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► **To cite this version:**

| Thaissa Meira. The "Middle Passage Memorial". *Neptunus*, 2021, 27 (3), pp.1-12. <hal-03833568>

HAL Id: hal-03833568

<https://hal.science/hal-03833568v1>

Submitted on 28 Oct 2022

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The “Middle Passage Memorial”: The legal duty towards underwater cultural heritage on the international Mid-Atlantic Ocean floor from the perspective of ongoing minerals exploration activities.

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Summary: In 2020, experts from the Duke University (North Carolina, USA) proposed a formal recognition of the cultural and historical values of the Middle Passage i.e. the Atlantic Ocean floor that corresponds to the most common and shorter ship routes used to transport enslaved Africans to the Americas in colonial times. This proposal to recognize the cultural and historical relevance of the Middle Passage by the Duke University experts (referred to as the *Memorial* in this paper) would be a sign of respect for the victims of the transatlantic slave trade, who lost their lives while crossing the ocean. By mapping the relevant Middle Passage through virtual ribbons, it would also aim to safeguard potential archeological artifacts (slave shipwrecks) that could be found on the mid-Atlantic Ocean floor from the impacts of future deep-seabed mining exploitation activities. This paper explores the Duke University’ experts’ *Memorial*, and the historical and cultural relevance of the Middle Passage. However, it turns to a different perspective than the one adopted by the *Memorial’s* authors, who focused on concerns about future marine mineral exploitation (commercial mining). Whereas, this paper looks at the legal duty to preserve historical artifacts from the perspective of ongoing licensed deep-sea mineral exploration activities in the Mid-Atlantic Ocean. Hence, it assesses the international legal duties of exploitation contractors, flag States and sponsoring States to cooperate among themselves and to report the discovery of archeological artifacts in mineral exploration licensed areas to the competent international organization(s). It does so by assessing the legal duty to protect such underwater artifacts under the Law of the Sea and Underwater Cultural Heritage treaties. Finally, through this legal assessment it recommends how to efficiently address the issue of safeguarding underwater archeological artifacts discovered on the international ocean floor during mineral resources prospecting and exploration activities.

Keywords: underwater cultural heritage (shipwrecks), marine archeology, international ocean-floor, Mid-Atlantic Ocean, Middle Passage, and transatlantic slave trade, marine minerals exploration.

Résumé : En 2020, des experts de l'Université Duke (Caroline du Nord, États-Unis) ont proposé une reconnaissance formelle des valeurs culturelles et historiques du Passage du Milieu, c'est-à-dire le fond de l'océan Atlantique qui correspond aux routes maritimes les plus courantes et les plus courtes utilisées pour transporter les Africains réduits en esclavage, aux Amériques à l'époque coloniale. Cette proposition de reconnaître la pertinence culturelle et historique du Passage du Milieu par les experts de l'Université Duke (appelée Mémorial dans cet article) serait un signe de respect pour les victimes de la traite transatlantique des esclaves, qui ont perdu la vie en traversant le océan. En cartographiant le passage du milieu pertinent à l'aide de rubans virtuels, il viserait également à protéger les artefacts archéologiques potentiels (épaves d'esclaves) qui pourraient être trouvés au fond de l'océan Atlantique contre les impacts des futures activités d'exploitation minière des grands fonds marins. Cet article explore le mémorial des experts de l'Université Duke et la pertinence historique et culturelle du passage du milieu. Cependant, il se tourne vers une perspective différente de celle adoptée par les auteurs du Mémorial, qui se sont concentrés sur les préoccupations concernant l'exploitation future des minéraux marins (exploitation minière commerciale). Considérant que, cet article examine l'obligation légale de préserver les artefacts historiques du point de vue des activités d'exploration minière en haute mer sous licence en cours dans l'océan Atlantique moyen. Par conséquent, il évalue les obligations juridiques internationales des entrepreneurs d'exploitation, des États du pavillon et des États parrains de coopérer entre eux et de signaler la découverte d'artefacts archéologiques dans les zones sous licence d'exploration minérale aux organisations internationales compétentes. Il le fait en évaluant l'obligation légale de protéger ces artefacts sous-marins en vertu des traités sur le droit de la mer et le patrimoine culturel subaquatique. Enfin, à travers cette évaluation juridique, il recommande comment aborder efficacement la question de la sauvegarde des artefacts archéologiques sous-marins découverts sur les fonds océaniques internationaux lors des activités de prospection et d'exploration des ressources minérales.

Mots-clés : patrimoine culturel subaquatique (naufages), archéologie marine, fonds océaniques internationaux, océan Atlantique moyen, passage moyen et traite négrière transatlantique, exploration des minéraux marins.

