

INTERNATIONAL LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE

by

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Recent years have seen the emergence of the need for international legal measures to preserve man's environment. Although a concern for the human environment has been present for most of this century, the pressures of overpopulation, uncontrolled development and the increasing evidence of ecological disturbance being found by scientists have suddenly made conservation an urgent problem and international legal controls important. Evidence of international activity in the area are the Stockholm Declaration on the Human Environment of 1972, the U.N. Conference on Human Settlements (Habitat) at Vancouver in 1976, the U.N. Conference on Desertification in Nairobi in 1977 and instruments such as the Convention on Wetlands of International importance especially as Waterfowl Habitat, 1971. There has also been increased interest in the specifically legal problems raised, evidenced (particularly in the national legal systems) by the multiplying writings on environmental protection.

Protection of the natural environment still represents only part of the problem. The man-made environment is also important; the built environment which includes beautiful and historic buildings, human settlements of any age and man-made sites, gardens, earth works, burial grounds and so on. It extends to archaeological objects not perhaps beautiful in themselves, but revealing much of human history and therefore precious in their own right.

This group includes, for example, human remains, flintstones, everyday objects of pre-historic man and later predecessors. Human life would also be much poorer if it were to lose by neglect or intention works of art and objects of beauty fashioned by man whose display or possession enriches man's cultural life and further inspires his creativity. All these categories too are increasingly being seen to require active protection of international law.

An area which has suddenly emerged as in dire need of international legal regulation is that of the underwater cultural heritage. The discovery of the aqualung in 1943 placed at the disposal of increasing numbers of hobby divers objects on the sea-bed which might have been preserved from classical or even pre-historic times. Some of these are of very great significance to man and should not be lost by indiscriminate looting and destruction.

WHAT IS THE « UNDERWATER CULTURAL HERITAGE » ?

The underwater cultural heritage includes, of course, shipwrecks and some fascinating finds have been made which greatly increase our knowledge of the craft and trading patterns of earlier times. Two marvellous bronze statues of the School of Lysippos have been raised from the sea (1) and provide our only complete examples of these great sculptures of classical Greece, all those remaining on land having apparently been long since destroyed. Beautiful jewellery belonging to Spanish grandees on board the ill-fated Armada ship « La Girona » has been brought up from the sea-bed off Northern Ireland (2), while the study of guns from other Armada wrecks has thrown new light on the reasons for British naval supremacy in 1588 (3). A number of sunken vessels of the Dutch East Indies Company have been discovered, some with coffers of coins, others with interesting artefacts filling gaps in our knowledge of the period (4). A find of great significance for research into ship-building techniques was that of the *Wasa*, a Swedish warship which sank in Stockholm harbour on its maiden voyage in 1628 (5).

Apart from shipwrecks there are other sites of importance underwater. Sunken settlements such as the former pirate town of Port Royal in Jamaica (6), the mediaeval city of Dunwich off the east coast of Britain (7) and coastal

(1) One is the « Youth from Antikythera » raised from the famous wreck at the island of Antikythera (between Crete and mainland Greece) raised in 1900 and now at the National Archaeological Museum in Athens. Its discovery is described in UNESCO, *Underwater Archaeology : A Nascent Discipline*, 1972, 35-37; the other is that of a young athlete just crowned with laurels apparently raised about 1963 off Italy and now in the Paul Getty Museum in California (see also text relating to n. 77 on the history of this statue).

(2) STENUIT, *Treasures of the Armada*, 1974.

(3) MARTIN, *Full Fathom Five : Wrecks of the Spanish Armada*, 1975, 247.

(4) Reports on some of these are noted in nn. 56-63 (incl.).

(5) FRANZEN, « The Salvage of the Swedish Warship *Wasa* » in UNESCO, *op. cit.* n. 1, 77-83.

(6) MARX, *The Lure of Sunken Treasure*, 1973, 47-80; MARX, « The submerged remains of Port Royal, Jamaica » in UNESCO, *op. cit.* n. 1, 139-145.

(7) BACON, « Underwater exploration at Dunwich, Suffolk », 3 *I.J.N.A.* (1974) 314 (see explanatory n. 28 on this Journal).

dwellings such as those in the Black Sea (8) are of great archaeological interest. Harbour works and port constructions which are now under water-level may also reveal much about the importance of a sea-board city; interesting investigations have been made underwater at the ancient Phoenician city of Sidon (9) and at Carthage (10). Rock-cut fish tanks were common in the ancient world; important examples have been found at Cyprus, Caesarea in Israel and other classical sites (11).

Internal waters may also have underwater treasures; a Gallo-Roman wreck has been found in a Swiss lake near Neuchâtel (12) and two enormous Roman ships (possibly imperial pleasure barges) found in Lake Nemi south of Rome were raised by order of Mussolini (13). There may also be submerged waterside dwellings such as those in Switzerland (14) and Scotland (15). A fascinating array of artefacts from every age since late Neolithic times has been found in Belgium in the underground caves of Han-sur-Lesse, which had been used from time immemorial as a hiding place in unsettled times (16). The banks of the river which ran through these caves had collapsed in places into the river, whose bed yielded up a treasure trove of objects. Finally, one of the most fascinating underwater explorations of recent years has been the sacred well of the Incas at Chichén-Itzá (17). Into this well the gifts and sacrificial victims of a fervent civilization were thrown, to be revealed centuries later to twentieth century man.

Submergence has preserved much that time and warfare has destroyed on land. Underwater remains may become the site of serious archaeological exploration or the haunt of hobby-divers and treasure-seekers. The danger is that piecemeal souveniring will destroy the unity of a site — much can be learnt from the placement of items in relation to one another (18). More

(8) BLAWATSKY, « Submerged sectors of towns on the Black Sea coast » in UNESCO, *op. cit.* n. 1, 115-122.

(9) FROST, « The offshore island harbour at Sidon and other Phoenician sites in the light of new dating evidence », 2 *I.J.N.A.* (1973) 75.

(10) Yorke and Little, « Offshore survey at Carthage, Tunisia, 1973 », 4 *I.J.N.A.* (1975) 85.

