property which is not permanently and intentionally attached to the shoreline. It can therefore confidently be asserted that it applies to vessels or goods which are afloat. Property which has sunk and become attached to the shoreline should also be covered since, even if it has become permanently attached, it is unlikely to have become so attached *intentionally*. [emphasis in original]

<sup>29</sup> For a general description of these provisions, see Brice, *supra* note 9 at 299-300; and Rose, *supra* note 8 at 330. Under section 255(1) of the *Merchant Shipping Act 1995*, *supra* note 14, the term “wreck” includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.

<sup>30</sup> U.K. The Maritime and Coastguard Agency, “The Receiver of Wreck,” online: BBCi <[http://www.bbc.co.uk/history/archaeology/marine\\_receive1.shtml](http://www.bbc.co.uk/history/archaeology/marine_receive1.shtml)> (date accessed: 14 November 2003).

<sup>31</sup> Brice, *supra* note 9 at 56, 276; Rose, *supra* note 8 at 189.

danger. This is a factual question determined on a case-by-case basis. There only has to be some peril to satisfy this requirement, or a reasonable apprehension of loss.<sup>32</sup> The loss can be pecuniary, or stem from the fact that the ship is in an unknown location, has been injured by the elements, or is merely stranded. According to Judge Anthony Mason in a 1977 decision of the Australian High Court, a salvor need only “recover the ship, its cargo or a part thereof,” because “[s]alvage is not limited to recovery of property in or from a ship which is actually in distress; it extends to the recovery of property in or from a ship which has lain at the bottom of the sea for a long time.”<sup>33</sup> Yet finding an element of danger in order to justify a grant of salvage rights over a wreck has been difficult for some American courts. For example, in *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, the Court of Appeals, Fifth Circuit, held that “[T]here is no dispute that the *Atocha* was lost. Even after the discovery of the vessel’s location it is still in peril of being lost through the actions of the elements.”<sup>34</sup> In another case it was held that a shipwreck could be in danger due to pirates.<sup>35</sup> Other courts have confined themselves to less creative rulings, simply holding that once underwater, property loses its value.<sup>36</sup> Ships that show no sign of deterioration in their underwater environment, however, are probably not in sufficiently “real” danger to justify salvage.

A salvor is not entitled to a salvage award if he has caused the wreck’s peril. Salvage law is guided by equity, and salvors must therefore have “clean hands” to qualify for remuneration.<sup>37</sup> Often a ship that has

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<sup>32</sup> See *The Saragossa*, 21 F. Cas. 425 at 426 (S.D.N.Y. 1867).

<sup>33</sup> *Robinson v. Western Australian Museum* (1977), 16 A.L.R. 623 (H.C.A.) at 663. This case involved a salvage claim to the *Gilt Dragon*, a Dutch ship that crashed into a reef forty miles from present-day Perth on its way from the East Indies to Holland. The plaintiff had discovered its remains and retrieved numerous artifacts from its wreckage.

<sup>34</sup> 569 F.2d 330 at 337 (1978).

<sup>35</sup> *Cobb Coin Co., Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 549 F.Supp. 540 at 557 (S.D. Fla. 1982).

<sup>36</sup> *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.* 56 F.3d 556 (4th Cir. 1995). Salvage services will not normally be rendered if the property is valueless, as these services are usually considered necessary only when the danger threatens the economic value of the subject of salvage: see Rose, *supra* note 8 at 170.

<sup>37</sup> See Joseph C. Sweeney, “An Overview of Commercial Salvage Principles in the Context of Marine Archaeology” (1999) 30 J. Mar. L. & Com. 185 at 193, for a discussion of the absence of clean hands as a defence to salvage. In *Danner v. United States*, 99 F.Supp. 880 (S.D.N.Y. 1951), a salvage award was denied where salvors looted the salvaged vessel and prevented assistance by other salvors. In a more recent treasure salvage case, *Black Gold Marine, Inc. v. Jackson Marine Co.*, 759 F.2d 466 (5th Cir. 1985), a contract salvage claim was contaminated by fraud, compulsion, and unconscionable conduct.

been underwater for a length of time has reached an equilibrium with its environment. Disturbing this equilibrium could cause chemical changes that in turn bring about the ship's rapid deterioration.<sup>38</sup> In *Ontario v. Mar-Dive Corp.*, a case that will be examined in more detail below, Justice Douglas H. Lissaman questioned this aspect of salvage. At issue in the case was a claim to salvage the *Atlantic*, which sank in 1852 and is firmly buried in about thirteen feet of mud at the bottom of Lake Erie. It was unlikely that the ship could be better preserved by salvage, Lissaman noted:

Danger of loss or damage to the subject matter of the service is the very foundation of a claim to salvage and the degree of danger has been said to be the most important element to consider in awarding salvage. ... [T]he *Atlantic* has been resting undisturbed on the lakebed of Lake Erie since she sank in 1852. Therefore, I conclude that the salvage proposed by Mar-Dive will not save the *Atlantic* from any danger.<sup>39</sup>

The salvors had argued that the ship was in peril of being destroyed by zebra mussels, the combined weight of which would eventually cause the vessel's structural collapse. However, a marine archaeologist testified that the exposed part of the *Atlantic* was not large enough for a significant number of zebra mussels to attach themselves. The court agreed.

The use of damaging methods of excavation also causes a wreck's peril. In an attempt to discourage this destructive treatment of wrecks, some American courts have considered whether the salvor's work met archaeological standards in the assessment of the salvage award. In *Columbus-America Discovery Group v. The Unidentified, Wrecked and Abandoned Sailing Vessel (The Central America)*, a case involving a nineteenth-century wreck laden with a cargo of gold, the Court of Appeals, Fourth Circuit, said that an extra factor should be added: "the degree to which salvors have worked to protect the historical and archaeological value of the wreck and the items salvaged."<sup>40</sup> But whether courts really understand the principles of archaeological excavation is another matter. Critics have pointed out that the emphasis in judgments seems to be on measurement, conservation and popular publications.<sup>41</sup> A commonly cited example demonstrates this:

The district court noted further that Columbus-America had published a book and

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<sup>38</sup> James M. Parrent, "Treasure Hunters in the Carribean: The Current Crisis" in James P. Delgado, ed., *Underwater Archaeology Proceedings from the Society for Historical Archaeology Conference* (Pleasant Hill, Calif.: Society for Historical Archaeology, 1988) 32 at 35.

<sup>39</sup> (1996), 141 D.L.R. (4th) 577 (Ont. Gen. Div.) at 592 and 638 [*Mar-Dive*].

<sup>40</sup> 974 F.2d 450 at 468 (4th Cir. 1992) [*Columbus-America*].

<sup>41</sup> O'Keefe, *supra* note 2 at 228.

promoted a television account of its endeavors, and had provided educational materials to schools interested in teaching their students about the *Central America* and its history. The court found that “the efforts to preserve the site and its artifacts have not been equaled in any other case” ...<sup>42</sup>

Although courts have decided that “salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded,”<sup>43</sup> courts are nevertheless at a disadvantage in properly assessing the archaeological methods used if they have to rely on the salvors’ evidence. It is unlikely that salvors would produce evidence against their own interest.<sup>44</sup> A court might refuse to grant an award, either fully or partially, if it discovered that a salvor’s excavation had not conformed to archaeological standards. When courts are willing to grant awards for partial excavations, however, they are in effect encouraging the irreparable dismantlement of a site that cannot be put back together again. Some historians and archaeologists argue that a wreck site should not be abandoned to the public until qualified authorities have assessed the site’s significance to the national and international heritage.<sup>45</sup>

Aside from equity, salvage is driven by commercialism.<sup>46</sup> The guiding premise behind the theory of salvage is to return goods to the stream of commerce.<sup>47</sup> As a result, there are aspects of the salvage award that run counter to important objectives of cultural heritage law, such as maintaining collections from sites as entities. First, the salvage award can never exceed the value of the property salvaged. Although there is no fixed rate for a salvage award, they have traditionally been generous. Salvors, under intense time and financial pressures and threatened by rivals, are therefore tempted to extract commercially valuable material as fast as possible to the detriment of other materials in a wreck.<sup>48</sup> Second, a salvage award is usually paid from the proceeds of the sale of the maritime property or the salvor is awarded the material raised. In the latter case, the material is often dispersed into the antique trade. For example, in 1986 porcelain and gold salvaged from the *Geldermahlsen*, a Dutch vessel wrecked

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<sup>42</sup> *Supra* note 36 at 573.

<sup>43</sup> *Supra* note 40 at 468.

<sup>44</sup> O’Keefe, *supra* note 2 at 229.

<sup>45</sup> See Runyan, *supra* note 4 at 32.

<sup>46</sup> See Edward W. Horan, “Organizing, Manning, and Financing a Treasure Salvage Operation” (1999) 30 J. Mar. L. & Com. 235.

<sup>47</sup> See Thompson M. Mayes, “Current Legal Issues in the Law of Historic Shipwrecks” (1986) 5 Preservation L. Rep. 2027 at 2039.

<sup>48</sup> O’Keefe, *supra* note 2 at 228.

in the South China Sea in 1752, was sold at Christie's, one of the world's biggest international auction houses. The auction raised U.S. \$16 million and established Christie's pre-eminence in the sale of underwater cultural heritage.<sup>49</sup> Very few courts have refused to grant a salvage award based on policy considerations that it is inappropriate to rescue marine antiquities for the purpose of selling them. Nevertheless, in *Subaqueous Exploration and Archaeology, Ltd. v. Unidentified Wrecked and Abandoned Vessel*<sup>50</sup> and *Chance v. Certain Artifacts Found and Salvaged from the Nashville*,<sup>51</sup> the salvors were denied an *in specie* award of historic artifacts on these grounds.

Some have argued that further proscription of treasure salvage will promote a black market in looted and counterfeit artifacts. However, this argument can be effectively countered by the fact that an active black market already exists.<sup>52</sup> Since no effective deterrents to protect the underwater cultural heritage have yet been put in place, we cannot conclusively determine whether stricter legal protection of shipwrecks on an international level will curb these illegal activities. By contrast, there are some who believe that treasure hunters have contributed greatly to our understanding of maritime history and should not be condemned or stopped from continuing their efforts. One scholar expresses the view that “[i]t is a simple fact that with bureaucratic archaeologists in control, the era of private enterprise recovery of ancient shipwrecks will be over.”<sup>53</sup>

The 1989 *Salvage Convention* does not define the relationship between salvage law and protection of underwater cultural heritage. The only reference to underwater heritage is in the form of a reservation. Parties may reserve the right not to apply the provisions of the 1989 *Salvage Convention* “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the seabed,” thereby excluding salvage law from national law governing underwater heritage.<sup>54</sup> Canada, for example, made such a reservation in

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<sup>49</sup> Facts from UNESCO Press Release, dated 29 October 2001. A treaty that has addressed the problem of dispersal is the *Agreement Between Australia and The Netherlands Concerning Old Dutch Shipwrecks*, 1972, 18 A.T.S. It provides for the disposition of material from wrecks, ensuring that “the total assemblage should be capable of reassembly to allow further statistical and scholarly analysis.”

<sup>50</sup> 577 F.Supp. 597 (D. Md. 1983).

<sup>51</sup> 606 F.Supp. 801 (S.D. Ga. 1984) [*Chance*].

