

The Protection of Underwater Cultural Heritage Program

Report of the Rapporteur

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Section on International Law and Practice, American Bar Association

The exploration of underwater archaeological sites including shipwrecks and other evidence of human existence presents a variety of fascinating and complicated legal issues. This is particularly true in light of recent technological advancements in this field. The purpose of this program was to bring together leading experts with experience and extensive knowledge in this area to address issues concerning the protection and conservation of underwater cultural heritage (UCH) from various viewpoints. The following is a brief summary of what was discussed.

This panel addressed the following issues: the competing interests of salvage rights, rights of cultural patrimony, national and private ownership claims; recent cases, including the Sea Hunt decision which involved the Spanish ships La Galga and the Juno sunk off the coast of the U.S.; ratification of the new UNESCO Convention on the Protection of the Underwater Cultural Heritage; measures necessary to ensure the physical protection of UCH, as well as their historical and scientific values; and, environmental issues affecting underwater sites.

The program was chaired by Bonnie Czegledi, and Patty Gerstenblith (Professor of Law, DePaul University, Chicago): the Co-Chairs of the International Cultural Property Committee. The moderator was John Huerta, General Counsel of the Smithsonian Institution. The speakers included: Dr. Paul Johnson, Curator of Marine History at the Smithsonian Institution's Museum of American History in Washington, D.C.; Ole Varmer, an international law attorney at the U.S Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) Office of the General Council; Caroline M. Blanco, a Trial Attorney at the U. S Department of Justice, Environmental & Natural Resources Division, General Litigation Section, Washington, D.C.; James A. Goold, Covington & Hurling, Washington, D.C.; and Peter E. Hess, a Wilmington, Delaware sole practitioner who has been involved in many cases concerning historic shipwrecks representing finders and salvors.

The first speaker, Dr. Paul F. Johnston, is a practicing underwater archaeologist who serves as a member of the U.S. Department of State's Interagency Working Group, with responsibility for the nation's position on a number of international treaties and agreements involving submerged cultural resources. He also serves on several of the U.S. Navy's oversight committees managing such famous shipwrecks as the confederate submarine CSS Hunley; the Confederate CSS Alabama, and the NOAA-managed Civil War ironclad Monitor.

Dr. Johnston addressed the importance of shipwrecks in terms of their historical, cultural, social and scientific information that they contain. Shipwrecks are an invaluable source of information and knowledge and when they are lost through damage or pillage there is an irretrievable loss of our collective cultural heritage. Their value transcends monetary value. Shipwrecks are actually time capsules that can tell us about a slice of time in a particular culture. They are self-contained miniature societies. Underwater archeological sites have been looted since antiquity. For example, some of the greatest examples of bronze sculptures have come from the sea, in particular from the Mediterranean.

Dr. Johnston provided a historical overview of past looting, involving some of the most famous artifacts found in the sea. He also discussed the damage that is often done in the process of looting, for example, the use of explosives to blow open ships to locate gold and other treasure. In the 1980's, auction houses sold massive quantities of materials from shipwrecks. He gave the examples of the auction sales of the well-known cargos of the Nan King and the Atocha. In summary, in response to this, guidelines have been developed by museum organizations not to display material taken from commercially exploited sites. These guidelines were a segway to the UNESCO Convention on the Protection of the UCH.

Mr. Ole Varmer and Ms. Caroline M. Blanco presented together. Mr. Varmer provides legal services at the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) Office of the General Counsel, where he has specialized in the application of international and domestic law to underwater cultural heritage. Since moving to NOAA in 1990, he has provided counsel on marine environmental and historic preservation laws including the National Marine Sanctuaries Act, the Abandoned Shipwrecks Act, and maritime salvage law in cases against treasure salvors. He has successfully defended NOAA decisions and regulations in cases involving historic sanctuary resources in the Monitor National Marine Sanctuary (NMS), the Channel Islands NMS and the Florida Keys NMS. Mr. Varmer also provided assistance to the DOJ Solicitor's Office in the Supreme Court case involving the BROTHER JONATHAN, and has worked on the designation and implementation of several national marine sanctuaries in the Florida Keys, Thunder Bay, Stellwagen Bank and Monterey Bay. He drafted the regulations and management plan for UCH in the Florida Keys NMS. He was a leading negotiator on the U.S. delegation to the "Meeting of Experts" for UNESCO's Convention on the Protection of the UCH and the international agreement to protect the Titanic.