(11) NICOLAU and FLINDER, « Ancient fish-tanks at Lapithos, Cyprus », 5 *I.J.N.A.* (1976) 133.

(12) ARNOLD, « La barque gallo-romaine de la baie de Bevaix », 3 *Cahiers d'Archéologie subaquatique* (Fréjus) (1974) 133-50, summarised in English in 4 *I.J.N.A.* (1975) 123.

(13) BASS, « Eighteen Mediterranean wrecks investigated between 1900 and 1968 », in UNESCO, book cited n. 1 at 40-41.

(14) RUOFF, « Palafittes and Underwater Archaeology », in UNESCO, *op. cit.* n. 1, 123-137.

(15) MCARDLE and MORRISON, « Scottish Lake-dwelling Survey: Archaeology and geomorphology in Loch Awe, Argyllshire », 2 *I.J.N.A.* (1973) 381.

(16) MARIEN, *Découvertes à la Grotte de Han*, 1964; *Nouvelles Découvertes à la Grotte de Han*, 1965; *Le Trou de l'Ambre à l'Eprave*, 1970. See also Note in English by Jasenski, 1 *I.J.N.A.* (1972) 188.

(17) MARX, *op. cit.* n. 6, 19-28; FOLAN, « The Cenote Sagrado of Chichén Itzá, Yucatan, Mexico, 1967-68 », 3 *I.J.N.A.* (1974) 283.

(18) An example of this occurred with the plundering, with use of a mechanical excavator, of the warship *Anne*, sunk after a battle with the French in 1690 near Hastings on the south coast of England: MARSDEN and LYON, « A Wreck believed to be the warship *Anne*, lost in 1690 », 6 *I.J.N.A.* (1976) 9 at 13.

serious destruction has occurred when treasure-seekers have dynamited historic wrecks in order to free coins sunken with them (19). Disputes between amateur divers have not been infrequent (20), and interference with serious research sometimes grave (21). This is not to deny that amateur divers have often acted with responsibility, have found some important sites (22), and some have indeed developed into serious underwater explorers (23). Courses are available in some countries to assist in the process. Nonetheless, destruction by unscrupulous treasure-hunters has been so severe, for example, the looting of virtually every wreck of importance off the coast of Turkey (24), as to lead to an increased concern by Governments to protect this part of the cultural heritage.

International concern was first focused on the problem by non-governmental organisations. Resolutions were passed by the First International Congress of Maritime Museums of the Atlantic Basin held at London in 1972 and another Conference held at Stavanger in Norway in 1973, both urging legal action to protect underwater cultural property, and in particular, the conclusion of international agreements on the subject. Already at New Delhi in 1956 the principle of protecting the archaeological heritage was affirmed at the 9th session of the UNESCO General Conference which included in the terms of its recommendation « any research aimed at the discovery of objects of archaeological character » whether on land or « on the bed or in the sub-soil of inland or territorial waters of a Member state... » (25).

UNESCO has continued to study the problem and has produced an important publication on it (26). There are two recently established international journals on marine archaeology, one in French (27), one in English

(19) Six months after the discovery of the *Vergulde Draeck* in 1963 in Western Australia there were reports of extensive blasting and removal of material and in 1971 an official expedition to another early wreck (thought to be the earliest in Australian waters) found it to have been blown to pieces. Report of the Committee of Inquiry on Museums and National Collections, *Museums in Australia* 1975, 1975, 89.

(20) STENUIT, *op. cit.* n. 2, 177 describes an underwater fight at the *Girona* wreck and similar incidents off the English coast led to the passing of the *Protection of Wrecks Act* 1973.

(21) WIGNALL in an Appendix to MARTIN, *op. cit.* n. 3, 233 records how he had to get a court order to restrain enthusiastic treasure-hunters from interfering with his investigation of the Armada wreck *Santa Maria de la Rosa* sunk in Blasket Sound off the west coast of Ireland. STENUIT, *op. cit.* n. 2, 177-180 records similar activity.

(22) E.g. among many which might be named, the finding of the Armada wreck *La Trinidad Valencera* off the north coast of Ireland, the first Armada site to yield heavy battery guns — important to assess the strength of Spanish gunnery at that time. MARTIN, *op. cit.* n. 3, 189-192. Another important find by amateurs was that of the *Zuytdorp*; see n. 62.

(23) STENUIT, *op. cit.* n. 2, 131-134 describes his conversion from an amateur treasure seeker to a serious underwater explorer.

(24) See Note in 3 *I.J.N.A.* (1974) 335 at 338.

(25) UNESCO Recommendation on International Principles applicable to Archaeological Excavations adopted by the General Conference at its Ninth Session, New Delhi, 5th December, 1956.

(26) UNESCO, *Underwater Archaeology: A Nascent Discipline*, 1972.

(27) *Cahiers d'Archéologie subaquatique* (Fréjus) commenced in 1972.

(28) both of which illustrate the richness of underwater finds, the dangers to which they are exposed and the urgent need for legislative protection — both national and international.

LEGAL STATUS OF THE UNDERWATER CULTURAL HERITAGE

To date there have been very few legal instruments specifically related to the underwater cultural heritage. There are some international agreements on cultural property in general terms which could be applicable, e.g. the three UNESCO Conventions; *Convention for the Protection of Cultural Property in the Event of Armed Conflict* 1954 (29), *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 (30), *Convention concerning the Protection of the World Cultural and Natural Heritage* 1972 (31). These make no specific reference to underwater cultural property, though the first two would undoubtedly apply in the particular circumstances to which they are directed. The last casts general duties of protection, conservation and presentation of cultural and natural environment for which States parties to the Convention are responsible. It also sets up a World Heritage List, and some items on this may well relate to underwater sites; Australia's Great Barrier Reef has been seen as a likely inclusion (32).

The Council of Europe was responsible for the drafting of the *European Convention on the Protection of the Archaeological Heritage*, 1969 (33) and some provisions of that Convention such as the delimitation and protection of sites (Article 2); the prohibition of illicit and supervision of licit excavations (Article 3) and the dissemination of information on findings (Article 4), may well be applied to the underwater cultural heritage. Clearly though they are not adequate to reach the kind of problems we have discussed. The Education and Culture Committee of the Council of Europe is at present studying the protection of underwater archaeological sites.