<sup>52</sup> See McQuown, *supra* note 6 at 326, n. 145.

<sup>53</sup> See Melvin A. Fisher, “The *Abandoned Shipwrecks Act*: The Role of Private Enterprise” (1988) 12 Colum.-V.L.A. J.L. & Arts 373 at 376.

<sup>54</sup> *Supra* note 13, Article 30(1)(d).

ratifying the *1989 Salvage Convention*.<sup>55</sup> The United States has also done this to some extent by enacting the *Abandoned Shipwreck Act*<sup>56</sup> and other laws to protect heritage within federal offshore jurisdiction. But courts are still attempting to apply the principles of salvage to wrecks beneath international waters in addition to those within twenty-four miles from their coasts. The federal courts of the United States have developed an extra-territorial high seas jurisdiction known as *quasi in rem* jurisdiction, triggered by the salvor bringing some property from the wreck before the court.<sup>57</sup> A court thereby asserted jurisdiction over the wreck of the *Andrea Doria*, an Italian luxury liner that sank following a collision on the high seas in 1956, when the salvor appeared with mosaic friezes recovered from the panelling of the ship.<sup>58</sup> American courts have also taken jurisdiction over wrecks in other states' territorial waters, such as the RMS *Lusitania*, which lies within twelve miles of the coast of Ireland.<sup>59</sup> With the advent of the *UNESCO Convention*, however, the law of salvage will cease to have free reign over the exploration and exploitation of shipwrecks beyond the margin of federal jurisdiction.

#### B. *The Law of Finds*

More than a century ago, an American court held that “[i]n a barbarous state of society wrecks were treated as the lawful plunder of the first comer ...”.<sup>60</sup> Although traditionally it has not been applied to historic shipwrecks, the law of finds has become an important part of American law in respect of underwater cultural heritage.<sup>61</sup> In the United States, once an

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<sup>55</sup> Tetley, *supra* note 21 at 364.

<sup>56</sup> 43 U.S.C. § 2101-2106 (1987).

<sup>57</sup> Brice, *supra* note 9 at 283.

<sup>58</sup> *J.F. Moyer v. The Wreck of the Andrea Doria*, 836 F.Supp. 1099 (D.N.J. 1993).

<sup>59</sup> *Bemis v. Lusitania*, 884 F.Supp. 1042 (E.D. Va. 1995). The *Lusitania* was a Cunard liner on a transatlantic voyage from New York to Liverpool when it was torpedoed off the Old Head of Kinsdale on May 7, 1915. The U.S. court has awarded the ship and cargo to U.S. citizens, although the Irish government has declared the *Lusitania* to be a protected national historic site.

<sup>60</sup> *Murphy v. Dunham*, 38 F. 503 at 507 (E.D. Mich. 1889).

<sup>61</sup> In *Bemis v. Lusitania*, *supra* note 59, the court stated at 1048-49 that “[t]raditionally the law of finds was applied only to maritime property which had never been owned by anyone. Yet recent trends suggest applying the law of finds when there has been a finding that the sunken property has been abandoned by its previous owners.” The case of *Eads v. Brazelton*, 22 Ark. 499 (1861), is considered by at least one writer to be the first reported U.S. case in which the law of finds was applied to a sunken shipwreck. See Craig N. McLean, “Law of Salvage Reclaimed: *Columbus-America Discovery v. Atlantic Mutual*” (1993) 13 *Bridgeport L. Rev.* 477 at 480.

admiralty court establishes jurisdiction, the next step is to decide whether to apply the law of finds or the law of salvage to the case at hand.<sup>62</sup> The object of the law of finds is to vest title in the first person who reduces abandoned property to his or her possession, unlike salvage law, where title to property is not at issue because it is assumed that the property still belongs to someone. Salvage law focuses instead on the right of the salvor to compensation for his successful efforts at saving the property.

The maritime law of finds is substantially similar to the law of finds as applied on land.<sup>63</sup> The object of the finder is to obtain legal title. A finder claims property at sea on the premise that the property has never been owned by anyone, such as plants or fish, or has been abandoned by the owner. Alleging that the owner has no intention of returning, the finder has to demonstrate an intent to reduce the property to his possession and show that he is exercising effort and control to make it his possession. Once a finder has taken control over the abandoned property, he holds title to it, a title which is good against the whole world, including the original owner. In respect of shipwrecks, there is an important distinction between the English and American rules. Under English law, the sovereign can assert its right over the wreck if no valid claim is made by the owner. Under American law, in the same circumstances, the finder, not the sovereign, becomes the owner.

An important element in determining ownership of marine property depends on where the property was found. At common law, there is an exception to the rule that a finder of abandoned property takes title to the property when he reduces it to his possession, even if it is discovered on another person's land. The title to abandoned property that is embedded in the soil (or in a river or sea floor, as the case may be) does not vest in its finder, but in the owner of the land where the property is found.<sup>64</sup> Similarly, where the owner of the locus where the property is found asserts "constructive possession" over the property, it is not considered

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<sup>62</sup> For an analysis of the relationship between these two areas of law, see Mark A. Wilder, "Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries" (2000) 67 Def. Couns. J. 92.

<sup>63</sup> See Mangone, *supra* note 20 at 223-29.

<sup>64</sup> See *e.g.* *Chance*, *supra* note 51, where the court held that a ship which had sunk 120 years earlier and was embedded in the soil underlying the Ogeechee River belonged to the State of Georgia because riverbeds are the property of the state. The Court in *Mar-Dive* referred to the definition of "embeddedness" adopted in *Chance*. See *supra* note 39 at 634.

abandoned, and title to it vests in the owner of the land.<sup>65</sup>

American courts have more often applied the principles of salvage than the law of finds to historic shipwrecks. Some argue that salvage law encourages less competitive, secretive conduct than the law of finds because it awards payment for partial service and requires a lower standard of possession. From a public policy perspective, salvage supports the preservation of maritime property and returns it to a use beneficial to society.<sup>66</sup> In *Columbus-America*, the court articulated this preference for salvage:

... when sunken ships or their cargo are rescued from the bottom of the ocean by those other than the owners, courts favor applying the law of salvage over the law of finds. Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence, though, such as an owner's expressed declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interests; in such a case the normal presumption would apply and an abandonment would have to be proved by strong and convincing evidence.<sup>67</sup>

It appears, then, that the law of finds should apply only where the owner has expressly and publicly abandoned his property, and where no one comes forward to claim the recovered property.<sup>68</sup>

### C. *The Law Governing Shipwrecks in Canada*

Canadian maritime law is a body of federal law, and as such is uniform across Canada and excludes provincial law. Admiralty jurisdiction in Canada is concurrent as between provincial superior and inferior courts

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<sup>65</sup> In *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 568 F.Supp. 1562 (S.D. Fla. 1983), the court ruled that the United States had constructive possession and intent to control an eighteenth-century English war vessel embedded in its property, thus it was not lost. The vessel was embedded in submerged lands in Biscayne National Park, Florida. These lands were owned by the United States and controlled by the National Park System.

<sup>66</sup> *Supra* note 62 at 94.

<sup>67</sup> *Supra* note 40 at 460-61.

<sup>68</sup> Schoenbaum, *supra* note 9 at 800. The issue of abandonment has been problematic for American courts. In recent treasure salvage cases such as *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) and *Fairport International Exploration, Inc. v. Shipwrecked Vessel, known as the Captain Lawrence*, 177 F. 3d 491 (6th Cir. 1999), for example, the courts have split as to whether abandonment can be inferred from the passage of time. See John Paul Jones, "The United States Supreme Court and Treasure Salvage: Issues Remaining After *Brother Jonathan*" (1999) 30 J. Mar. L. & Com. 205 at 214-25, n. 2.

that have maritime jurisdiction, and the Federal Court of Canada.<sup>69</sup> Most admiralty and maritime cases are taken before the Federal Court. Both systems provide the right to appeal to the Supreme Court of Canada. “Navigation and shipping” are among the subjects over which the federal Parliament has exclusive jurisdiction under section 91(10) of the *Constitution Act, 1867*.<sup>70</sup>

Like the United Kingdom, Canada has the institution of Receiver of Wrecks. Appointed by the federal government under Part VI of the *Canada Shipping Act*,<sup>71</sup> Receivers can be found on both the East and West coasts (Halifax and Vancouver), where most issues involving wrecks arise. The Receiver has jurisdiction over any wreck, which is defined broadly.<sup>72</sup> Anyone who discovers a wrecked vessel or part of such a vessel, including cargo, must report the discovery to the Receiver of Wrecks and also deliver it to the Receiver, who determines the reward. It is the Receiver’s responsibility to try and locate the owner, and to dispose of the wreck if no one claims it. After the payment of expenses, costs, fees and salvage, the proceeds are to be paid over to the Receiver General to form part of the Consolidated Revenue Fund.

Under the *Canada Shipping Act, 2001*, the Receiver continues to have jurisdiction over wreck.<sup>73</sup> The 2001 Act no longer requires wreck to be delivered to a Receiver of Wreck as it has been deemed more practical and cost-effective for the person who found the object to simply report the find and follow the instructions given by the Receiver. The *Canada Shipping Act, 2001* also contains new authority for the Minister of Fisheries and

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<sup>69</sup> *Federal Court Act*, R.S.C. 1985, c. F-7, s. 22(1). Under s. 22(1), the Federal Court of Canada has a wide jurisdiction over any remedy sought or claim for relief made under or by virtue of “... Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, except to the extent that jurisdiction has been otherwise specially assigned.” See also *ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; Tetley, *supra* note 9 at 434-35. Arthur J. Stone outlines the evolution of the Federal Court of Canada’s admiralty jurisdiction in “Canada’s Admiralty Court in the Twentieth Century” (2002) 47 McGill L.J. 511.

<sup>70</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>71</sup> *Supra* note 14, ss. 422-75.

<sup>72</sup> Pursuant to the *Canada Shipping Act*, *supra* note 14, s. 2, wreck includes the following: “jetsam, flotsam, lagan and derelict found in or on the shores of the sea or of any tidal water, or of any of the inland waters of Canada; cargo, stores and tackle of any vessel and of all parts of the vessel separated therefrom; the property of shipwrecked persons; and any wrecked aircraft, any part or cargo of any wrecked aircraft and any property in the possession of persons on board any aircraft that is wrecked, stranded or in distress.”

<sup>73</sup> Part 7 of the *Canada Shipping Act, 2001*, *supra* note 14, ss. 153-164, governs wreck. “Wreck” is defined in section 153 as jetsam, flotsam, lagan and derelict and any other thing that was part of or on a wrecked vessel, as well as aircraft or parts thereof wrecked, stranded or in distress in waters.