1. Introduction

1.1- The Middle Passage Memorial (*the Memorial*)

With the murder of George Floyd, in Minnesota, USA, in May 2020, a call of justice for African people began through the *Black Lives Matter Movement*. As a consequence of this movement, colonial transatlantic slave trade history was revisited. Historians have noted the importance of shedding light on this chapter of human history in an attempt to address current matters of inequality and injustice faced by African people across the world.¹ Against this background, a group of experts from Duke University (North Carolina, USA) have called the international community's attention to the historical, cultural, and archeological importance of the Mid-Atlantic Ocean floor. More precisely the Middle Passage, which was the shortest maritime route used by slave ships to transit African captives to the American colonies between the sixteenth and nineteenth centuries.

Accordingly, the Duke University experts shared their concern with the international community that deep-seabed mining activities, more precisely future exploitation (commercial mining) for marine minerals in the international Atlantic Ocean floor, may put at risk the historical artifacts yet to be discovered there, e.g. sunken slave ships. According to the experts from Duke University, there could be 1,000 slave shipwrecks yet to be found there.² Additionally, they noted that the Middle Passage ocean-floor has intangible cultural value to humankind, mainly to the African diaspora in the Americas. This intangible cultural value is due to it being the resting place of thousands of victims of the slavery trade who died or were murdered while crossing the Atlantic Ocean. Hence, the authors of the *Memorial* suggested formally recognizing the Middle Passage ocean-floor as the final resting place of the transatlantic slave trade victims by putting "virtual memorial ribbons" on the virtual charts and maps) produced by the International Seabed Authority (ISA). The ISA is the competent international organization for administering mining activities on the sea floor out of national jurisdiction. By doing so, the ISA would remind mining companies of the cultural and historical significance of the Middle Passage and of their legal duties to carry out their activities cautiously to preserve any archeological artifacts that are yet to be found. To summarize, the authors of the *Memorial* proposal did not ask for a ban (permanent prohibition), nor did they ask for a moratorium (temporary prohibition) of deep-sea mining on the international Atlantic Ocean floor. Instead, they asked that mining companies be aware and act cautiously to protect the underwater cultural heritage of the Middle Passage.³

This paper echoes the Duke University's experts' Middle Passage Memorial proposal. It does so by reinforcing the importance of establishing such a virtual memorial, through charters, not only to safeguard the historical artifacts from future marine minerals exploitation but, most notably, to remind the actors engaged in ongoing mineral exploration and prospecting activities in the Mid-Atlantic Ocean of their duty to preserve archeological artifacts found there. For this purpose, this paper now invites its readers to revisit the history of the voyage through the Middle Passage by the transatlantic slave trade. This is followed by a brief section on the intangible and tangible cultural values of the Middle Passage. Then, the following section provides an overview of the current permits for mineral exploration in the Mid-Atlantic Ocean Ridge showing who are the States sponsoring ongoing deep-sea mining exploration activities in the vicinity of the proposed *Memorial*. Finally, it assesses the relevant international law on the legal duties of marine mineral resources exploration contractors, flag and sponsoring States, to preserve, cooperate and report archaeological findings in the international ocean floor and draws its conclusions upon this legal assessment.

1.2- Historical background: Transatlantic slave trade and the Middle Passage voyages

For over three hundred years (1519-1865⁴) millions of Africans were captured in their homeland, shipped overseas, and enslaved in plantations in the American colonies. Approximately, 40,000

¹ Ellen Wulffhorst, 'To Honor Slave Trade Victims, a Memorial in the Depths of the Atlantic' *Reuters*, (New York, November 20, 2020) <www.reuters.com/article/us-global-slavery-memorial-idUSKBN2801KA> accessed 11 August 2021.

² Karl Leif Bates, 'Group Urges Atlantic Seafloor be Labeled a Memorial to Slave Trading *Duke Today*', (Beaufort, North Carolina, 10 November 2020) <<https://today.duke.edu/2020/11/group-urges-atlantic-seafloor-be-labeled-memorial-slave-trading>> accessed 11 August 2021.

³ Ibid

⁴ This date records the formal prohibition of transatlantic slave trade in regard to the United States of America. Other countries, such as Brazil, took even longer to formally prohibit this trade of human beings. In Brazil, formal abolition of slavery took place in 1888 - with illegal traffic of human beings from Africa to Brazil happening even after the adoption of the relevant Brazilian law ("*Lei Aurea*") that prohibited slave work in the former Portuguese colony. Records show that while

voyages took 12.5 million captive African people (men, women, and children) to the Americas.⁵ This resulted in the largest forced migration in human history to date - not to say the current inequality, racism, and injustice suffered by African people worldwide.