One of the problems emerging from any study of the issue is the very confused legal status of the property in question. A good deal of cultural property found in waters within a State's borders (such as lakes, rivers, historic bays, wells, moats and marshes) belongs sometimes to the State and sometimes to private owners. The national law of the State determines the issue. Only a few States such as Greece (34) and Turkey (35) provide that all

(28) *The International Journal of Nautical Archaeology and Underwater Exploration* (London and New York) commenced in 1972. Referred to in these footnotes as *I.J.N.A.*

(29) 249 *U.N.T.S.* 215.

(30) *U.N.T.S.* reference not yet available.

(31) *U.N.T.S.* reference not yet available.

(32) *National Estate*, Report of the Committee of Inquiry, 1974, Parliamentary Paper N° 195 (Commonwealth of Australia), para. 3.118.

(33) *Eur. T.S.* N° 66.

(34) Act N° 5351 concerning Antiquities, Article 1.

(35) Law of Antiquities 1973, Art. 3.

antiquities discovered within its territory belong to the State (it is noteworthy that this is coupled with very substantial finder's rewards).

Cultural finds in territorial waters of a State are also controlled by divergent legal regimes. Some States such as France (36) and Denmark (37) have specifically legislated for State control or State ownership of cultural property found within its waters. In others, it falls within the general national law as to salvage. In some States the issue is further confused by the division of powers between a Federal State and its component members. In the United States the responsibility for shipwrecks in the territorial sea at present appears to rest with each of the component States (38); in the Commonwealth of Australia it has been held that the Federal Government has power to legislate for the territorial sea surrounding Australia, but it seems that internal waters remain within the powers of the States (39).

On the sea-bed of the continental shelf and deep sea only international salvage law appears to apply, although one State (Australia) has extended special legislative provisions to historic shipwrecks found on its continental shelf. Some of the wrecks covered by this legislation are the subject of an Agreement between the Netherlands and Australia concerning old Dutch shipwrecks (40). In the Agreement reference is only made to wrecked vessels of the VOC « lying on or off the coast » of Western Australia. It is therefore not clear whether the Agreement amounts to a recognition by the Netherlands government of this wider jurisdiction, since either interpretation is a reasonable one — Altes obscures the problem by saying that it refers only to wrecks « within Australian waters », for this is not the same thing (41).

Salvage law is a most inappropriate vehicle to control proper underwater exploration of sites of cultural value. It is based on assumptions of economic risk and of the rescue of goods and vessels which are in peril of the sea. The salvor normally acts to maximize his gains by saving objects of high monetary value first, without regard to what might lie in the way. Thus dynamiting a wreck to get at a horde of ancient coins may be good salvage practice. It may also be disastrous for the cultural heritage which the shipwreck may represent — the soggy wood which is of no commercial value to a salvor may be of great value to archaeology for it may disclose much about early shipbuilding

(36) Loi N° 61-1262 du 24 novembre 1961 relative à la Police des Epaves Maritimes (Journal Officiel, 25 nov. 1961); Décret N° 61-1547, 26 déc. 1961 fixant le régime des épaves maritimes (Journal Officiel du 12 janvier 1962) Ch. V; Arrêté du 4 février 1965 relatif aux épaves maritimes (Journal Officiel, 13 fév. 1965) Ch. IV.

(37) Act N° 203 of 31 May, 1963.

(38) Cf. *State ex rel. Ervin v. Massachusetts Co.* 90 So. 2nd 902 (Fla. 1956), certiorari denied by the Supreme Court 355 U.S. 881 (1957); *Treasure Salvors v. Abandoned Sailing Vessel* 408 F. Supp. 907 (1976).

(39) *Bonser v. La Macchia* 122 C.L.R. (1969) 177; *Robinson v. Western Australian Museum*, decision of High Court of Australia of 31st August, 1977 not yet reported.

(40) See n. 70.

(41) ALTES, *Prijs der Zee*, 1973, 154.

techniques and even about the availability of certain woods in a particular age and about trading routes of vessels from a particular civilisation. Properly preserved they may become museum pieces enriching the cultural life of many.

Salvage law was originally based on the need to encourage enterprising persons to rescue goods which were in danger at sea. Yet much of the underwater cultural heritage is not « in peril of the sea ». Until exposed by low tides, shifting sands or bulldozers it has been preserved; the law should be providing deterrents rather than incentives to salvage items which may be altogether destroyed by removal when proper preservation facilities are not immediately available. This criticism has, for example, been levelled at the French legislation : the provisions as to ancient wrecks have been inserted into the general law of salvage and the obligation of a finder remains to place a wreck in safety out of reach of the sea. It would be more desirable to provide against any alteration of the site or premature removal (42). One expert has even coined the phrase « excavation without conservation is vandalism » (43).

THE LAW OF THE SEA

It may be thought that the international law of the sea is a more appropriate area of law to apply to this special problem than salvage law. Unfortunately, it has very little to say on the topic.

It has been very strongly argued by Castagné that the 1958 Convention on the Continental Shelf and Contiguous Zone, which gives the coastal State the right to the resources of the continental shelf, should be applied equally to cultural resources as well as to natural resources (44). It is doubtful whether the stretching to cultural property of provisions designed for other purposes is a better solution than the stretching of salvage law. In any case, the International Law Commission in its explanatory comments on the relevant article of the Geneva Convention stated :

« It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by sand of the subsoil » (45).

(42) Décret 61-1547 du 26 déc. 1961, Article 2 « Toute personne qui découvre une épave est tenue, dans la mesure où cela est possible, de la mettre en sécurité, et notamment de la placer hors des atteintes de la mer », See Castagné, art. cit. n. 44 at 181.

(43) PEARSON, « On-site Conservation Requirements for marine Archaeological Excavations », 6 *I.J.N.A.* (1977) 37 at 45.

(44) CASTAGNÉ, « L'archéologie sous-marine et le droit » in Proceedings of the French International Law Association, Montpellier meeting, 1972, publ. in *Le Nouveau Droit de la Mer* (éd. Soc. française de Droit Internat.) 1974, 164-188.