Oceans and the Minister of Heritage Canada to jointly develop Heritage Wreck/Receiver of Wrecks Regulations that could restrict access to wrecks that are considered to be of heritage value.<sup>74</sup> There may well be overlap with provincial and territorial legislation in the administration of these regulations. Although this collaboration should help protect and preserve shipwrecks that have cultural or historical significance from being looted or damaged, conflicts may arise between the federal government and the provinces. However, before the regulations are in place, consultations will be held with the diving community, salvage operators, provinces, aboriginal groups, and other stakeholders. These consultations were scheduled to commence in the fall of 2003.<sup>75</sup>

Canadian courts have not encountered the multitude of treasure salvage cases that have come before their American counterparts. In fact, there have been only two reported Canadian decisions to date. The first is *Blunden v. Storm*,<sup>76</sup> a 1971 decision of the Supreme Court of Canada. In that case, a partner withdrew from a formal partnership that had been formed to search for and salvage the wreck of a French vessel, *Le Chameau*. The ship had sunk off the coast of Nova Scotia in 1725 and reportedly had on board a quantity of gold and silver coins. When the partner secretly located the treasure in the area previously claimed by the partnership, the Court held that he must share the treasure with the other partners. *Blunden* is usually classified as a partnership case,<sup>77</sup> and as such contributes little to treasure salvage jurisprudence in Canada. However, the second case, *Mar-*

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<sup>74</sup> See Canada, Fisheries & Oceans Canada, *Canada Shipping Act, 2001: Regulatory Reform, Questions and Answers* (Ottawa: Fisheries & Oceans Canada Communications Branch, 2003), online: <[http://www.ccg-gcc.gc.ca/csa-lmmc/csa\\_info/Q&A\\_e.htm](http://www.ccg-gcc.gc.ca/csa-lmmc/csa_info/Q&A_e.htm)> (date accessed: 13 November 2003). This regulatory reform process will be carried out in two phases over the next several years. The new *Canada Shipping Act, 2001* reorganizes, updates and streamlines the current *Canada Shipping Act*. For example, it reduces instances where the Federal Court will have exclusive admiralty jurisdiction. The regulatory project is linked with the development of regulations regarding the salvage of wreck or classes of wreck under Part 6 of the *Canada Shipping Act, 2001* under the jurisdiction of Transport Canada. A second link is with the UNESCO initiative dealing with the underwater cultural heritage under the jurisdiction of Heritage Canada. See Canada, Fisheries & Oceans Canada, *Canada Shipping Act, 2001: Regulatory Reform, Questions and Answers* (Ottawa: Fisheries & Oceans Canada Communications Branch, 2003), online: <[http://www.ccg-gcc.gc.ca/csa-lmmc/proj\\_e.htm](http://www.ccg-gcc.gc.ca/csa-lmmc/proj_e.htm)> (date accessed: 13 November 2003).

<sup>75</sup> See Canada, Fisheries & Oceans Canada, *Canada Shipping Act 2001: Regulatory Reform, Public Consultations* (Ottawa: Fisheries & Oceans Canada Communications Branch, 2003) online: <[http://www.ccg-gcc.gc.ca/csa-lmmc/cons\\_e.htm](http://www.ccg-gcc.gc.ca/csa-lmmc/cons_e.htm)> (date accessed: 13 January 2004).

<sup>76</sup> [1972] S.C.R. 135 [*Blunden*].

<sup>77</sup> Steven R. Yormak, "Canadian Treasure: Law and Lore" (1999) 30 J. Mar. L. & Com. 229. This is the source for several statements in my discussion of *Ontario v. Mar-Dive Corp.*

*Dive*,<sup>78</sup> is particularly noteworthy. Judge Lissaman held that the wreck of the *Atlantic*, a U.S. steamship that sank in Canadian waters in 1852, had become the property of the Crown in Right of Ontario. The decision, which was expected to be overturned,<sup>79</sup> is worth considering in some detail as another example of the controversy surrounding claims to historic shipwrecks.

Two decades after the *Atlantic* had sunk, the Western Wrecking Company, an American firm, purchased title to the wreck from the captain who owned her. The company began salvaging the wreck, but ceased operations after only a few months. In 1914, the company's articles of incorporation were revoked. No further claims were made to the *Atlantic* until 1984, when Canadian Michael Fletcher located the vessel. During the next five years, he made numerous dives, collected artifacts, placed dive lines around the site, and videotaped it. But in 1989, American Stephen Borsse also located the wreck. Borsse returned several times with an American colleague, sometimes using the dive lines left by Fletcher and retrieving artifacts. By 1991, Borsse and three other Americans were seeking to obtain legal title to the *Atlantic*.

In order to claim legal title, the Americans formed two new companies, Mar-Dive Corporation and Atlantic Western Limited. They then revived Western Wrecking, which purportedly transferred title to Atlantic Western, which in turn entered into an agreement with Mar-Dive under which the latter agreed to salve the wreck. Finally, Borsse and his partners took several of the retrieved artifacts to California (where Mar-Dive was headquartered) and commenced an *in rem* suit. In March 1992, the United States District Court for the Central District of California issued an order recognizing Atlantic Western as the undisputed owner of the *Atlantic*. Fletcher was ordered to stay away from the wreck. Fletcher, joined by lawyers representing the Government of Canada and the Province of Ontario, was soon challenging Borsse and his colleagues in a Canadian court.

Mar-Dive submitted that it was the owner of the *Atlantic*. It had

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<sup>78</sup> *Supra* note 39.

<sup>79</sup> Mar-Dive initially appealed the decision but gave up, apparently because their company ran out of money. Stephen Borsse and Joe Morgan, the diver and treasure hunter who formed the Mar-Dive team, have since set their sights on wrecks in the Caribbean. See Mark Bourrie, "In Court Over Ghost Gold: The Atlantic Case" (2001) 25 Can. Law. 35 at 38. Meanwhile, Steven Yormak, a London, Ontario lawyer, is trying to reverse the *Atlantic* judgment. He is representing American diver Gary Gentile in a case challenging the authority of the City of Hamilton and Province of Ontario to restrict access to the wrecks of the *Hamilton* and the *Scourge*, two U.S. warships that sank in Lake Ontario during the War of 1812. See James Elliott, "Diver Sues for Access to Wrecks: *Hamilton* and *Scourge* are Target of Suit" *The Hamilton Spectator* (23 December 2000) A17. The case is pending.

three main arguments. First, the *Atlantic* had been an American ship, as had been the vessel with which it collided. Second, when the ship sank, it had been travelling between two American ports. Third, Canada was obligated to defer to the American view of the case pursuant to a 1908 treaty between Great Britain and the United States that regulated wrecking and salvage in the Great Lakes.<sup>80</sup> Fletcher countered these arguments by maintaining that he was the first recent finder and, as a result, his rights were superior. However, Fletcher's position and interests were taken over by the Province of Ontario following an agreement reached prior to trial. The federal government withdrew from the case.

Judge Lissaman awarded rights to the Province of Ontario for several reasons.<sup>81</sup> First, the judgments of the U.S. court were not enforceable in Ontario because there was no "real and substantial connection" between California and the site of the wreck, and it was contrary to public policy to recognize a judgment that had been based on misleading information. Second, the *Atlantic* had been abandoned, if not when she sank, then when Western Wrecking ceased its salvaging operations, or failing that, when Western Wrecking's articles of incorporation were revoked. Third, the wreck was not simply "floating" in the mud as *Mar-Dive* contended, but had become embedded at the bottom of Lake Erie, and was thus the property of the Province of Ontario. Even if the wreck was not embedded, the Province could assert title to her on the basis of the royal prerogative. In Judge Lissaman's view, the *Canada Shipping Act* did not transfer the province's rights over wrecks to the federal government.

As Yormak points out, the ruling in *Mar-Dive* raised several questions about Canada's law in respect of historic shipwrecks.<sup>82</sup> Judge Lissaman held that the salvage provisions of the *Canada Shipping Act* do not apply to provincial territorial waters, leaving one to speculate as to which bodies of water they ought to apply. He also found that salvage pertains only to contemporary vessels faced with marine peril—does salvage not pertain to any historic wreck, then? In addition, Judge Lissaman dismissed the 1908 treaty as irrelevant because *Mar-Dive* failed to comply with one of its terms, namely the requirement to notify Canadian officials of their discovery of the wreck. Could any treaty be rendered irrelevant by private parties' mere lack of compliance with its terms?

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<sup>80</sup> *Treaty between the United States and Great Britain Concerning Reciprocal Rights for the United States and Canada in the Conveyance of Prisoners and Wrecking and Salvage*, 18 May 1908, 35 Stat. 2035.

<sup>81</sup> *Supra* note 39 at 622-36.

<sup>82</sup> *Supra* note 77 at 233-34.

Finally, the case raised the issues of what evidence would be required to prove a “real and substantial connection” with a foreign jurisdiction, and at what point a wreck can be said to be “embedded.”

Similar to provincial claims to objects embedded in provincial maritime property are the cases dealing with control over natural resources. In this regard, the federal Parliament’s jurisdiction over “Navigation and Shipping” threatens to encroach upon the important provincial head of power, “Property and Civil Rights.”<sup>83</sup> Hence, there is a distinction between federal jurisdiction and provincial property in Canada. Three rulings of the Supreme Court of Canada illustrate the uncertainty this distinction has caused regarding the respective jurisdiction of the federal government and the coastal provinces to control the exploration for and exploitation of natural resources in coastal waters.

In a 1967 ruling, *Reference Re Offshore Mineral Rights of British Columbia*,<sup>84</sup> the Court held that the coastal waters off British Columbia that ended at the low-water mark were within federal jurisdiction. As those waters had not been within the jurisdiction of the colony prior to Confederation, they fell to federal jurisdiction. The federal government owned the seabed of the territorial sea off British Columbia under the peace, order and good government clause of the Constitution because offshore minerals were “of concern to Canada as a whole and go beyond local or provincial concern or interest.”<sup>85</sup> The federal government therefore had the right to explore for and exploit resources on the continental shelf. Subsequently in *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas*,<sup>86</sup> the Court decided that the waters between the mainland of British Columbia and Vancouver Island were within the jurisdiction of the province, since they had been included in the colony of British Columbia at the time of its creation and thus formed part of the province at the time it entered Confederation in 1871.

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<sup>83</sup> *Supra* note 70, s. 92(13). See generally William Tetley, “A Definition of Canadian Maritime Law” (1996) 30 U.B.C. L. Rev. 137 at 146, 163.

<sup>84</sup> [1967] S.C.R. 792 [*Reference Re Offshore Mineral Rights*]. See Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at c. 29.3 for a detailed analysis of these cases.

<sup>85</sup> *Reference Re Offshore Mineral Rights*, *ibid.* at 817. The opening words of s. 91 of the *Constitution Act, 1867* confer on the federal Parliament the power “to make laws for the peace, order, and good government of Canada (“p.o.g.g.”), in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces ... .” There are different branches of the p.o.g.g. power. The Court relied on the “national concern” branch in the 1967 B.C. case. See Hogg, *ibid.* at c. 17.1 and c. 17.3(a).

<sup>86</sup> [1984] 1 S.C.R. 388.

In *Reference Re Newfoundland Continental Shelf*,<sup>87</sup> the Court concluded that the right to explore for and exploit minerals on the continental shelf was within federal jurisdiction under the peace, order and good government clause in its residual capacity, because Newfoundland had no jurisdiction over this area at the time it entered Confederation in 1949.<sup>88</sup> By contrast, the result in *Mar-Dive* supports provincial jurisdiction over objects embedded in provincial maritime property and could have implications for similar provincial claims.