In colonial times, the shortest route from the African to the American continents was known as the Middle Passage (Image 2). In geographical terms, the Middle Passage corresponds to the sea route from the Western Coast of Africa, called, at the time, the “Slave Coast” (territories that today known as Angola, Benin Congo, Guinea, Sierra Leone, Senegal, and Nigeria), to the Americas, mainly the current territories of the Caribbean, northeast, and southeast of Brazil, as well as southern USA (Images 1 and 2). A voyage through the Middle Passage in colonial times took from 21 days (three weeks) up to 90 days (three months).⁶ During which time the Africans on board were exposed to inhuman conditions and cruel treatment.

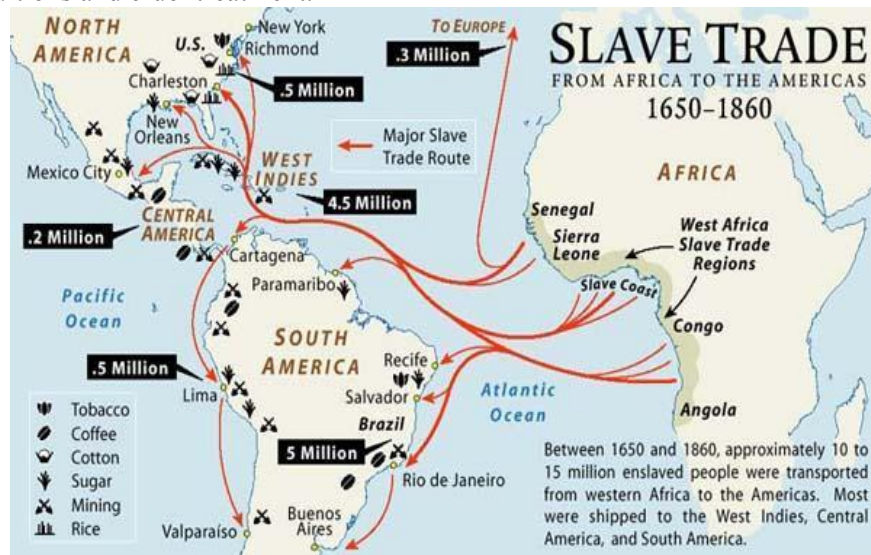


Image 1: illustrates the transatlantic slave trade between the three continents of Europe, Africa, and the Americas, the goods (commodities) involved, the common ship routes at the time, and estimated numbers of enslaved Africans.⁷

Most of the slave ships held between 150 to 500 enslaved individuals⁸ in close and squalid quarters below deck (Images 3 and 4). Other records reported even higher numbers: slave ships loaded with cargoes of 700 to 800 humans.⁹ For example, accounts of the slave-ship named the *Parr* recorded that there were 100 crew members and 700 enslaved Africans onboard - when the slave ship left the African coast, thus a total of 800 humans were onboard a 140 tonnage-ship.¹⁰ The enslaved human beings were kept captive under confined spaces, had inadequate nutrition, and limited (if any) opportunity for personal hygiene, which led to the description of the slave ships as a “marketplace” for diseases (e.g. scurvy, dysentery, and smallpox).¹¹ Enslaved Africans were also exposed to physical, emotional, and psychological violence from sailors. When found ill or guilty of rebellion they were

the slave trade was abolished in the USA and Britain illegal trade occurred using Brazilian and other Latin American countries ports.

⁵ David Eltis, and David Richardson, *Atlas of the Transatlantic Slave Trade* (New Haven, Conn, London, Yale University Press; 2010).

⁶ Encyclopedia Britannica (Eds) ‘Middle Passage: Slave Trade’ (*Encyclopedia Britannica*) <www.britannica.com/topic/Middle-Passage-slave-trade> accessed 11 August 2021.

⁷ Mappenstance ‘Map of the Week: Slave Trade from Africa to the Americas 1650-1860’ (Richmond University, Mappenstance, 11 November 2014) <<https://blog.richmond.edu/livesofmaps/2014/11/11/map-of-the-week-slave-trade-from-africa-to-the-americas-1650-1860/>> accessed 11 August 2021.

⁸ Encyclopedia Britannica.

⁹ Craig Koslofsky and Roberto Zaugg, ‘A German Barber-Surgeon in the Atlantic Slave Trade-The Seventeenth-Century’ *Journal of Johann Peter Oettinger* (University of Virginia Press, 2020) 16.

¹⁰ Encyclopedia Virginia ‘Slave Ships and the Middle Passage’ (*Encyclopedia Virginia, Virginia Humanities*) <<https://encyclopediavirginia.org/entries/slave-ships-and-the-middle-passage/>> accessed 11 August 2021.