(45) Report of the International Law Commission to the General Assembly, 1956 *Yearbook of the International Law Commission*, Vol. 11.

Castagné's interpretation has also been contested by a Dutch commentator on the topic (46).

Of course, it is true that the law of the continental shelf simply developed as customary law by a series of unilateral assertions of jurisdiction (47) which was only subsequently codified in the Geneva Convention. It is possible that control over the cultural resources of the continental shelf might be acquired thus, since at least one State has made such an assertion (Australia in the Commonwealth *Historic Shipwrecks Act* 1967). Many more countries will have to take this step, however, before a customary law can be regarded as established.

Some States, such as France, apply their legislation to wreckage found with the territorial sea, or found on or under the high seas and brought within territorial waters (48). The provisions of the Geneva Convention on the Territorial Sea and Contiguous Zone state that the coastal state may within the contiguous zone exercise the control necessary to prevent or punish infringements within its territory or territorial sea of its customs, fiscal, immigration or sanitary regulations (49). It is silent as to other matters.

The law on the deep sea bed is still being negotiated at the Conference on the Law of the Sea. So far this area has not been as important as the areas of continental shelf and territorial sea for the underwater cultural heritage. Yet there are undoubtedly finds to be made and it would seem wise to be prepared for the time when divers will begin working on them, since preliminary surveys are already being made in specially equipped vessels (50). A wreck from classical times has been photographed in the Straits of Gibraltar at a depth of 400 metres (51).

Greece and Turkey, who have (or have had) great treasures underwater, took the initiative to try and insert in the current negotiating documents an article concerning the cultural heritage. Discussion on the article raised the question whether it was appropriate to deal with this issue at all in articles dealing with the sea-bed. Greece, Turkey and Cyprus said that these treasures were part of the common cultural heritage but that special regard should be had to the State of historical origin. Another delegation wanted that reference to the State of historical origin deleted. The discussion did not appear to raise much State interest.

(46) ALTES, « Submarine Antiquities; A Legal Labyrinth », 4 *Syracuse Journal of International Law and Commerce*, 77 at 79-81.

(47) *North Sea Continental Shelf Case*, 1969 *ICJ Reports*, 4 at 33-34.

(48) Décret N° 61-1547, 26 December 1961 fixant le régime des épaves maritimes.

(49) 516 *U.N.T.S.* 205, Art. 24.

(50) MARX, in a note in 2 *I.J.N.A.* (1973) 204 describes the use of the *Seaprobe*, a vessel originally designed for deep sea drilling, for deep water survey for shipwrecks by side-scanning sonar and television.

(51) CASTAGNÉ art. cited n. 44, 165.

Article 149 of the Informal Composite Negotiating Text (due to be discussed again at the next session of the Law of the Sea Conference in 1978) now reads :

« All objects of an archaeological and historical nature found in the area shall be preserved or disposed of for the benefit of the international community 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 ».

There are many reasons why this article is insufficient for the protection of the underwater cultural heritage, although it is doubtless better than nothing. It is likely that the final text of the emerging Convention will empower the Seabed Authority to licence exploration of seabed areas for economic exploitation. In the course of the explorations it is highly likely that shipwrecks and perhaps other items of cultural importance (e.g. single items lost overboard or jettisoned) will be discovered, yet there is no duty on licensees to report a find to the Seabed Authority or to anyone else, nor is the Seabed Authority, if it does become aware of such a find, obliged to notify interested States. The Seabed Authority is not a body of cultural experts and is not designed to have expertise in marine archaeology; it would probably be ill-equipped to take decisions on the recovery, preservation and disposal of the underwater cultural heritage. The phrase « preserved or disposed of » writes an unfortunate conflict into the article — the question whether to preserve a shipwreck, requiring the suspension of exploration or construction projects at enormous cost, or « dispose of » it in some other way has already caused serious dissension within a number of national States. One of the earliest modern discoveries of a shipwreck, at Bruges in Belgium in 1899, was demolished by a canal constructor — apparently in order to prevent delay to his construction project by archaeological investigations (52).

A final problem created by the article in its present form is the number of States given preferential rights. These are the State or country of origin, the State of cultural origin, or the State of historical and archaeological origin. There are situations where these could be in serious conflict e.g. a Roman ship carrying classical Greek statues. In at least one recent case it has been suggested that Romans had looted Greek statues and were shipwrecked on their way home. A recent discovery of a Dutch ship with a cargo of Ming Dynasty porcelain sunk in the sea off Saint Helena raised similar issues (53). Trading vessels normally carry goods from a great variety of places. Finally, the true origin of a ship may be disputed by experts for many years and may never be finally established (54).

(52) MARSDEN, « A boat of the Roman period found at Bruges, Belgium in 1899 and related types », 5 *I.J.N.A.* (1976) 23.

(53) 6 *I.J.N.A.* (1977), 257.

(54) MARX, « Our Lady of the Miracles », *op. cit.* n. 6.1 relates how difficult it can be to identify a vessel of this kind carrying goods originating in a number of countries.

CONFLICTS OF TITLE

The question of origin leads us on to the difficult issue as to title. In some cases owners of wrecked ships are clearly traceable and continue to assert title. A good example is the case of ships of the Dutch East Indies Company (VOC - Vereenigde Oost-Indische Compagnie) which went bankrupt in 1798 and all of whose property was vested in the Dutch Government. Over the centuries of its prosperity this great trading company lost hundreds of ships in dangerous waters on its long sea-routes and in recent years a number of them have been found; the *Akerendam* off Runde in Norway (55), the *Liefde* (56) and *Kennemerland* (57) in the Shetland Islands, north of Scotland, the *Amsterdam* off Hastings in England (58), the *Hollandia* off the Scilly Isles south of England (59), the *Vergulde Draeck* (60), *Batavia* (61), *Zuytdorp* (62) and *Zeewijk* (63) off the dangerous reef-bound coast of Western Australia. The Dutch Government in a number of cases has asserted its ownership of these vessels and goods belonging to them.