Although there is only one case that sheds light on how Canada might handle future international disputes concerning wreck and salvage, Canada has addressed the preservation of historic wreck sites in other ways. The Fathom Five Marine Park at Tobermory, Ontario, preserves twenty-two sail and steamships underwater. There have been plans to create a similar park at Red Bay, Labrador. The site features a sixteenth-century Basque whaling ship, a wreck of major historical importance.<sup>89</sup> Most recently, the Parks Canada Agency presented a proposal in 2000 for a National Marine Conservation Area for Lake Superior, noting the preservation of shipwrecks as one of the project's goals.<sup>90</sup> These efforts on the part of legislators and archaeologists to promote Canada's underwater cultural heritage have also heightened public awareness of its educative value.

### III. THE UNESCO CONVENTION

#### A. Purpose

The *Convention*<sup>91</sup> began as a draft agreement prepared by UNESCO and DOALOS (Division for Ocean Affairs and the Law of the Sea), in consultation with the IMO (International Maritime Organization). There were four years of negotiations within UNESCO before the final

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<sup>87</sup> [1984] 1 S.C.R. 86.

<sup>88</sup> The analysis that the Court used was similar to that of the "gap" branch of the p.o.g.g. power. Its function is to fill gaps in the scheme of the distribution of powers. The p.o.g.g. power is "residuary" in its relationship to the provincial heads of power, because it is expressly confined to "matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces." See Hogg, *supra* note 84 at c. 17.2.

<sup>89</sup> Runyan, *supra* note 4 at 40.

<sup>90</sup> See Parks Canada, online <[http://www.pc.gc.ca/progs/amnc-nmca/proposals/vision/visionb\\_E.asp](http://www.pc.gc.ca/progs/amnc-nmca/proposals/vision/visionb_E.asp)> (date accessed: 8 January 2004).

<sup>91</sup> *Supra* note 7.

draft was adopted.<sup>92</sup> Parties to the *Convention* acknowledge “the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.”<sup>93</sup> Great emphasis has been placed on the urgency of adopting an international instrument designed to protect underwater cultural heritage. Parties to the *Convention* express concern that this heritage “is threatened by unauthorized activities directed at it” and is the subject of “increasing commercial exploitation,” realizing that responsibility for its protection rests with all states.<sup>94</sup>

The *Convention* is the first multilateral text on underwater cultural heritage, and UNESCO’s fourth heritage convention. The other three heritage conventions are the *Convention on the Protection of Cultural Property in the Event of Armed Conflict*,<sup>95</sup> the *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*,<sup>96</sup> and the *Convention concerning the Protection of the World Cultural and Natural Heritage*.<sup>97</sup> Within the past decade, there has been a concerted effort to merge cultural property law with the law of the sea. Before that, the underwater cultural heritage was protected by a few general principles and several bilateral and regional agreements.<sup>98</sup> In 1994, however, there were two major accomplishments: the 1982 *United Nations Convention on the Law of the Sea*<sup>99</sup> came into force and the International Law Association (ILA) adopted the *Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage*.<sup>100</sup> A

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<sup>92</sup> A useful commentary on the legal background of the *Convention* appears in Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Leicester: Institute of Art and Law, 2002) at 14-32.

<sup>93</sup> *Supra* note 7 at Preamble.

<sup>94</sup> *Ibid.*

<sup>95</sup> 14 May 1954, 294 UNTS 215 (entered into force 7 August 1956).

<sup>96</sup> 14 November 1970, 823 UNTS 231 (entered into force 24 April 1972).

<sup>97</sup> 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975).

<sup>98</sup> See Craig Forrest, “A New International Regime for the Protection of Underwater Cultural Heritage” (2002) 51 I.C.L.Q. 511 at 552, n. 188, for examples of these bilateral and regional agreements.

<sup>99</sup> *United Nations Convention on the Law of the Sea*, 10 December 1982, U.N. Doc. A/Conf. 62/122 (1982) [UNCLOS]. As O’Keefe explains, the acronym “UNCLOS” originally referred to the United Nations Conference on the Law of the Sea, but now it is used to refer to the UNCLOS convention itself, for example in reports by the Secretary-General of the United Nations. See O’Keefe *supra* note 92 at 3, n. 4. UNCLOS currently has 143 Parties to it.

<sup>100</sup> ILA, Report of the Sixty-Sixth Conference 432 (1994).

comprehensive legal framework was further developed as the United Nations proclaimed 1998 the International Year of the Ocean, during which UNESCO published the *Draft Convention on the Protection of the Underwater Cultural Heritage*.<sup>101</sup>

In order to understand the full implications of the *Convention*, it is helpful to review the key maritime zones affected by it. There are six zones to which the *Convention* specifically makes reference: internal waters, territorial sea, the contiguous zone, the Exclusive Economic Zone, the continental shelf, and the Area. In each of these zones, states have different rights and obligations. The following are the definitions according to *UNCLOS*:<sup>102</sup>

*Internal waters* are located on the landward side of the baseline of the territorial sea (Art. 8(1)). The normal baseline is the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State (Art. 5).

The *territorial sea* is the area of sea adjacent to a coastal State over which its sovereignty is exercised subject to letting foreign ships pass – the right of innocent passage. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles from the baseline (Art. 3).

The *contiguous zone* may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. The coastal State may enforce its customs, fiscal, immigration or sanitary laws and regulations in this zone (Art. 33).

The *Exclusive Economic Zone*, or “EEZ,” is an area beyond and adjacent to the territorial sea and shall not extend beyond 200 nautical miles from the baselines (Arts. 55 and 57).

The *continental shelf* of a coastal State encompasses the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured (Art. 76(1)). Where the continental margin extends beyond this 200 mile limit, the shelf could extend as far as 350 nautical miles (Art. 76(5)).

*Area* means the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction (Art. 1(1)). The Area and all solid, liquid or gaseous mineral resources *in situ* in the Area or beneath the seabed, including polymetallic nodules, are “common heritage of mankind” (Art. 136).

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<sup>101</sup> U.N. Doc. CLT- 96/CONF.202/5 (1998). A revised draft was produced after the first and second meetings of experts in 1998 and 1999: CLT-96/CONF.202/5 Rev. 2 (1999). The draft agreed to at the fourth meeting of experts was adopted by the General Assembly. See *supra* note 7.

<sup>102</sup> *Supra* note 99, Articles 8(1), 5, 3, 33, 55, 57, 76(1), 76(5), 136. For summaries of these maritime zones, see the *UNESCO Information Kit: General Information and Convention Text*, 11 June 2002, online: UNESCO <<http://www.unesco.org/culture/legalprotection/water/images/infkite.pdf>> (date accessed: 8 January 2004) at 13-14 [*UNESCO Information Kit*]; *supra* note 92 at 3-4; Tetley, *supra* note 9 at 634-39.

The *Convention* does not specifically mention another maritime zone, the high seas, but it is nevertheless important. The high seas comprise all parts of the sea that are not included in the EEZ, the territorial sea or the internal waters of a state, or in the archipelagic waters of an archipelagic state (Article 86). Here the freedom of the high seas exists, including the freedom of navigation. Brice has argued that freedom of navigation includes the right to conduct salvage operations on the high seas.<sup>103</sup>

The previous legal regime, as contained in particular in *UNCLOS*, failed to provide sufficient protection for underwater cultural heritage. The two relevant provisions of *UNCLOS* are Articles 149 and 303. As Nafziger notes, it was originally the intention that these provisions would broadly govern the underwater cultural heritage. However, they ultimately became “the product of political compromise and trade-offs involving more general concerns among the maritime powers about creeping coastal state jurisdiction.”<sup>104</sup> Article 149 states:

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.

One of the problems with this provision is that it lacks a concise definition of the “objects” to which it refers, other than that the objects must be found in the Area. Further, this provision implies that these objects must be either preserved *or* disposed of, leaving no middle ground.<sup>105</sup>

To make matters more uncertain, there is no ranking provided for

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<sup>103</sup> *Supra* note 9 at 261, n. 11.

<sup>104</sup> Nafziger, *supra* note 3 at 319. See also Anastasia Strati, “Deep Seabed Cultural Property and the Common Heritage of Mankind” (1991) 40 I.C.L.Q. 859 at 865. Strati has summarized these political problems as follows:

The lengthy negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III) show that the archaeological issue was entangled within the more general conflict between the interests of the maritime powers, being the main promoters of the freedom of the high seas, and those of coastal States. Thus, the *prima facie* non-controversial issue of underwater cultural heritage acquired a political character since it was employed as a basis for expanding both coastal jurisdiction over the continental shelf and the powers of the Authority over the Area for non-resource-related purposes.

Within this context, the drafters of the 1982 Convention adopted a compromise formula, and one which fails to provide an effective and comprehensive regime of protection of underwater cultural property. The desire for consensus did not always promote clarity of the law and the solution provided for in the Convention is far from satisfactory.

<sup>105</sup> O’Keefe, *supra* note 2 at 224.

the states that are to have preferential rights. Not only does Article 149 fail to prioritize the claims of the three states to which it refers – the state or country of origin, the state of cultural origin, and the state of historical and archaeological origin – but also it does not provide a procedure to settle disputes that may arise from the drafters' lack of clarity.<sup>106</sup> An incident in the Gulf of Thailand in 1992 illustrated this need for prioritization and a means of dispute settlement. The Thai Navy seized a hoard of deep-sea treasure, including more than 2,000 porcelain pots and jars, from a privately-owned Australian ship that was 65 miles offshore.<sup>107</sup> The treasure had been recovered from a twelfth-century Chinese junk. Divcon International, the Australian company contracted to carry out the diving, apparently worked for an Australian-Malaysian consortium that was planning to sell the artifacts through a London auction house. Divcon protested that they were in “international waters” and that the Thai authorities had even given them permission to proceed with the salvage operation. But Thailand claimed Divcon was acting illegally when it salvaged the antiques, as it was within a 200-nautical mile exclusive economic zone that Thailand had declared in the Gulf in 1981. Divcon countered the claim by insisting that archaeological finds were not covered by economic zones. In the end, the Australian ship was released without any arrests and sailed on to Singapore without the artifacts, leaving the complexities of the situation unresolved. The incident highlights the complexities surrounding the preferential rights of states of cultural origin.

Article 303 is the other provision in *UNCLOS* that addresses the cultural heritage. Article 303(1) provides that states have a duty to protect objects of an archaeological and historical nature found at sea and must cooperate for that purpose. But there is little else in the provision that would enable a state to fulfill this duty. Article 303(2) reads as follows:

In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

The zone referred to is the “contiguous zone,” defined in Article 33. The coastal state may exercise the control necessary to “prevent

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<sup>106</sup> Jean Allain, “Maritime Wrecks: Where the *Lex Ferenda* of Underwater Cultural Heritage Collides with the *Lex Lata* of the Law of the Sea Convention” (1998) 38 Va. J. Int'l L. 747 at 763-64; M. June Harris, “Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws” (1997) 14 Ariz. J. Int'l & Comp. L. 223 at 245.

<sup>107</sup> Facts from Teresa Poole, “Thailand’s Navy Seizes Sunken Treasure Trove” *The Independent [London]* (11 February 1992) 11. Brice, *supra* note 9, alludes to this incident at 267.

infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea,” but these matters have no relationship to removal of archaeological material.<sup>108</sup> The provision appears to give states control over underwater cultural heritage between twelve and twenty-four nautical miles from their coastlines. It is uncertain, however, whether the provision also covers the margin between the contiguous zone and the seabed that typically lies between twenty-four and two hundred nautical miles offshore.<sup>109</sup> This distance can be even greater because of coastal states’ ability to claim an entire continental margin that may extend as far as 350 nautical miles. Article 303(3) protects the rights of “identifiable owners,” with no explanation of who these might be, and preserves the law of salvage or other rules of admiralty, in addition to “laws and practices with respect to cultural exchanges.” No state has applied either Article 149 or Article 303(2), a probable result of the provisions’ ambiguous and unreliable wording.