¹¹ Phillip J. Turner, Sophie Cannon, Sarah DeLand, James P. Delgado, David Eltis, Patrick N. Halpin, Michael I. Kanu, Charlotte S. Sussman, Ole Varmer and Cindy L. Van Dover, ‘Memorializing the Middle Passage on the Atlantic Seabed in Areas Beyond National Jurisdiction’ (2020) 122 *Marine Policy*, <<https://doi.org/10.1016/j.marpol.2020.104254>>, accessed 11 August 2021.

thrown overboard, physically punished, or tortured. Overall, the mortality rate onboard slave ships was approximately from 13%¹² to 15%.¹³ These inhuman conditions and cruelty onboard slave ships, together with suicide and shipwrecks resulted in the death of approximately 1.8 million African captives in 40,000 (est.) transatlantic voyages.¹⁴

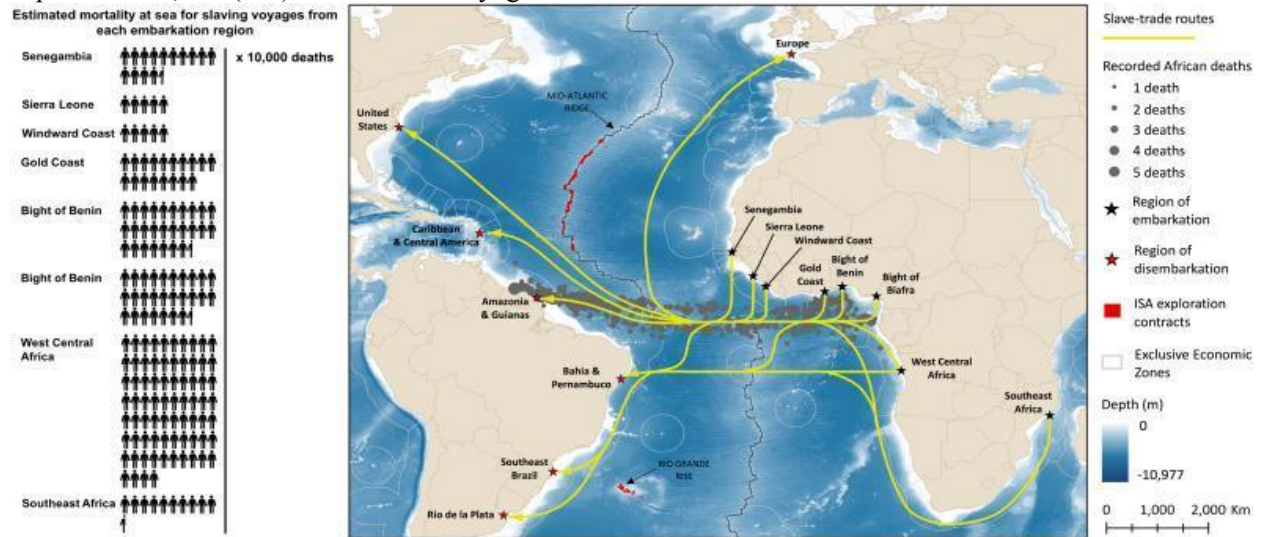


Image 2: Illustration on left depicts the deck of a slave ship with its overloaded human cargo. The illustration on the right is a map with the ship routes used during the transatlantic slave trade marked in yellow, the grey dots represent the approximate locations where 522 Africans were cast into the sea during 35 Dutch slaving voyages; the red squares show exploration contract blocks for polymetallic sulfide deposits on the Mid-Atlantic Ridge and ferromanganese crusts on the Rio Grande Rise (not to scale).¹⁵

A report from a Brazilian slave ship describes these high mortality rates onboard the Middle Passage voyage:

“On 4 August 1816 the ship *Pastora de Lima* left the port of Rio de Janeiro (Brazil) to Mozambique (Africa) with the aim to buy slaves to work in the plantations. As the *Pastora de Lima* docked Mozambique, 404 slaves were embarked, but 290 arrived in Brazil. The conclusion is that 114 men, women and children died during the Atlantic crossing.”¹⁶

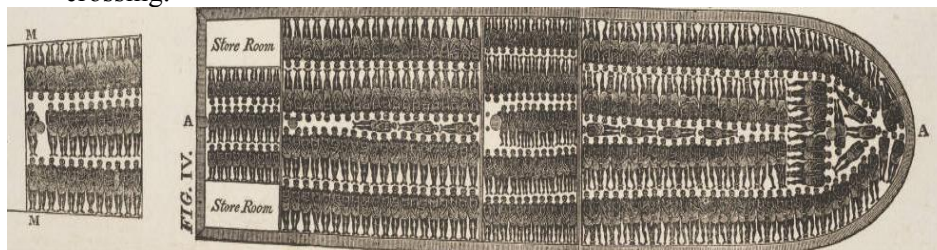


Image 3: Illustration of the slave ship deck and how the human cargo was tightly “packed”.¹⁷

¹² Encyclopedia Britannica.