This raises difficult issues of title. Where the wreck is within territorial waters much depends on the national law of the State concerned. In earlier centuries coastal populations seemed generally in Europe not to have been interfered with by the territorial authorities for appropriating anything from shipwreck within their grasp — such was the fate, even as late as 1588, of the unfortunate survivors of the Spanish Armada wrecked upon the shores of Ireland on their way home after leaving the English Channel in the hands of the English (64). But, gradually the territorial sovereign asserted control, either to monopolise wreck to his own advantage or, more humanely, to allow the original owner some right of recovery (65). Thus, an English Statute

(55) BRAEKHUS, « Salvage of Wrecks and Wreckage; Legal issues arising from the Runde Find » 20 *Scandinavian Studies in Law* (1976), 37.

(56) BAX and MARTIN, « *De Liefde*, a Dutch East Indiaman lost on the Out Skerries, Shetland in 1711 » 3 *I.J.N.A.* (1974) 81.

(57) FORSTER and HIGGS, « *The Kennemerland*, 1971 », 2 *I.J.N.A.* (1973) 291; PRICE and MUCKELROY, « The second season of work on the *Kennemerland* site, 1973 », 3 *I.J.N.A.* (1974) 257; PRICE and MUCKELROY, « *The Kennemerland* Site. The third and fourth seasons 1974 and 1976 », 6 *I.J.N.A.* (1977) 187.

(58) MARSDEN, *The Wreck of the Amsterdam*, 1974.

(59) COWAN, COWAN and MARSDEN, « The Dutch East Indiaman *Hollandia* wrecked on the Isles of Scilly in 1743 », 4 *I.J.N.A.* (1975) 267.

(60) GREEN, « The wreck of the Dutch East Indiaman the *Vergulde Draeck*, 1656 », 2 *I.J.N.A.* (1973) 267.

(61) GREEN, « The VOC ship *Batavia* wrecked in 1629 on the Houtman Abrolhos, Western Australia », 4 *I.J.N.A.* (1975) 43.

(62) CRAMER, « The First *Zuytdorp* Dive » in Edwards, *Sharks and Shipwrecks* 1975, 115.

(63) INGLEMAN-SUNDBERG, « The VOC Ship *Zeewijk* lost off the Western Australian coast in 1727 », 6 *I.J.N.A.* (1977) 225.

(64) STENUIT, *op. cit.* n. 2, 107-111.

(65) BRAEKHUS, art. cited n. 55, 42-47.

of 1275 provided that if an owner could prove his right to the goods coming from a shipwreck within a year and a day they were to be restored to him (66). Similar provisions were made in Scandinavian codes about that date (67).

Can title be affected by abandonment? The international practice on this matter is confused and the law complex. Altes describes several cases in recent times, where ships have been abandoned temporarily by their crews in dangerous circumstances and promptly claimed by salvors as « prize of the sea » (68). Where there is no intention to abandon and no doubt as to who is the owner such claims to acquire title (as opposed to salvage rights) appear unfounded. But is the situation the same where the original owner has, as it were, « written off » a ship which has been actually wrecked? Can he ignore its fate, perhaps for centuries, and then assert title over valuable objects raised from it, often at great expense and with great effort without any contribution whatever on his part?

These considerations have arisen in respect of ships of the Dutch East Indies and interesting solutions found.

The wreck of the *Akerendam* was found off Norway in 1972. Norwegian legislation passed in 1963 vested ownership of vessels, but not of cargoes, in the State. Did coins found at the wreck belong to the finders or the State? While lawyers put together a case for each side the Dutch Government asserted its title as owner of the ship. The case would have provided very interesting arguments on the interaction of salvage law, national law of antiquities and assertion of title. It was settled between the parties concerned, 75 % of the coins recovered going to the divers, 15 % to the State and 10 % to the Dutch Government (69).

Similar issues arose with respect to the Dutch ships off the Western Australian coast. The first of these to be excavated, the *Vergulde Draeck*, went down in 1656. The second wreck to be properly explored and excavated was of great historical significance. It was the *Batavia* which ran aground on the Abrolhos Reefs off Fremantle in 1629. The captain of this unhappy ship, which had already been threatened by mutiny on the voyage out, sailed north with eleven of his crew along the Western Coast of Australia to fetch help from the Dutch settlement to the North. In his absence, the mutiny took place, a bloodthirsty ruffian named Cornelisz assuming command. The weak and honest members of the crew together with children and unwilling women were butchered. The mutineers were arrested on the arrival of the rescue ship and subsequently tortured and executed. The landsite occupied by the *Batavia* survivors revealed much historical evidence of these gruesome events, including a skull with an axe-cut (now on display in the Fremantle Branch of the Western Australian Museum).

(66) Statute of Westminster, I 3 Edw. 7 c.4 (1275).

(67) BRAEKHUS, art. cit. n. 55, 43-44.

(68) ALTES, *op. cit.* n. 41, 7-9.

(69) BRAEKHUS, art. cited n. 55, 64.

The state of Western Australia (one of the component states of the Commonwealth) vested title in historic shipwrecks in the Western Australian Museum by legislation dating from 1964. The Dutch Government however notified its interest in the finds. The conflict of interests thus raised, similar to those in the case of the *Akerendam*, were resolved by the intervention of a fourth party, the Commonwealth of Australia, which entered into an *Agreement Concerning Old Dutch Shipwrecks* with the Netherlands in 1972 (70). By this Agreement, the Netherlands transferred « all its right, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the state of Western Australia and in and to any articles thereof to Australia ». It should be noted that the Agreement does not state that the Netherlands actually *had* title to the wrecks and thus does not constitute an acknowledgement of this claim by the Australian Government. It does provide that whatever title, if any, the Netherlands had under its own or any other system of law was transferred to Australia. On the other hand, Australia recognized that the Netherlands « has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels » that were referred to in the transfer of right, title and interest. Australia agreed that it would not seek reimbursement from the Netherlands of any costs incurred in searching for the vessels or recovering articles from them (in 1972 estimated as costing about \$ A 2,000,000) (71).

The Agreement also set up a Committee to determine the disposition and subsequent ownership of the recovered articles between the Netherlands, Australia and the state of Western Australia. Costs of this Committee are born 1/3rd by the Netherlands and 2/3rds by Australia.