The *Convention*, by contrast, is accused of being too inflexible. Not everyone saw the goal of those working on the drafts as ratification by the General Assembly. For salvors and those who represent them, the rise of legal protection for underwater cultural heritage sounded the death knell for private enterprise and possibly the law of treasure salvage. From 1998 to 2001, four meetings, attended by government delegations and experts from more than ninety countries, were held in Paris to discuss and modify the drafts. One staunch critic of the *Convention* quoted an unnamed fellow-detractor as observing that

[t]he invited “experts” are exclusively government bureaucrats or academicians with little or no diving experience who are collectively and implacably hostile to any role for the private sector or any other non-governmental underwater exploration. The depth of this hostility is evident from a reading of the draft Convention.<sup>110</sup>

U.S. Senators and Congressmen also joined in the fray. In a letter to then Secretary of State Madeleine Albright, Senator Jesse Helms wrote:

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<sup>108</sup> O’Keefe, *supra* note 92 at 18.

<sup>109</sup> Nafziger, *supra* note 3 at 320.

<sup>110</sup> Robert D. Peltz, “Salvaging Historic Wrecks” (2000) 25 Tul. Mar. L.J. 1 at 105. David J. Bederman, another staunch critic of the *Convention*, provided an alternative to the initial draft by drafting his own “International Convention on the Exploration and Protection of Submerged Historic Wrecks,” in collaboration with the Professional Shipwreck Explorers Association. See Bederman, “The UNESCO Draft Convention on Underwater Cultural Heritage: A Critique and Counter-Proposal” (1999) 30 J. Mar. L. & Com. 331 at 346-53. Bederman has critiqued the provisions of the *Convention* in its present form from the perspective of the American salvage industry in “Maritime Preservation Law: Old Challenges, New Trends” (2002) 8 Widener L. Symp. J. 163 at 192-206.

American salvors believe ... that this convention will pose a formidable threat to America's maritime salvage industry—and, also, to U.S. admiralty jurisprudence, which, as I am sure you are aware, has strong roots in the United States Constitution.

... [T]he draft UNESCO convention will, at a single stroke, erase many centuries of workable maritime salvage law if it enters into force in its current form. In its place, the UNESCO convention proposes to substitute a government-run system that will crush private incentive to recover and preserve ocean resources, and may spell the end of serious archaeological access to underwater sea sites.

... In my mind, this situation underscores the wisdom of our country's decision some years ago to withdraw from UNESCO. I urge you to join me in an effort to stop UNESCO's effort to scuttle an important and workable area of Anglo-American law drawn from centuries of maritime custom, and to put an entire American industry sector out of business.<sup>111</sup>

While it appears from these statements that the divide between admiralty and heritage law can never be crossed, there are ways of satisfying both sides' interests in the same treasure. By considering how the *Convention's* provisions deal with control over shipwrecks, funding, and public awareness and training, one realizes that not only can the deficiencies in the *Convention* help to resolve many problems in the law of salvage, but also how salvage law can contribute much-needed resources to the protection of wrecks. It is to the provisions under these three headings that I now turn.

#### B. *Control*

The first criticism concerning the *Convention* is its apparently all-inclusive definition of underwater cultural property. Underwater cultural heritage is defined as “all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years.” Examples of this heritage include “sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and objects of prehistoric character.”<sup>112</sup> One of the *Convention's* more outspoken critics wryly suggested that the definition in the negotiating draft, which was

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<sup>111</sup> Letter from Jesse Helms, U.S. Senator, to Madeleine K. Albright, U.S. Secretary of State (27 June 2000), online: The Institute of Marine Archaeological Conservation <<http://www.imacdigest.com/helmsltr.html>> (date accessed: 8 January 2004), cited in Peltz, *ibid.* at 107.

<sup>112</sup> *Supra* note 7, Article 1(1).

similarly expansive, included “not only historic shipwrecks, but everything from broken surfboards to yesterday’s beer cans thrown over the transoms of recreational fishing boats.”<sup>113</sup> Despite the all-encompassing appearance of the definition, at least one omission has been perceived: two experts thought that the underwater cultural heritage of indigenous peoples should be expressly recognized.<sup>114</sup>

The period of time during which a shipwreck must be submerged in order to be considered underwater cultural heritage also caused debate among the experts modifying the drafts of the *Convention*. Some experts preferred one hundred years, while others recommended the adoption of a fifty-year limit. Still others proposed that 1945 be adopted as the temporal limit so as to include in the definition of underwater cultural heritage all objects from the first half of the century having a historical or archaeological value.<sup>115</sup> The one hundred-year time period significantly broadens the scope of wrecks that can be salvaged by non-governmental bodies and private individuals.

The provisions likely to receive the most criticism from treasure seekers are Article 2(7) and rule 2 of the Annex. Article 2(7) states that underwater cultural heritage shall not be commercially exploited. Rule 2 of the Annex elaborates this general principle, declaring that “[t]he commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage.” Furthermore, underwater cultural heritage shall not be traded, sold, bought

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<sup>113</sup> Peltz, *supra* note 110 at 105. Peltz adds that this all-inclusive reach of the *Convention*, in what he calls UNESCO’s “naked grab for absolute power” (at 111), “clearly goes light years beyond any purported need to protect archaeologically or historically significant wrecks,” maintaining that “its real motivation is power, control, and money” surreptitiously “expressed in terms of altruistic goals.” He suggests that a more efficacious approach would be to first determine what specifically constitutes a historically or archaeologically important wreck or artifact (at 109).

<sup>114</sup> See *Final Report of the First Meeting of Governmental Experts on the Draft Convention for the Protection of the Underwater Cultural Heritage*, UNESCO 1998, Doc. CLT-98/CONF. 202/7 (June 29–July 2, 1998), at 4 [*Final Report of the First Meeting of Governmental Experts*]. Indigenous underwater cultural heritage would include non-human resources, such as palaeontological objects and “natural features of cultural significance to indigenous peoples that have spiritual associations with the oceans.” See Forrest, *supra* note 98 at 523, n. 57. See generally Clarine Osgrove and Patrick Walker, “The Aboriginal Right to Cultural Property” (1995) 29:2 U.B.C. L. Rev. 13, which discussed the role of fiduciary obligations of governments, constitutionally protected rights, and customary tribal law in claiming aboriginal cultural property.

<sup>115</sup> *Final Report of the First Meeting of Governmental Experts*, *ibid.* at 4. Brice, *supra* note 9 at 271, points out that it is not practicable to refer to a specific age such as one hundred years because some newer wrecks rapidly acquire historic value and some older wrecks may be of little interest. For instance, the *Titanic*, which sank in 1912 and therefore does not yet qualify as “underwater cultural heritage” for the purposes of the Convention, has long captured the public’s imagination.

or bartered as commercial goods. As one commentator points out,

[t]he Convention introduces the idea that the commercial recovery of UCH [underwater cultural heritage] is incompatible with the preservation of this resource. As such, the Convention attempts to protect the archaeological value of UCH by eliminating recognition of any economic value. As a consequence, the place of salvage law as a mechanism for the realisation of an economic value was a crucial issue during negotiations.<sup>116</sup>

The debate as to whether the law of salvage and the law of finds are applicable to underwater cultural heritage resulted in Article 4. It states that any activity relating to underwater cultural heritage to which the *Convention* applies shall not be subject to the law of salvage or law of finds, unless it is authorized by the competent authorities, is in full conformity with the *Convention*, and ensures that any recovery of the underwater cultural heritage achieves its maximum protection.<sup>117</sup>

Despite the *Convention's* purported regulation of the ownership of historic wrecks, and in particular all salvage work conducted by states parties, some believe that this body of law will remain intact:

The law of salvage and finds will nevertheless continue to be important. A redefinition of this body of law to include shared rules and principles of international law governing underwater cultural heritage poses no serious threat to responsible salvage or to the normal practice of salvage law, particularly if the salvage is conducted with the consent of interested states. Commercial incentives can contribute to a responsible management of historic wreck. The core principle is simply "preservation for the benefit of humanity."<sup>118</sup>

But it is difficult to be so optimistic in view of the fierce debate concerning the application of these laws. As explained above, the law of salvage applies generally to vessels in peril, and the law of finds to sunken and abandoned vessels. In some countries, salvage law no longer applies once a ship has sunk. In others, the law of finds is not applied to

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<sup>116</sup> Forrest, *supra* note 98 at 533.

<sup>117</sup> One commentator has argued that there is an implied fourth condition concerning the applicability of the law of finds: "[P]revious abandonment of ownership is required and never presumed." See Guido Carducci, "New Developments in the Law of the Sea: The UNESCO Convention on the Protection of the Underwater Cultural Heritage" 96:2 Am. J. Int'l L. 419 at 426. O'Keefe, *supra* note 92 at 63, maintains that it is difficult to justify exclusion of the law of finds from the *Convention*. Since this law treats the finder as owner with complete control over what has been found, its application would not ensure protection of the heritage in accordance with the *Convention's* principles. But its exclusion "means that an ancient wreck found on the deep seabed, for example, and brought ashore has no owner unless the State where it comes ashore provides for this. The Underwater Convention provides no guidance on the basis that it was not a Convention dealing with ownership issues."

<sup>118</sup> James A.R. Nafziger, "The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck" (2003) 44 Harv. Int'l L.J. 251 at 269.

shipwrecks, because a ship that has been abandoned becomes the property of the Crown. In fact, the private law concept of abandonment does not exist in the domestic law of numerous countries, especially those in Latin America. Experts feared that if no qualifications were put on the application of the law of salvage and finds, a state that recognizes such laws may seek to apply them extraterritorially to the underwater cultural heritage of another state with a different legal regime for wrecks. Archaeologists also found that the common objective of salvage, namely to rescue only what is of commercial value without regard to the preservation of heritage sites in their entirety, was incompatible with the *Convention's* protective regime.<sup>119</sup> In order to resolve the problems caused by different legal systems and perspectives, the requirement that the *Convention* apply solely to “abandoned” underwater cultural heritage was eliminated and the question of title was not dealt with at all.<sup>120</sup> However, all underwater cultural heritage is to be subject to the protection regime established in the *Convention* and, consequently, to the principles embodied in the *ICOMOS Charter for the Protection and Management of the Archaeological Heritage*,<sup>121</sup> regardless of ownership.

Some states were concerned that the *Convention* could undermine the existing legal order based on *UNCLOS*, which carefully balances the interests of states in controlling activities off their own coasts with the interests of all countries in protecting the freedom to use ocean spaces. Article 3 attempts to address this concern, stating that the *Convention* “shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.” The *Convention* further provides that “States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.”<sup>122</sup> Without prejudice to other international agreements and rules of international law,

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<sup>119</sup> O’Keefe, *supra* note 92 at 61-62.

<sup>120</sup> *Final Report of the First Meeting of Governmental Experts*, *supra* note 114 at 5; Forrest, *supra* note 98 at 524-25.