¹³ Koslofsky.

¹⁴ Turner, et al

¹⁵ ibid

¹⁶ Patrícia Mariuzzo, ‘Atlas do Comércio Transatlântico de Escravos’ (2011) 63 (1) *Science and Culture* <http://cienciaecultura.bvs.br/scielo.php?script=sci_arttext&pid=S0009-67252011000100021&lng=en. <http://dx.doi.org/10.21800/S0009-67252011000100021> > accessed 25 June 2021.

¹⁷ Yale University, ‘Yale Slavery and Abolition Portal’ (Yale University, 2021) < <https://slavery.yale.edu/links/external-databases> > accessed 11 August 2021.



Image 4: Depiction of a reporter's view of the upper deck of a slave ship: "about four hundred and fifty native Africans, in a sitting or squatting posture, the most of them having their knees elevated so as to form a resting place for their heads and arms."¹⁸



Image 5: Illustration of the Triangular trade route, which involved three continents: the Europeans exchanged guns, metals, and textiles with the Africans, who provided the former with captive people who were kidnaped, war prisoners, or alleged criminals; in the American colonies, the Europeans then traded the enslaved Africans for local commodities (e.g. sugar, tobacco, and cotton), which they sold in the European market, the enslaved Africans were forced to work in the plantations in American continent.¹⁹

1.3- Cultural, historical and archeological significance of the Middle Passage

It is important to mention the intangible cultural aspects of the Middle Passage for both educational and awareness raising reasons, thus it will be briefly discussed here. However, and worth noting that this paper limits its legal assessment to the tangible aspect of the Middle Passage.

A. Intangible cultural value

In early colonial times, references to the Middle Passage were made in poetry, such as the Brazilian-Portuguese poem *Navio Negreiro* (free translation: "Black Ship") by Castro Alves:

*Yesterday the Sierra Leone,
The war, the lion hunting,
The sleep, slept without worries,
Under the tent of the amplitude!
Today... the dark basement, deep,
Infected, crowded, gross,
Housing the plague, instead of a jaguar,
And the deep always interrupted,
By the sudden pull of a deceased,
And the crashing of a body into the sea...*

¹⁸ US History, 'American History: From Pre-Colombian to the New Millennium' (*US History* 2021) <<https://www.ushistory.org/us/index.asp>> accessed on 21 August 2021.

¹⁹ *ibid*

Yesterday plain freedom,
 The will for the power...
 Today immense cruelty
 Even not free to die...
 Fastened at the same chain
 -Ironged, dismal, serpent-
 In the links of the slavery.
 And so, mocking from the death,
 Dance the dreadful cohort
 At the sound of the lash...Disdainful!²⁰

The Middle Passage and transatlantic slave trade are also subjects of contemporary cultural expression (hip-hop and novels). For example, the myth of the *Drexciyan* was created by the Detroit electro duo of the same name in their 1992 album *Deep Sea Dweller*.²¹ The *Drexciya* was a baby of a pregnant African woman, who was considered by their captors to be sick or disruptive and thrown off the slave ship to drown.²² The baby *Drexciyan* swam from their mothers' wombs, never needing to breathe air, and gave rise to a subaqueous mythological empire.²³ The *Drexciyan* mythos also inspired the actor and rapper Daveed Diggs, known from the musical *Hamilton*, to write a song with his hip-hop group, Clipping, called *The Deep* in 2017.²⁴ Since then, the legend of the *Drexciyan* has been adopted by other artists. e.g. the novel, also called *The Deep*, by Rivers Solomon, and in *Abdul Qadim Haqq* and Dai Sato's graphic novel, *The Book of Drexciya*.²⁵ The *Drexciyan* tales aim to deal with the trauma of slavery by imagining an alternative narrative. In summary, all these references to the Middle Passage through poetry, music, literature, and art reflect its intangible cultural heritage to humankind.