DIVISION OF ITEMS AND MAINTENANCE OF COLLECTIONS

The provisions of the Netherland-Australian Agreement are very interesting and provide a useful precedent which could, e.g. assist in the kind of conflicts raised by the present draft Article 149 in the Informal Composite Negotiating Text relating to cultural finds on the sea-bed.

The members of the apportioning Committee must have scientific and cultural expertise and are to be guided in their functions by an « Arrangement ». This « Arrangement » begins by stating certain general principles on the partition of archaeological collections. Maintenance of the material collected as « a corporate entity rather than its division into parts » is stressed, thus covering a problem which has long been of concern to archaeology; the dispersal of finds whose scientific value may be much greater if kept together.

(70) For a more detailed discussion of this Agreement see O'KEEFE & PROTT, « Australian Protection of Historic Shipwrecks » 1973-1976 *Australian Yearbook of International Law*, (forthcoming).

The Agreement is printed in the *Australian Treaty Series* 1972 N° 18.

(71) So stated in the Arrangement attached to the Agreement and printed with the latter, n. 70.

The arrangement makes it clear that the sharing of material from an archaeological site « is best regarded as the accommodation in several localities of a corporate entity ». This follows from the viewpoint that « sites are no longer regarded merely as a source of important individual items, but rather as a body of material whose collective value far outweighs the importance of the individual pieces and in which the relationship of individual objects within the sample are a major part of its historical value ». Although the bulk of the material excavated was to be held in the Western Australian Museum, it was most desirable on « historic, educational, scientific and international considerations » to make the deposition of representative collections in the museums of the Netherlands and Australia.

A suggestion was made in the Dutch press at the time the Agreement was signed that the Agreement was interpreted by the Netherlands as entitling it to a third of the material recovered (72). There is no basis for this in the Agreement; indeed the Arrangement by which the Committee is to be guided goes out of its way to emphasise that the « sharing-out » arrangement is at all times secondary to the maintenance of the material as a unit. It provides that « the total assemblage should be capable of re-assembly to allow further statistical and scholarly analysis » and that « where unique and rare objects, themselves, form a meaningful assemblage within the whole, this assemblage should not be split, or if split, perfect replicas made to complete the assemblage ». An even clearer indication of the draftsman's intentions is given in the details of the arrangement relating to coins; both the Australian and the Netherlands governments are to receive as complete a series as possible representing the mintings and values contained within each of the wrecks. « These will provide their museums with ample material of this class of objects for display purposes and sufficient to enable a scholar to make the initial qualitative studies which would possibly lead him to a more detailed statistical treatment of the bulk sample retained in the Western Australian Museum ». Clearly in the case of coins, as in the case of the bulk of the material excavated, it was always intended that most of the items recovered would belong to the Western Australian Museum.

This Agreement and its annexed arrangement include some of the features which one would like to see in any international agreement on the underwater cultural heritage. It emphasises the cultural and scientific, rather than the pecuniary aspect of the finds. It places control of dispersal in the hands of an expert committee. (It is noteworthy that, so far as is known this Committee works most harmoniously, and takes its decisions by consensus) (73). Finally it ensures that the material will always be accessible as a collection for scientific use and will be available to enrich the culture of participating States.

(72) ALTES *op. cit.* n. 41, 154.

(73) See article cited above n. 70 for workings of this committee.

INTERNATIONAL ASPECTS OF THE UNDERWATER CULTURAL HERITAGE

The Agreement just discussed was made easier by two factors; the origin of the vessels and present claims to ownership could be easily ascertained, and the divers were all operating from the Australian coast in waters remote from any other country. This made bilateral solution of the problem relatively straightforward.

Unfortunately, most activities relating to the underwater cultural heritage include many more complicating factors. Around the Mediterranean, e.g. divers may operate from bases in any one of a number of countries. Unless these countries co-operate it is easy for lawbreakers to move from one jurisdiction to another. In many areas damage has been done by visiting divers from countries far away; Norway e.g. is said to have very good relations with its own small diving clubs which are aware of the regulations in force; the same is not true for some of the visiting hobby-divers.

Even professional archaeological teams usually involve international elements e.g. British archaeologists have been active around the Mediterranean (74) and an American team has conducted a systematic survey for important wrecks around the shores of Turkey (75). The Belgian diver Sténuît discovered the wreck of the Spanish ship *Girona* off Northern Ireland and some Dutch VOC wrecks in various places. Countries aware of these aspects usually provide for licensing arrangements, frequently with stringent conditions as to financial backing, expertise and knowledge of the local language (76).

Another international aspect which cannot be ignored is the involvement of the international art trade. In a recent notorious case the course of events seemed to run as follows. Two Italian fishermen raised from the sea a masterpiece of Greek sculpture in bronze, possibly the only example remaining of the work of the sculptor, Lysippos. It came into the hands of art dealers, was bought by a South American collector, sold by him to an English firm and passed by them to a German art dealer for restoration. At this point, it should be noted, it had apparently passed through four countries without the Governments of any of them being aware that a major art treasure was being traded in or out of the country. A possible buyer alerted the Greek authorities to its existence, the first news apparently they had had about the survival of a masterpiece of classical Greek art. It was subsequently sold for \$ 5 million to an American Museum (77). While we may rejoice that the piece has at last found its way into a public collection, this case does arouse serious

(74) E.g., Frost; see reports of expeditions in various issues of the *I.J.N.A.*

(75) Note on Turkey in 3 *I.J.N.A.* (1974) 335.

(76) E.g. Turkish Regulations on Soundings and Excavations of 19 August, 1973 (*Journal Officiel* N° 14630).

(77) *The National Times* (Australia), 26 December, 1977, 10.

concern about the clandestine way that items of great cultural importance, whether found underwater or on land, are handled. Italian legislation provides that all antiquities wherever found belong to the State, and there is provision for a finder's reward (78). An international agreement on the underwater cultural heritage might have enabled some of the other governments through whose territory the statue passed to enforce the public interest.

The case history of this statue points up an important aspect; from many points of view culture is truly international. UNESCO has made this point with its World Heritage Programme. The *European Cultural Convention* of 1954 stresses that each party is to regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe (79).