<sup>121</sup> International Council on Monuments and Sites, *Charter on the Protection and Management of Underwater Cultural Heritage* (1996), online: International Council on Monuments and Sites <[http://www.international.icomos.org/underwater\\_e.htm](http://www.international.icomos.org/underwater_e.htm)> (date accessed: 8 January 2004) [*ICOMOS Charter*]. The *ICOMOS Charter*, which as modified provides the basis for the rules of the Annex, is intended to provide a standard against which activities are to be measured. Some of its provisions have attracted criticism from those states with a treasure-seeking lobby. For example, the *ICOMOS Charter* emphasizes preservation *in situ* and further states at Article 3 that “project funding must not require the sale of underwater cultural heritage,” both of which would limit commercial operations.

<sup>122</sup> *Supra* note 7, Article 7(1).

they must require that the rules of the Annex be applied to activities in these waters.<sup>123</sup> In accordance with Article 303(2) of *UNCLOS*, states parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone and must require that the rules be applied in doing so.<sup>124</sup>

Beyond the contiguous zone, however, the proposed extension of coastal state jurisdiction has been highly controversial. Under *UNCLOS*, the rights of coastal states gradually decrease as the distance from the shore increases. Maritime states such as the U.S., Russia, and several Western European countries have traditionally argued in favour of maximum freedom and minimal jurisdiction in international waters. But the *Convention* places an obligation on coastal states to monitor sites up to 200 nautical miles from their coasts. Hoping to resolve this apparent discrepancy, those modifying the drafts based the jurisdictional structure of the *Convention* on the principles of nationality and flag state jurisdiction.<sup>125</sup> There is both a reporting regime and a protective regime for underwater cultural heritage in the EEZ, on the continental shelf and in the Area. The states parties have a general duty to cooperate in the protection of underwater cultural heritage,<sup>126</sup> and the coastal states and flag states must work together if these regimes are to succeed.

Any discovery or activity directed at underwater cultural heritage located in the EEZ or on the continental shelf of a coastal state is subject to a complex system of reporting, notification, and authorization. States parties must ensure that their nationals or vessels flying their flag report any discovery or intention to engage in activities directed at underwater cultural heritage located in their EEZ or on their continental shelf.<sup>127</sup> When a state party's national or state vessel discovers underwater cultural heritage or intends to undertake activities directed at it in or on another state's EEZ or continental shelf, the state party must ensure that the national or state vessel notifies it and that the other state receives notification. The state party itself, or alternatively the national or master of the vessel, can notify the other state.<sup>128</sup> The state party must then notify the Director-General of UNESCO of discoveries or activities reported to

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<sup>123</sup> *Ibid.* Article 7(2).

<sup>124</sup> *Ibid.* Article 8.

<sup>125</sup> Forrest, *supra* note 98 at 543.

<sup>126</sup> *Supra* note 7, Article 2(2).

<sup>127</sup> *Ibid.* Article 9(1)(a).

<sup>128</sup> *Ibid.* Article 9(1)(b).

it.<sup>129</sup> The Director-General promptly follows up by making this information available to all states parties.<sup>130</sup> If a state party has a verifiable link, especially a cultural, historical, or archaeological link, to the underwater cultural heritage concerned, that state may declare to the state party in whose EEZ or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of the heritage.<sup>131</sup>

There is also a protective regime for underwater cultural heritage in the EEZ and on the continental shelf. The *Convention* states that “[a] State Party in whose EEZ or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided by international law, including UNCLOS.”<sup>132</sup> Putting this provision into effect may be problematic, however. The *Convention* is only binding upon the nationals and vessels of states that have acceded to it, and this unilateral jurisdiction could result in a legal impasse:

The question of whether the Unesco Convention does or does not conflict with UNCLOS remains open to interpretation. What is clear is that countries that have acceded to the convention could now find themselves in conflict with countries that have not. For example, let us imagine that a private US vessel were engaged in the recovery of artifacts from a shipwreck in international waters but within 200 miles of the coast of Italy (which voted in favour of the convention). Under the terms of the convention, Italy would be obliged to exert authority over the U.S. vessel, but the U.S. would not recognise Italy’s right to do so.<sup>133</sup>

The coastal state is not granted exclusive jurisdiction, but is designated as the “coordinating state,” organizing the consultations of the interested parties referred to in Article 9(5).<sup>134</sup> The coordinating state is responsible for implementing measures of protection that have been agreed upon by the consulting states, issuing all necessary authorizations for such measures in conformity with the *Convention’s* rules, conducting any necessary preliminary research on the underwater cultural heritage and

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<sup>129</sup> *Ibid.* Article 9(3).

<sup>130</sup> *Ibid.* Article 9(4).

<sup>131</sup> *Ibid.* Article 9(5).

<sup>132</sup> *Ibid.* Article 10(2).

<sup>133</sup> Cristina Ruiz, “Who Owns the Watery Past?” *The Art Newspaper* (September 2002), online: The Art Newspaper <<http://www.theartnewspaper.com/news/article.asp?idart=8150>> (date accessed: 13 November 2003).

<sup>134</sup> *Supra* note 7, Article 10(3). See generally Forrest, *supra* note 98 at 543-44, for a discussion of Article 10.

issuing authorizations for activities directed at it. The coordinating state must also inform the Director-General of UNESCO of the results, who in turn will make this information available to all states parties.<sup>135</sup> However, a coastal state is granted the right to undertake emergency measures to prevent “immediate danger” to the underwater cultural heritage belonging to other flag states, “prior to consultations” with those states if necessary.<sup>136</sup>

The responsibilities of states for ships flying their flag that might be undertaking activities directed at underwater cultural heritage extend beyond the obligations in Articles 9 and 11. Nations may exercise jurisdiction over activities taking place even further offshore—that is, on the high seas, subject to the exclusive authority of no nation, or even on the continental shelf of another nation—by mandating that a state party prohibit its own citizens and vessels flying its flag from violating any provision of the *Convention*.<sup>137</sup> Article 16 illustrates the problem of control. Early in the negotiations, one expert voiced the opinion that a system of protection based on the flag state jurisdiction would most likely not prevent the looting of underwater cultural heritage from the continental shelves of third states.<sup>138</sup> After all, the purpose of the *Convention* was to create a practical means of control, rather than putting in place a slow and bureaucratic system. Whether or not its provisions will actually work, the *Convention*’s reach from the shore is nevertheless considered virtually unlimited. In fact, the *Convention* can also apply to each country’s geographical “internal” waters, including its rivers, lakes, wells, moats and possibly marshes.<sup>139</sup>

Articles 11 and 12 address underwater cultural heritage found in the Area. The reporting and protective regimes are similar to those applicable to the continental shelf and EEZ, with one notable exception. A state party will be appointed as coordinating state, a role that the coastal

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<sup>135</sup> *Supra* note 7, Article 10(5).

<sup>136</sup> *Ibid.* Article 10(4).

<sup>137</sup> *Ibid.* Article 16, which reads, “States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.”

<sup>138</sup> *Final Report of the First Meeting of Governmental Experts*, *supra* note 114 at 8.

<sup>139</sup> Article 28 provides that “[w]hen ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.” See generally Forrest, *supra* note 98 at 532-33; O’Keefe, *supra* note 92 at 144; and Peltz, *supra* note 110 at 108. Peltz, at 111-12, claims that national laws already exist to protect wrecks and their cargoes, rendering the *Convention* redundant and unnecessary.

state had assumed in the context of the other maritime zones.<sup>140</sup> Article 13 protects the confidentiality of naval operations. It provides that warships or other government vessels with sovereign immunity that accidentally come across underwater cultural heritage in the EEZ, on the continental shelf or in the Area, while on a state-controlled operation, do not have to report the discovery.<sup>141</sup>

Negotiators also battled over the sovereign immunity of state vessels and warships. The view of many maritime nations is that states do not abandon their property without an express declaration to that effect. The United States, for example, has long maintained that title to U.S. warships is not extinguished by the passage of time, regardless of when and where they were lost at sea.<sup>142</sup> But there is no rule of express abandonment for sunken warships in international law.<sup>143</sup> When the concept of abandonment was eliminated from the *Convention*, difficult questions regarding sovereign immunity arose. The definition of “State vessels and aircraft” in Article 1(8) includes warships, but the term itself is not

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<sup>140</sup> *Supra* note 7, Article 12(2). For a detailed discussion of the regime applicable to underwater cultural heritage in the Area, see Carducci, *supra* note 117 at 431-32.

<sup>141</sup> Article 13 reads:

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

See O’Keefe, *supra* note 92 at 101-102.

<sup>142</sup> The U.S. position was reiterated in the closing hours of Bill Clinton’s presidency, in a statement entitled “President’s Statement on United States Policy for the Protection of Sunken Warships,” 37 Weekly Comp. Pres. Doc. 195196 (22 January 2001), reproduced in Jason R. Harris, “Protecting Sunken Warships as Objects Entitled to Sovereign Immunity” (2002) 33 U. Miami Inter-Am. L. Rev. 101 at 102-03. Harris notes at 103-04 that the Statement appears to affirm the decision in *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000). The U.S. Court of Appeals, Fourth Circuit, held that Spain did not abandon, either expressly or by implication, title to two Spanish warships, *La Galga* and the *Juno*, which sank near the coast of Virginia in 1750 and 1802 respectively. Because the ships had not been abandoned, they were not subject to salvage. For commentary on the case, see Michael White, “Sunken warships – historic wrecks – title – abandonment – law of finds – salvage rights: *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*” (2001) 95 Am. J. Int’l L. 678.

<sup>143</sup> David J. Bederman, “Rethinking the Legal Status of Sunken Warships” (2000) 31 Ocean Devel. & Int’l L. 97 at 100.

defined.<sup>144</sup> Because Article 3 states that the *Convention* is to be interpreted in a manner consistent with *UNCLOS*, it has been suggested that the definition of “warship” in Article 29 of *UNCLOS* can be used.<sup>145</sup> However, this definition is intended for modern navies and is not easily applied to warships that must meet the definition of underwater cultural heritage, having been partially or totally underwater for at least 100 years.

At first glance, it appears that under generally recognized principles of international law, there must be special immunity for all warships. Article 2(8) of the *Convention* states that consistent with state practice and international law, including *UNCLOS*, nothing in the *Convention* shall be interpreted as modifying the rules of international law and state practice pertaining to sovereign immunities, nor any state’s rights with respect to its state vessels and aircraft. The 1910 and 1989 salvage conventions do not apply to warships.<sup>146</sup> Articles 32, 95 and 96 of *UNCLOS* provide for the immunity of warships and other government ships operated for non-commercial purposes.<sup>147</sup> Articles 95 and 96, in particular, ensure that on the high seas these vessels are completely immune from the jurisdiction of non-flag states. Despite the straightforward appearance of these provisions, however, it is uncertain whether the *UNCLOS* regime applies in the context of a sunken vessel. A number of commentators believe that a sunken vessel ceases to be a ship, especially if it is no longer engaged in the active military service of the state and has long since been abandoned by its crew. Therefore, the vessel is no longer under the exclusive jurisdiction of the flag

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<sup>144</sup> “State vessels and aircraft” is defined in the *Convention*, *supra* note 7, Article 1(8), as “warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.”