B. Tangible cultural value

The Middle Passage also has its tangible cultural value i.e. it is a potential site for artifacts of historical importance, which could help better study this historical chapter and keep its memory alive. Although, it is highly unlikely that human remains would be found on the Atlantic Ocean floor, experts aim to find evidence of the transatlantic slave trade, such as shipwrecks and metal instruments used onboard to imprison and torture slaves. For example, according to maritime archeologist James Delgado, one of the contributors to the *Memorial* proposal:

The trade actually entered its deadliest phase at sea after Britain made slavery illegal: some captains, caught by British Royal Navy ships patrolling the African coast, tied captives to anchor chains and threw them over the side- as the crime was only punishable if you had evidence in the form of actual human beings on your ship, thus with modern underwater surveying tools it would be possible to find evidence, such as metal anchors with shackles still attached.²⁶

Other marine archeology experts question what crew and captives carried on their Middle Passage voyage. They suggest that artifacts such as gold, coins, musical instruments, and jewelry could also be found in slave shipwrecks' sites.²⁷ Thus, the discovery of such artifacts would help better picture the trade, the traders, and its victims. It is unquestionable that technology has developed to the point that it can trigger archeological investigations on the international Atlantic Ocean floor. Particularly, if there is coordination and cooperation between marine minerals exploration activities and archeological investigations. The momentum of building consciousness of the transatlantic slave trade and addressing the issue of racism, injustice, and inequality may also lead to greater interest and financial support for these archeological investigations.

²⁰ All Poetry 'Navio Negreiro by Castro Alves with English Translation' (*All Poetry*) <[https://allpoetry.com/O-Navio-Negreiro-Part-1-\(With-English-Translation\)](https://allpoetry.com/O-Navio-Negreiro-Part-1-(With-English-Translation))> accessed 11 August 2021.

²¹ Helen Scales, 'Drexciya: How Afrofuturism is Inspiring for an Ocean Memorial to Slavery' *The Guardian* (London 25 January 2021) <www.theguardian.com/environment/2021/jan/25/drexciya-how-afrofuturism-inspired-calls-for-an-ocean-memorial-to-slavery> accessed 11 August 2021.

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Jerome S Handler, 'The Middle Passage and the Material Culture of Captive Africans' (2009) 30 (1) *Slavery & Abolition*, 1–26; Jane Webster, 'Historical Archaeology and the Slave Ship' (2008) 12 (1) *IJHA* 1–5. <www.jstor.org/stable/20853143> accessed 11 August 2021,

1.4- Current exploration contracts in the Mid-Atlantic Ocean Ridge

There are three ongoing mineral exploration licenses close to the *Memorial* site. The ISA has granted permits to contracts sponsored by France (2014-2029), Russia (2012-2027) and Poland (2018-2033) to explore Polymetallic Sulphides in the Mid-Atlantic Ridge.²⁸ (Images 2 and 6).

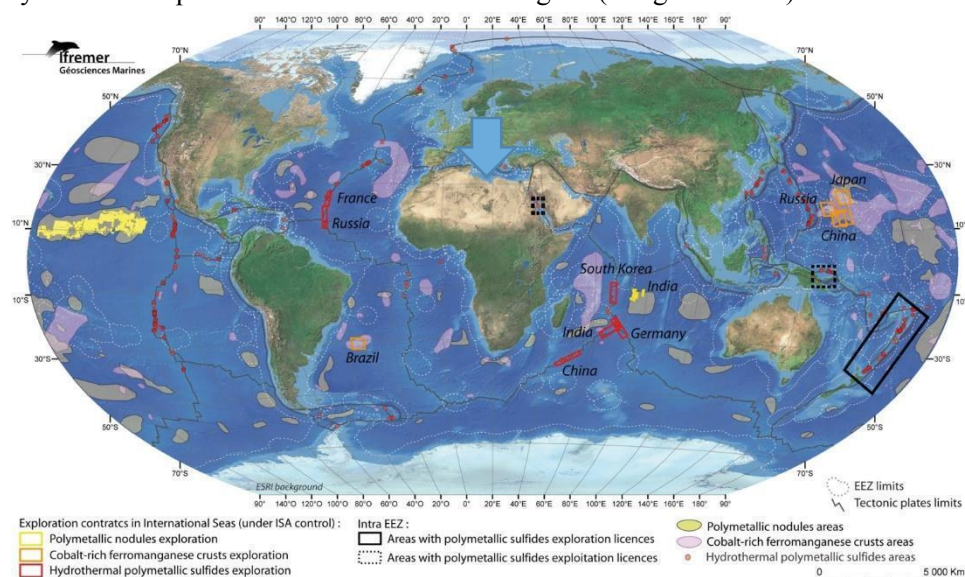


Image 6: Illustrates ongoing permits, licenses or contracts for mineral and metal marine resources exploration in international waters, emphasis is given to the contacts conducted on the Mid-Atlantic Ocean Ridge (arrow in light blue) sponsored by France, and Russia.²⁹ The map dates from 2017, thus the Polish Exploration contract, which was signed in 2018, does not appear here.