It is especially true that the underwater cultural heritage around Europe is significant for European culture as a whole; shipwrecks often reveal much about the cargoes, the routes, the amount of contact between European peoples. The Council of Europe initiative on the matter can therefore only be applauded. But it is equally true that items may be of great significance for other societies; Australia has a great historic interest in the Dutch shipwrecks off its coast (which include artefacts not only from the Netherlands) and States in the Americas great interest in old Spanish ships off their coasts, some of which may contain extraordinarily diverse collections of artefacts filling in gaps in our knowledge of crafts in various periods and countries. Intelligent arrangements for control of excavation and partitions of the finds such as have to date been made uniquely, on the inter-State level, between Australia and the Netherlands, are all the more necessary.

INTERESTS AT STAKE

The involvement of various persons of very different motivations reveals a classic pattern of conflicting interests.

First of all there is the diver. He is often an adventurer who has worked in remote, often dangerous areas on his own for many years. Described by one marine historian as the last real sea explorer, he often does not take kindly to interference from anyone, regarding whatever he finds as a just reward for his efforts. He may be self-reliant and somewhat pugnacious — qualities which have been exemplified by destruction of wrecks by dynamite, violence between divers over discovered wrecks and litigation by divers seeking their « rights » against the intervention of public bodies (80).

Apart from divers with this somewhat buccaneering mentality there are those with more clearly economic motives. These systematically search for

(78) Law of 1 June, 1939, Tutela delle cose d'interesse artistica e storico, Art. 44.

(79) Article 5, *Eur. T.S.* N° 18.

(80) *Robinson v. Western Australian Museum* n. 39.

marketable goods and may have a close relationship with the less reputable sectors of the international art market (81). They appear to be responsible for most of the looting that has gone on around Greece and Turkey. Others may simply be souvenir-hunters. The archaeologist reporting on the submerged settlement of Phourkari (dated to the 4th century A.D.) near Greece comments on the gradual pillage of ceramic evidence over a period of four years and comments « This anchorage is heavily used by pleasure boats on the run from Athens to Hydra and the site is well known to souvenir hunting snorkelers » (82).

Archaeologists have a different kind of interest. Before anything is raised they want a site to be properly surveyed and mapped. Because of tides, shifting sands, rock formations or coral growths this may be difficult and special techniques have been developed for this purpose (83). Once material is lifted it must be preserved; this sometimes requires extensive technical expertise and investment of resources (84). The material should be properly catalogued and its ultimate disposition recorded so that it can be properly studied by other scholars for comparison with other and possibly later finds. Finally, it is very important that a report of the excavation is published so that the record is available to other researchers — once the material has been raised the integrity of the site has been destroyed. Information about the placement of objects and the nature of the location may assist later researchers puzzled by the cause of the shipwreck or the apparent disposal of the cargo.

Economic interests frequently become involved in a fairly urgent way. As in land archaeology, many important sites are only discovered during construction projects, private or public. Thus « rescue archaeology » has been involved at the sunken city of Port Royal Jamaica, where a deep water steamer terminal was planned (85), in Sicily, where parts of an ancient Roman wreck discovered while a land reclamation project was being carried out, were burnt before archaeologists could begin their investigation (86) and in London where a Roman barge was discovered in the Thames during construction of a Thames side traffic route (87). Projects such as these may

(81) MARX, reporting on an official survey of wrecks of Lebanon, reports that looters have sacked a Phoenician wreck of 4th-3rd centuries B.C., from which there apparently came at least six bronze statues, 3 *I.J.N.A.* (1974) 332.

(82) FROST, « Phourkari, A villa complex in the Argolid (Greece) », 6 *I.J.N.A.* (1974) 237.

(83) E.g. various techniques have been developed to tag every piece of wood *in situ*; grid systems of mapping are also used as well as photomosaic based on the assembly of overlapping photographs.

(84) Untreated metal once raised corrodes badly, untreated wood dries and shrinks, untreated fabric rots and disintegrates. Remedies have been found for all these problems and research continues.

(85) MARX, *Port Royal rediscovered*, 1973.

(86) THROCKMORTON and THROCKMORTON, « The Roman Wreck at Pontano Longarini », 2 *I.J.N.A.* (1973) 243 esp. 260-262.

(87) Known as Blackfriars I, since two other ships (one of the 17th and one from the 15th centuries) were also discovered at this site; see Note in 1 *I.J.N.A.* (1972) 130 and Marsden, *A Roman Ship from Blackfriars London* (Guildhall Museum publications).

have to be suspended, at greater or lesser cost to the property owner, contractor or taxpayer while rescue archaeology takes place. Decisions on these problems will need a nice weighing up of the rarity of the find, its value to archaeology, its degree of future inaccessibility (it may be covered by tons of concrete or destroyed altogether) and the expense of holding a big construction plant idle. There could be some merit in requiring all contractors and public utilities working on major projects in potentially rich areas eg. cities such as York, Bath or London where there are known to be important Viking or Roman remains, or the Mediterranean coast of France, to contribute to a special fund which could be used to ease the economic burden imposed by the delay of an expert study of an important find during an expensive construction project.

The State represents the general interest of all citizens in its encouragement of archaeological and historical studies which enrich a people's culture. Articles of comparatively little commercial value may need to be protected for this purpose. A well accepted technique of dating land excavations is by the dating of pottery sherds, particularly of amphorae, the big storage jars used for transporting a vast array of commodities in the ancient world. Knowledge of how to date these has been vastly increased by underwater finds which have revealed many complete or nearly complete amphorae which can be dated or whose origin can be ascertained by other cargo or by the ship itself on which they sank (88). There are so many sunken loads of these amphorae around the Mediterranean that they are of little commercial value; but their discovery and proper classification has greatly assisted archaeology generally.

There is also a general interest in preserving articles of great artistry and beauty, ensuring that they are properly preserved and accessible to the public. The State may therefore want to intervene if too many items of this kind disappear into private collections, or are sent out of the country before an opportunity has been given to a local institution to acquire it.