<sup>145</sup> O’Keefe, *supra* note 92 at 46. The three criteria of the definition, which O’Keefe acknowledges could be problematic, are as follows: the vessel must bear external marks showing its nationality; the commanding officer must be duly commissioned with his or her name appearing in the appropriate service list; and the vessel must be manned by a crew under regular armed forces discipline.

<sup>146</sup> *Supra* note 12, Article 14, and *supra* note 13, Article 4.

<sup>147</sup> *UNCLOS*, *supra* note 99. Article 32, entitled “Immunities of warships and other government ships operated for non-commercial purposes,” ensures that warships are entitled to immunity from non-flag States, unless the ships have not complied with the laws and regulations of the coastal State concerning passage through the territorial sea. Article 95 states that “[w]arships on the high seas have complete immunity from the jurisdiction of any state other than the flag State.” Article 96 provides that “[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.”

state.<sup>148</sup> If this is the case, then warships that are underwater cultural heritage for the purposes of the *Convention* may not qualify for sovereign immunity.

The provisions in the *Convention* regarding warships are further evidence of the compromise reached between flag states and coastal states. The coastal state has exclusive jurisdiction over its archipelagic waters and territorial sea, but the *Convention* encourages the coastal state to inform the flag state of its discovery of state vessels “with a view to cooperating on the best methods of protecting [them].”<sup>149</sup> In respect of the EEZ and the continental shelf, the coastal state and the flag state must also work together, because “no activity directed at state vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.”<sup>150</sup> Beyond the EEZ or the continental shelf, however, the exclusive jurisdiction of the flag state is recognized. Article 12(7) declares that “[n]o State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.” Despite the requirement that coastal states notify flag states of their discoveries, Nafziger notes that flag states still feel powerless as the “... State vessels ... often contain the remains of military and other personnel. The Flag States are concerned about their lack of control over tampering with the bones of their dead and are also concerned with protecting the technology aboard their military vessels ... .”<sup>151</sup>

While the *Convention* may not grant states full control over their

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<sup>148</sup> Forrest, *supra* note 98 at 527, n. 74 and accompanying text; Harris, *supra* note 142 at 110-111. Bederman, *supra* note 143 at 112-14, rejects the view that sunken warships are insulated from general principles of salvage law. This view is based on the beliefs that warships should be immune from salvage as grave sites and that a sovereign can legitimately reject salvage services for its sunken warships.

<sup>149</sup> *Supra* note 7, Article 7(3).

<sup>150</sup> *Ibid.*, Article 10(7).

<sup>151</sup> Ruiz, *supra* note 133. War graves constituted a controversial issue. Many ships have sunk during battle, and the *Convention* enshrines the need to respect human remains at these sites (*supra* note 7, Article 2(9)). Rule 5 of the Annex ensures that “[a]ctivities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.” Some reasons for the divisiveness of the issue were expressed in a UNESCO press release:

While many countries, such as the United Kingdom and Germany, protect sunken warships in which there has been loss of life, other countries claimed that all should be equal before death. They explained that they were reluctant to distinguish military underwater graves, objecting to the granting of special status to shipwrecks that carried slave traders and invading armies.

See UNESCO, Press Release (10 July 2001) online: <<http://www.unesco.org/bpi/eng/unescopress/2001/01-81e.shtml>> (date accessed: 14 November 2003).

sunken warships, it appears to vest complete discretion in the governments of member states in respect to the disposition of all items defined as “underwater cultural heritage.” Article 30 prevents the intervention of any other authority by providing that “no reservations” are allowed by its adopting members.<sup>152</sup> Article 18 deals with seizure and disposition of underwater cultural heritage.<sup>153</sup> Article 18(4), which aims at ensuring that seizures are for the public benefit, is of particular interest. Is the “public benefit” in this paragraph different from the “benefit of mankind” in Article 149 of *UNCLOS*? Further, the provision does not provide a way of prioritizing the cultural, historical and archaeological links which may arise, similar to the lack of a prioritization scheme in Article 149 for the preferential rights of the state or country of origin, the state of cultural origin, or the state of historical and archaeological origin.<sup>154</sup> Finally, Article 18(4) does not address the difficulties involved in reassembling a dispersed collection and the extent to which attempts to reassemble such a collection would—and should, given limited financial resources—reach.

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<sup>152</sup> The only exception is Article 29, which allows states with groupings of smaller political units (e.g. federal states and those with self-governing territories) to make a declaration to the depositary regarding the areas to which they do not wish the *Convention* to apply. During the negotiations leading to Article 29, Canada had proposed a federal clause for the *Convention*, explaining that certain small areas of its territorial sea and internal waters remain within provincial jurisdiction. See O’Keefe, *supra* note 92 at 145-46.

<sup>153</sup> *Supra* note 7, Article 18. Article 18 reads:

1. Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.
2. Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.
3. Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.
4. A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account the need for conservation and research; the need for re-assembly of a dispersed collection; the need for public access, exhibition and education; and the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.

<sup>154</sup> O’Keefe, *supra* note 92 at 118-19, suggests that the seized material may have to be split where the link of the second state is strong.

### C. *Funding*

One of the major deficiencies in the legal instruments now in place is that states do not have the financial resources to safeguard underwater cultural heritage. However, the *Convention* does not sufficiently address this need either. At an average cost of U.S. \$30,000 per day to salvage an historic wreck,<sup>155</sup> there are concerns that the costs in time, money and expertise necessary to locate many of the wrecks are beyond the means and desires of most government agencies:

It is highly unlikely that governments will devote the resources necessary to locate and salvage historic wrecks, particularly when they might end up having to turn them over to other governments under the Convention's terms. Thus, what will likely eventually happen is similar to what has occurred under the Abandoned Shipwreck Act [in the U.S.], in which states have sold permits to salvors in exchange for a "piece of the action," usually amounting to 25%.<sup>156</sup>

Rule 17 of the Annex states that "an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination," except in cases of emergency to protect the underwater cultural heritage. The overall goal of the *Convention* is to increase protection on an international level. It is difficult to imagine how wrecks can be protected at the international level, however, when budgetary means do not support this protection at the local level.<sup>157</sup> Private salvors are required to contribute much-needed funds to underwater cultural heritage exploration.

The General Principles of the Annex also state that "[u]nderwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods."<sup>158</sup> This moratorium on commercial activities means that the proceeds from such exchanges could never be used as project funding. This provision will severely limit a salvor's ability to recoup his or her financial expenditures from the salvage operation. If such financial rewards are outlawed, the salvor's incentive to discover and recover historical shipwrecks may also disappear, leaving cultural treasures lost on

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<sup>155</sup> McQuown, *supra* note 6 at 321, n. 132.

<sup>156</sup> Peltz, *supra* note 110 at 112.

<sup>157</sup> One of the advantages of ratification listed in the *UNESCO Information Kit*, *supra* note 102 at 11, is the opportunity for states parties to "benefit from UNESCO's technical assistance, within the limits of the Organization's budget, for drafting national legislation relating to application of the Convention."

<sup>158</sup> *Supra* note 7, Annex, rule 2.

the ocean floor. Nevertheless, it has been acknowledged that commercial incentives have not been completely ruled out. Responsible non-intrusive access to observe or document *in situ* underwater cultural heritage is encouraged,<sup>159</sup> and rule 7 of the Annex confirms that “[p]ublic access to *in situ* underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management.” Such commercial incentives as the sale of television rights or paying school excursions have been considered acceptable.<sup>160</sup> If salvors can dive onto a wreck for the purposes of taking pictures and marketing the images, as long as they do not disturb the wreck itself, there will still be some financial incentive to discover these underwater treasures.<sup>161</sup>

#### D. *Public Awareness and Training*

A final goal of the *Convention* is to stress the importance of underwater archaeology for the knowledge of the past. The *Convention* emphasizes the “importance of research, information and education” in the Preamble, further stating that “[e]ach State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.”<sup>162</sup> States must help one another achieve these objectives by sharing information.<sup>163</sup> The historic and educational value of old shipwrecks to our national and international cultural heritage has now been recognized. One author writes that

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<sup>159</sup> *Ibid.* Article 2(10).

<sup>160</sup> *Final Report of the First Meeting of Governmental Experts*, *supra* note 114 at 9.

<sup>161</sup> See Justin S. Stern, “Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks” (2000) 68 *Fordham L. Rev.* 2489 at 2526-27. Stern describes the establishment of exclusive photographic rights to the *Titanic*.

<sup>162</sup> *Supra* note 7, Article 20. Forrest, *supra* note 98 at 550, notes that during the negotiations, the term “education” was replaced by “public awareness,” the latter being a “less stringent duty on States” than the requirement to provide formal training connoted by “educating” the public. Article 15 of the negotiating draft read: “Each State Party shall endeavour by educational means to create and develop in the public mind a realization of the value of the underwater cultural heritage as well as the threat to this heritage posed by violations of this Convention and non-compliance with the Rules of the Annex.” During the drafting process, some experts also expressed the view that articles 15 and 16 (in the initial and negotiating drafts) implicitly made a distinction between education, which refers to archaeology as a university subject, and training, which is technical training. See *Final Report of the First Meeting of Governmental Experts*, *supra* note 114 at 12. Inherent in such a distinction is a notion of intellectual hierarchy. This proved unhelpful in reconciling private salvors, who view themselves as trained specialists, with the proponents of the *Convention*, whom the salvors view as officious interlopers with no practical experience in the field.

<sup>163</sup> *Supra* note 7, Article 19.

[t]he story which the salvors and wrecks have to tell is unique in many instances since shipwrecks are time capsules containing materials from an earlier age frozen in location at the moment of their sinking. The discovery of an undisturbed wreck, such as the Civil War ironclad USS *Monitor* or Henry VIII's flagship the *Mary Rose*, which sank in 1545 and was raised in 1982 with over 15,000 artifacts, is comparable to a discovery on land of an important early frontier settlement frozen in time by a catastrophic natural event such as a volcanic eruption which buries the site and preserves it.<sup>164</sup>

Historic shipwrecks can provide information about early ship-building techniques, trade and navigation. Proponents of the *Convention* hope that it will act as a powerful disincentive to salvors and sports divers in order to protect the information that wreck sites have to offer. However, there are also those who believe that such disincentives will severely limit the number of wrecks discovered.

Some argue that most shipwrecks and their artifacts should not be given to museums and government archives because these items are by now redundant and of little historical importance. One supporter of this view gives the example of shipwrecks found off Florida and the Caribbean:

[F]or artifacts or sites to be construed as being of archaeological importance, they must add significant previous unknown data to the world body of knowledge pertaining to a given culture, time frame or technology ... . Over the past 30 years hundreds of shipwrecks have been found off Florida and in the Caribbean. Millions of artifacts have been recovered of many types of categories. We are now to the point where these types and categories of artifacts have become extremely redundant, and while many may have significant intrinsic value and are interesting or beautiful, most have ceased to impart relatively new data.<sup>165</sup>

This is a specious argument because it assumes that items with intrinsic value or which merely invite curiosity cannot possess an educational component. Furthermore, if these artifacts are as superfluous as some salvors claim them to be, it is odd that they are nevertheless continuing to retrieve them from the depths on a steady basis. The artifacts' intrinsic value lies in the fact that they are part of the underwater cultural heritage, the mystique of which is still novel. It has only been in the last two decades that technology has brought these wrecks to the surface, and their value and marketability will probably increase in time. If private collectors are willing to pay thousands and even millions of dollars for such "redundant" material, then surely there are at least some items in which the general public would also be interested.