Caroline M. Blanco, a Trial Attorney in the General Litigation Section of the Environment and Natural Resources Division of the U.S. Department of Justice, specializes in public land law and in particular, cultural property law. She serves as a Professorial Lecturer on cultural property law at the American University's Washington College of Law in Washington, D.C. She also served as a member of the U.S. negotiating team responsible for developing an international agreement to protect the Titanic.

The concept that Ms. Blanco emphasized was that UCH is a non - renewable resource. She explained that in the recent years, there has been more of an acceptance and understanding that when an archaeological site is destroyed, a natural resource is damaged as well as cultural resource. She discussed protective measures including U.S. statutes that provide a general protection of certain underwater cultural heritage.

Mr. Varmer provided an overview of the legal framework for protecting UCH and the factors for determining jurisdiction and control. The framework of the law of the sea is a delicate balance between rights and responsibilities of freedom of navigation and all the nation states to use the seas, and coastal rights to patrol its territories for different activities. He addressed the NOAA Guidelines for Research, Exploration and Salvage. He presented the scope of the UNESCO's Convention on the Protection of the UCH, where UCH is broadly defined as all traces of human existence having a cultural, historical or archaeological character... underwater at least 100 years". The general principles of this Convention are the same as the UNESCO Convention on the Illicit Trafficking of Cultural Property (1970).

James A. Goold, a partner at Covington & Burling, Washington, D.C. was the next speaker. He is also the General Counsel and Secretary of the Institute of Nautical Archaeology, Chairman of the Board, Secretary and General Counsel of the RPM Nautical Foundation (Key West, Florida), Counsel in the Society for American Archaeology in Washington, D.C. His areas of practice cover admiralty, including historic preservation, sovereign immunity, pollution liability, and salvage; complex litigation, including environmental, toxic tort, product liability and contract. Mr. Goold has represented the Kingdom of Spain in the recent "Sea Hunt" case which involved the Spanish ships La Galga and the Juno.

Significantly, in the "Sea Hunt" decision it was held that the Juno and its treasures belonged to Spain. Permission of the owner was required to salvage. The Spanish government recognized the great danger its cultural patrimony was in, particularly because of the new technologies that allow looters to go underwater. The U.S. respects foreign nations rights to ownership of their vessels in the same way the U.S. would like other nations to respect its proper vessels. The owner of a ship does not loose its ownership on this ship just because it sinks, and a Sovereign has the right to say that it does not want salvage done to its ships. The passage of time is meaningless. He also addressed two other major cases, including the CSS Alabama, in which the U. S. retained title.

The final speaker was Peter E. Hess, a Wilmington, Delaware sole practitioner who enjoys combining his vocation and avocation. He has been an avid shipwreck diver and amateur underwater archaeologist for almost twenty-five years. In his many cases concerning historic shipwrecks, he has represented finders and salvors, the state government, the sport diving public, and a federal admiralty court. His clients have been engaged in the salvage of wrecks ranging from Spanish galleons, windjammers laden with Oriental porcelain, twentieth century liners, private yachts, warships, and sunken warplanes. In April and July 2001, on behalf of the underwater explorers he represents,

Mr. Hess was a U.S. delegate to the Paris negotiations of UNESCO's International Convention for the Protection of the UCH.

As Mr. Hess has represented salvors and finders, he addressed their viewpoint. In summary, his main thesis was that the current incentive-based system works. Salvors should be rewarded for recovering materials that are found underwater. Many archaeological sites are deteriorating and it is through the excavation of finders and salvors that these sites are being found and saved.

The above discussion is only a brief summary of the lengthy discussion held by the speakers. Any inaccuracy in the above rests with the rapporteur. Needless to say, the panel was fascinating because of the differing viewpoints and scintillating subject matter. Many thanks to the speakers for their excellent presentations, and to the moderator, John Huerta, who did a superb job of ensuring that each speaker had an opportunity to present.

Rapporteur; **Bonnie Czegledi** - Barrister & Solicitor, International Art & Cultural Heritage Law, CzeglediArtlaw.ca, Toronto, Canada