The State may also be concerned because of its interest in the general health, safety and welfare of its citizens. Diving clubs provide healthful recreation and their interests are properly to be regarded. Violence however will not be tolerated by a State — especially where its law provides that other interests in underwater property, such as those of former owners, are to be preserved. Safety is a factor which cannot be ignored; earlier excavations on one of the richest wrecks ever discovered in the Mediterranean were suspended when a diver died (89). Techniques have advanced but scuba diving

(88) The abundance of amphorae found on underwater sites led archaeologists to expand the best-known typology (that of Dressel) UNESCO, *op. cit.* n. 1, 37-38, 297. An interesting account of the importance of amphorae from a wreck in archaeological research and of their looting and subsequent recovery by police can be read in an article by Eiseman, « Amphoras from the Porticello shipwreck (Calabria) » 2 *I.J.N.A.* (1973), 13.

(89) « The wreck at Artemision », UNESCO, *op. cit.* n. 1.

should still be only undertaken by properly trained and experienced people. Even experts of many years standing can be in danger from exhaustion or underwater hazards, such as collapsing walls, dangerously balanced rocks or bad cuts from coral. The State may therefore want to encourage safety standards if not by law, at least by regulations or codes applied by members of diving clubs.

Concern for the natural environment may also enter into consideration. At one site in the sea of Aqaba for example, the relics of a wreck are incorporated into coral growth forming a fascinating combination of underwater seascape and impressive archaeological artefacts. It was decided in this case to disturb as little as possible, so as to preserve the natural beauty of the site as an attraction for tourists and divers (90).

Some States consider that financial gain from wrecks should go into the State Treasury for the advantage of all rather than the enrichment of a few.

Some shipwrecks are actually war graves which should be treated with respect. This is true for example of the Australian naval vessel the « Perth » sunk in battle in Sunda Strait (off Indonesia) in 1942 which divers located in 1967 (91) and of a Japanese midget submarine which appeared to be the scene of unseemly competition between salvage hunters in January, 1978 (92). There must be many sunken vessels from both World Wars off the coasts of Europe, which are the graves of naval personnel (93).

Clearly the interests at stake are very diverse and this is reflected in national legislation which has fixed the compromise at different points in different countries. In France, which had some of the earliest legislation on the topic, a special agency was set up with its own vessel, not only to patrol but itself to participate in underwater exploration (94). The Director of Submarine Archaeological Research is responsible to the Ministry of Culture. On the other hand developments in the United States have been more in favour of the « salvor ». Numerous salvage companies operate off the coast of Florida all the time and some very wealthy finds have been made to the advantage of the salvors (95). The gradual intervention of State control of licensing and a share of the profits has been greeted with indignation by some American writers on the topic, to whom this offends against the spirit of free

(90) RABAN, « The Mercury carrier from the Red Sea », 2 *I.J.N.A.* (1973) 179 at 180.

(91) BURCHELL, « At the Bottom of Sunda Strait; HMAS *Perth* » in Edwards, *op. cit.* n. 62, 52.

(92) See report in Australian newspaper, The Sun Herald of 15th January, 1978, 5.

(93) BRAEKHUS, art. cited n. 55, 53-55 discusses an interesting case in 1970 when the German government claimed property in a U-boat scuttled by its own crew in 1917 and a similar case has arisen in Singapore where a German U-boat torpedoed in the Straits of Malacca in 1944 was the object of salvage operations in 1972; *Simon v. Taylor* (1975) 2 *Lloyd's Rep.* 338 (Singapore High Court). Cf. also COLLINS, « The Salvage of Sunken Military Vessels », 10 *International Lawyer* (1976), 681.

(94) CHABERT, « The *Archéonaute* », in UNESCO, *op. cit.* n. 1, 169.

(95) The classic case is that of Spanish treasure fleet, a convoy of 12 ships wrecked off Florida in 1715 now being salvaged, which have yielded over \$ 6 m dollars to the salvors. MARX, « The 1715 Treasure Fleet », *op. cit.* n. 6, 81.

enterprise (96). (It should be noted that there are important differences between United States and English law on salvage dating back many decades). Yet Greece, Turkey and Italy vest all antiquities automatically in the State, a solution which certainly reflects a very different philosophy to the « finders keepers » views of American salvage law.

POSSIBLE DEVELOPMENTS IN LEGAL PROTECTION

The limits of legal action in this case indicate the importance of obtaining the co-operation of hobby and professional wreck-hunters. They are unlikely to be satisfied unless Governments are prepared to reward reported finds of significance, and are actively involved in the survey of reported sites and in the conservation and exhibition of material. Examples of this kind of active governmental involvement have been provided by Sweden and Western Australia, which reward finds of significance and encourage diver participation in survey and in some cases excavation. The French *Direction des Recherches Archéologiques Sous-Marines* (DRASM) has an active programme of survey, control and research.

There are various ways in which legal protection may soon develop. An obvious one has been the passing of national legislation. Thus legislation dealing specifically with aspects of this problem has recently been passed by France, the United Kingdom, Norway, Turkey and some other States such as the Netherlands and Ireland are considering legislative action.

International agreement is essential however because of the need to cover the international aspects which have been set out in this article. The inclusion of an article on the deep sea-bed in the new law of the sea convention is one possibility, although not a very promising one for reasons already suggested. The unilateral extension of control over finds on the continental shelf may develop a new international custom in this area, though this would be a slow and perhaps disputed process. The Council of Europe interest in the subject could result in a European Convention which would be an excellent solution provided it is strong enough and governments are prepared to invest resources in its enforcement. It would not be a complete solution, however, for in one of the most threatened areas — the Mediterranean — the involvement of the Levantine and North African states would almost certainly be necessary if controls are to be successful.

The most promising development would appear to be the promotion of a general international convention through UNESCO. UNESCO'S interest in the topic is a continuing one; it is presently revising its book on underwater archaeology. It is to be hoped that in the course of the next few years the initiative taken by the Council of Europe will be followed up by the UN instrumentality.

(96) See e.g. VRANESH and MUSICK, « Finders Keepers? or the New Statutory Laws of Treasure Trove and Related Subjects », *5 Natural Resources Lawyer* (1972) 1 at 5, 7-8.