Accompanying this argument that these artifacts lack archaeological value because they are so similar to one another is the claim

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<sup>164</sup> Runyan, *supra* note 4 at 33 [footnotes omitted].

<sup>165</sup> Peltz, *supra* note 110 at 110.

that there are simply too many of them. Private and public collections have apparently become so large that governments no longer have the ability to catalogue them, and therefore can only display for the public a small fraction of the artifacts available. “The staggering amount of material that has been amassed world wide,” insists Peltz, “has led some researchers to call for a moratorium on excavation ... .”<sup>166</sup> The *Convention* has responded to this argument in Article 2(5) and rule 1 of the Annex, which promote *in situ* preservation of sites as the best means of achieving protection of the cultural heritage. Qualified archaeologists will determine whether the site would contribute anything new to the body of scientific and cultural knowledge already available before excavating it. Prior to any activity, a project design for the activity will be developed and approved by the competent authorities.<sup>167</sup> This procedure could substantially reduce the number of wreck sites that can be excavated.

Article 21 is particularly important owing to the lack of specialized archaeologists, technicians, and resources for their training in a number of developing countries. “States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage,” the *Convention* states. The provision does not appear to put all states under the same obligation to provide training in archaeology. States parties should be in compliance if they share resources and cooperate, but the extent to which they must do so is unclear. Article 21 does place an onus on developed states to provide training and the requisite technology. Will they be able to finance the training requested of them? Will the training and technology which they provide be required to meet certain standards? What if one state promotes underwater archaeological techniques that are considered incompetent by another? What are the “current professional standards” referred to in rule 24 of the Annex, in accordance with which conservation shall be carried out?<sup>168</sup> The transfer of technology will be on terms agreeable to the transferring state, and some states may be unwilling to transfer certain types of technology, particularly military technology.<sup>169</sup> Therefore, a

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<sup>166</sup> *Ibid.* at 111.

<sup>167</sup> *Supra* note 7, Annex, rules 9-16.

<sup>168</sup> O’Keefe acknowledges that it will be difficult to establish “current professional standards” on an international basis, and suggests that “[t]he best approach would be to aim for the most effective process of conservation available considering the circumstances.” See O’Keefe, *supra* note 92 at 178.

<sup>169</sup> Forrest, *supra* note 98 at 551. For example, Dr. Robert Ballard discovered the *Titanic* using remotely operated vehicles funded by the U.S. navy. See Tim Hulse, “Robert Ballard: Explorer of the drowned world” *The Independent [London]* (17 September 2000) 28.

developing state without its own resources to provide training could still be deprived of the highly technical equipment used by developed states. If states parties are obligated to cooperate in the provision of training, as Article 21 suggests, then clear standards should be defined. Admiralty lawyers are well aware of many of the national standards that are in place in various countries. Thus, they are in a position to share this knowledge with cultural heritage experts. By working together, both sides could better define the terms of Article 21, making it easier for states parties to adhere to the training standards articulated therein.

The cooperative aspect of training is also of fundamental importance. It has, in at least one instance, brought together the opposing sides in this debate. One training scheme reportedly turned some former looters into allies and protectors. The training course for amateurs by the Nautical Archaeology Society of the United Kingdom focuses on physical and chemical techniques used in archaeology, as part of the scientific action of the Commission of Science and Technology of the Council of Europe.<sup>170</sup> The interjection of scientific evidence in the debate deflects attention from what can be seen as the moralistic underpinnings, and therefore less tangible values, of cultural heritage arguments, persuading salvors to develop an awareness of conservation in their training. ICOMOS has called for this type of scientific education to be undertaken at many levels – resource managers, the public at large, as well as local groups assisting in protection.<sup>171</sup> Recovery should be attempted only after proper evaluation of the conservation needs of found items.<sup>172</sup> Salvors could complement their vast practical experience with this knowledge of conservation techniques, enabling them to contribute to designing effective training programs.

Despite the fact that salvors and admiralty lawyers tend to view inimically the stance of cultural heritage proponents as a moral one, they could in fact benefit from the ethical codes and duties that the other side has attempted to formulate. One such code which has governed the

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<sup>170</sup> *Final Report of the First Meeting of Governmental Experts*, *supra* note 114 at 12.

<sup>171</sup> This idea that the conservation of cultural heritage requires public support at the local level is reflected in Mexico's *Declaration of Oaxaca*, which adapted the *International Charter for the Conservation and Restoration of Monuments and Sites, 1966*. Conservation methodology "should never be established as an activity lying outside the values, aspirations and practices of communities ... [nor should it] ignore the very existence of the living heritage of cultural customs and traditions." See Patrick J. O'Keefe, "Codes of Ethics: Form and Function in Cultural Heritage Management" (1998) 7 *Int'l J. Cult. Prop.* 32 at 38.

<sup>172</sup> Rule 4 of the Annex ensures that "activities directed at underwater cultural heritage use non-destructive techniques and survey methods in preference to recovery of objects." See *supra* note 7.

underwater cultural heritage is the *ICOMOS Charter*.<sup>173</sup> Establishing accepted practices of professionals in salvage operations can help to deal with problems raised by the unique nature of cultural heritage issues.<sup>174</sup> Salvage law does not have a code of ethics *per se*, but the profession has considered adopting a much needed archaeological duty of care.<sup>175</sup> The notion that salvors should act to preserve the archaeological and historical provenance of a wreck is an emerging doctrine in maritime law.<sup>176</sup> In the United States, one court has actually referred to this duty as the “Archaeological Duty of Care,” and other courts have imposed similar requirements on salvors.<sup>177</sup> Yet in the view of critics of the *Convention*, admiralty law already requires explorers to act in good faith and perform “good” archaeology on salvage operations under the jurisdiction of admiralty courts. Such laudable mandates would be instantly negated if the *Convention* enters into force in its current form.<sup>178</sup>

#### IV. CONCLUSION

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<sup>173</sup> *Supra* note 121.

<sup>174</sup> O’Keefe recognizes that the enforcement of such codes is frequently difficult, especially since there is no clear guide on what the content of a code of ethics should be. Nevertheless, he argues, “[these codes] serve a valuable role both in educating the members of the various organizations and the public and in establishing goals for which these professionals aspire.” See generally O’Keefe, *supra* note 171.

<sup>175</sup> See Clemency Chase Coggins, “A Licit International Traffic in Ancient Art: Let There Be Light!” (1995) 4 Int’l J. Cult. Prop. 61 at 65. Coggins points out that archaeologists only dig as much as necessary for scientific research; treasure seekers tend to dig for profitable material without regard to preserving the site for future generations.

<sup>176</sup> “Provenance,” which can generally be defined as a place of origin, in the context of cultural heritage law means the entire history of an object. Provenance is important for two reasons. First, as O’Keefe explains, it “places an object in context and gives it meaning.” Second, if an object lacks provenance, then the consequences may be legal. O’Keefe provides an example of a person who purchases such an object: “[The purchaser] cannot be sure of keeping it, because there might be a defect in the title that means the purchaser will then have to hand the object back to someone with a better claim or there may be some legislative provision which means that the object can be seized by authorities.” See Patrick J. O’Keefe, “Provenance and Trade in Cultural Heritage” (1995) U.B.C. L. Rev. 259 at 261-62.

<sup>177</sup> *Marex Int’l, Inc. v. The Unidentified, Wrecked and Abandoned Vessel*, 952 F. Supp. 825 (S.D. Ga. 1997), where the district court held at 829 that courts can impose this duty on salvors operating on wrecks of historic or archaeological value. For a survey of the other cases, see Christopher R. Bryant, “The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks” (2001) 65 Alb. L. Rev. 97 at 138-43. Bryant argues that the Archaeological Duty of Care would protect historical shipwrecks without abrogating the laws of finds and salvage in relation to wrecks.

<sup>178</sup> Peltz, *supra* note 110 at 112.

It may be several years before the *Convention* enters into force. With its abundance of treasure salvage cases, many speculate as to what position the U.S. will take. Although it actively participated in the negotiations, at the General Conference the American delegation stated that it could not support the *Convention* as it now stands.<sup>179</sup> It remains uncertain whether the Senate will give its consent to the ratification of the *Convention*, especially since it has not yet approved *UNCLOS*.<sup>180</sup> The U.S. declined to sign *UNCLOS* because of its deep-seabed mining provisions.<sup>181</sup> The U.S. has indicated, however, that it will generally be guided by *UNCLOS* in other respects.<sup>182</sup> Like the U.S., the U.K. delegation said that it could not support the *Convention*. Canada, an actively involved member of UNESCO, voted in favour of the *Convention* and has been discussing the processes of its ratification and implementation with partners from the Caribbean and Americas.<sup>183</sup>

Because of the potential for infringement on the rights of other nations and the international community as a whole, exercise of extraterritorial jurisdiction must be, above all, reasonable. Underwater cultural heritage law can work, but its effectiveness depends on the assistance that admiralty law can offer.<sup>184</sup> The UNESCO *Convention* presents a thoughtful theoretical framework from which to address the protection of historic shipwrecks in international waters. Salvors and admiralty lawyers bring a wealth of practical experience and substantial

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<sup>179</sup> The lack of support was due to "serious concerns with certain provisions," such as Articles 9 and 10, which the U.S. alleged create new rights for coastal states in a manner that could alter *UNCLOS*. See Sean D. Murphy, "U.S. Concerns Regarding UNESCO Convention on Underwater Heritage" (2002) 96 Am. J. Int'l L. 468 at 469-70. Because the U.S. is not a member of UNESCO, the American delegation was not entitled to vote, but the U.S. could still ratify the *Convention*.

<sup>180</sup> McQuown, *supra* note 6 at 321, n. 132.

<sup>181</sup> The problems posed by the controversial nature of the part of *UNCLOS* that deals with deep seabed mining (Part XI) were addressed through the negotiation of the 1994 agreement relating to the implementation of Part XI of the *Convention*. The Agreement, which adopted a modified regime for those mineral resources found on the seabed in the high seas, still has not been accepted by the U.S. Online: United Nations <[http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)> (date accessed: 13 November 2003).

<sup>182</sup> See Marshall King, "Admiralty Law: Evolving Legal Treatment of Property Claims to Shipwrecks in International Waters" (1990) 31 Harv. Int'l L. J. 313 at 317, n. 34 (citing United States Oceans Policy, Statement by the President, 19 *Weekly Comp. Pres. Doc.* 383 (Mar. 10, 1983)).

<sup>183</sup> See Canada@UNESCO, online: International Relations and Policy Development <[http://www.pch.gc.ca/progs/ai-ia/ridp-irpd/07/index\\_e.cfm](http://www.pch.gc.ca/progs/ai-ia/ridp-irpd/07/index_e.cfm)> (date accessed: 13 November 2003).

<sup>184</sup> King has identified the following international implications that must be taken into account: "fairness to the parties, the needs of the international system, contacts with the adjudicating forum, potential conflicts of law, the interests of the State in adjudicating the dispute, and the impact on the needs of other States." *Supra* note 182 at 319, n. 41.

financial resources to learn more about this heritage. The opposing sides in this debate should view their problems as opportunities for cooperation. That way, they can each get the best of both worlds and avoid sunken opportunities.