2. The legal duties of marine mineral exploration contractors, sponsoring and flag States towards archeological underwater cultural heritage on international ocean floor

The starting point of this legal analysis is the 1982 United Nations Convention on the Law of the Sea (UNCLOS). The UNCLOS does not widely regulate the protection of underwater cultural and historical heritage. Only two provisions safeguard historical heritage found on the international sea floor. The first provision is a *lex specialis*, according to which, “all objects of an archaeological and historical nature found on the seafloor and subsoil out of national jurisdiction 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.”³⁰ Firstly, when reading this provision, one should read the wording “objects of archeological and historical nature” as any trace of human existence³¹ that has been lying on the bottom of the sea for over 100 years.³² This definition of underwater cultural heritage very much applies to objects (cargo or items carried onboard) or vehicles (the vessels themselves) linked to the transatlantic slave trade. Secondly, and with regard to the States’ claims of interest over the object(s) or “claim of preferential rights”,³³ scholars have suggested that from this provision one could conclude that the “State of origin” would have a preferential right in face of a claim from the “State of cultural,

²⁸ International Seabed Authority (ISA), ‘Exploration Contracts for Polymetallic Sulphides’ (International Seabed Authority, 2021) <www.isa.org.jm/exploration-contracts/polymetallic-sulphides> accessed 11 August 2021.

²⁹ Ifremer, ‘Contracts: metallic mineral resources in international waters’ (Ifremer, 2017) <www.ifremer.fr/en/Public-policy-support/Raw-materials-and-resources/Contracts-metallic-mineral-resources-in-international-waters> accessed 21 July 2021.

³⁰ United Nations General Assembly, *Convention on the Law of the Sea* (UNCLOS). (adopted 10 December 1982, entered into force on 1 November 1994) 31363 UNTS art 149

³¹ United Nations Organization for Education, Science and Culture, *Convention on the Protection of the Underwater Cultural Heritage* (adopted on 2 November 2001, entered into force on 2 January 2009) 45694 UNTS art. 1 (1); Tullio Scovazzi, ‘Article 149’ in Proelss, Alexander, et al. *United Nations Convention on the Law of the Sea: A Commentary*. (Hart, Oxford, 2017), 1055

³² Sarah Dromgoole, *Underwater cultural heritage and international law* (Cambridge University Press; 2013) 94.

³³ ‘ibid’ 123.

historical or archeological origin”.³⁴ One could then reasonably ask: i) could interest claims come from different States? and ii) if so, who would be the “State of origin” and/or the “State of cultural, historical and archaeological origin”? In answer to these questions, it is possible that the “State of origin” is different from the “States of cultural, historical and archaeological origin”. For instance, hypothetically a sunken galleon is found on the international seafloor. It is known that the galleon flew the Spanish Crown’s flag when it sank and that it was built with resources (gold, other minerals, and wood) from a Spanish colony. In this hypothetical case and with this background information, the “State of cultural, historical and archaeological origin” would be Spain, while the “State of origin” would be the former Spanish colony (e.g. Colombia, Peru or Mexico).³⁵ However, the picture may rather be blurred (not clear) when it comes to the origin of the slave ship- mainly due to difficulties (or impossibility) of identifying or tracing the origin of the human cargo. Hypothetically, if a slave shipwreck was found on the international sea floor and records or evidence point to it flying a British flag at the time it sank, then, in this case, it would be clear that its “State of cultural, historical and archaeological origin” would be the United Kingdom. It may not be easy, however, to track from which African State(s) the human cargo belonged. Thus, resulting in challenges finding the “State(s) of origin” and who would therefore have the preferential rights of investigating the archeological finding under the Law of the Sea.

The second relevant UNCLOS provision regards the *lex generalis* duty of States to duly protect and cooperate in the protection of historical artifacts in the international sea. It says that “States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.”³⁶ Two conclusions follow from this general rule: i) a State who knowingly destroys, or allows the destruction of, elements of underwater cultural heritage can be held responsible for a breach of the obligation to protect it; and ii) a State who persistently disregards any request by other States to negotiate on forms of cooperation aiming at the protection of underwater cultural heritage could also be held responsible for an internationally wrongful act.³⁷ Additionally, this duty to protect archeological artifacts has been interpreted as an “internationalist” one in nature, i.e., regardless of the origin of the artifacts and the national interests of the States, the latter are duly obliged under the Law of the Sea to protect the first.³⁸ Hence, sponsoring States’ (France, Russia and Poland) to ongoing deep-sea mineral exploration activities in the Mid-Atlantic Ocean Ridge are obliged to protect any archeological artifact found there regardless of their national interests and the origin of the archeological artifact.

The ISA Exploration Regulations and the 2001 United Nations Educational, Scientific and Cultural Organization’s (UNESCO) Convention on Underwater Cultural Heritage plug the procedural gap left by the UNCLOS on how States shall preserve and cooperate for the preservation of archeological artifacts found on the international sea floor. These frameworks do so by providing for more pragmatic procedural duties of sponsoring States to deep-seabed mineral exploration activities and flag States, as well as their nationals to report, notify and engage in consultations when identifying any trace of human existence with cultural or historical value on the international ocean floor. In other words, they rule on who would be responsible for protecting archeological artifacts and how they should go about effectively protecting them *in situ*.³⁹ This means that if any human remains or objects of an archaeological or historical nature are found on the international ocean floor, the following ISA Exploration Regulations’ procedures shall be observed:

- i- The contractor or prospector shall immediately notify the Secretary-General of the ISA in writing of any finding on the international ocean floor of the object and its location, as well as measures taken to preserve or protect it;⁴⁰

³⁴ Scovazzi, 2017.

³⁵ *Ibid.*

³⁶ UNCLOS art. 303 (1).

³⁷ Scovazzi, 2017.

³⁸ Dromgoole, 246.

³⁹ Dromgoole, 284.

⁴⁰ International Seabed Authority, ‘Regulation 8 Objects of an archaeological or historical nature’, in International Seabed Authority, *Council, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* (15 November 2010) Doc ISBA/16/ A/12/REV.1.

- ii- The Secretary-General of the ISA shall transmit such information to the Director of the UNESCO,⁴¹ and
- iii- No further prospecting or exploration shall take place, within a reasonable radius, until such time as the ISA Council decides otherwise after taking account of the views of the Director-General of the UNESCO or any other competent international organization.⁴²

In summary, all sponsoring States (France, Russia, and Poland) of Polymetallic Sulphides exploration in the Mid-Atlantic Ridge shall duly regard these procedures and duties to notify the ISA of the archeological discovery and stop prospecting and exploring activities until further deliberation of the ISA. Notably, France, in its contract with the ISA, reiterated all these procedural obligations to notify the competent authorities and stop any exploration or prospecting activities until further deliberation from the competent international organization(s) under its license contract to explore for Polymetallic Sulphides in the Mid-Atlantic Ridge.⁴³

The UNESCO is the competent UN bureau for scientific, cultural, and social matters, thus the competent United Nations bureau for marine archeology. It has added further procedural layers to the legal duty to preserve underwater cultural heritage through the 2001 Convention on the Protection of the Underwater Cultural Heritage (CPOCH) and its Operational Guidelines. According to the CPOCH, if an object of archeological or historical value is found in the international waters:

- i- The vessel flying the flag of a State-Party or the national of the State-Party onboard should report the finding/discovery to the State-Party and observe its duty to protect underwater heritage under international law;⁴⁴
- ii- The notified State-Party shall through diplomatic means notify the UNESCO Director-General and the ISA Secretary-General of the archeological discovery;⁴⁵
- iii- The Director-General of the UNESCO shall then notify all State-Parties of the discovery;⁴⁶
- iv- Any State-Party with a proven cultural or historical link to the artifact may declare to the UNESCO its interests in preserving the artifact or engaging in consultation for that purpose;⁴⁷
- v- The Director-General of the UNESCO shall then invite all States which manifested interest (and proved the linkage to the artifact) to engage in consultations for the best preservation strategies;⁴⁸
- vi- This preservation coalition shall also establish inter-agency and inter-organizational cooperation by consulting the Secretary-General of the ISA;⁴⁹
- vii- A “Coordinating-State” will be appointed by the Director-General of the UNESCO, among those who manifested interest, to coordinate this preservation strategy and who will be responsible for implementing preservation measures agreed by the task force and undertake preliminary research of the underwater cultural heritage artifact, as well as report the outcomes of that research to the UNESCO.⁵⁰

⁴¹ibid

⁴² International Seabed Authority, ‘Regulation 37 Human remains and objects and sites of an archaeological or historical nature’, in International Seabed Authority, *Council, Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area* (15 November 2010) Doc ISBA/16/ A/12/REV.1 <www.isa.org.jm/documents/isba16a12-rev-1> accessed 11 August 2021.

⁴³ Ifremer, ‘ISA Contract for Exploration –Public Information Template: Article 7’ (*ISA, Doc. ACM/2019/031/34I.Annex*) <https://isa.org.jm/files/files/documents/Public%20information%20on%20contracts%20Ifremer_PMS.pdf> accessed 11 August 2021.

⁴⁴ United Nations Organization for Education, Science and Culture, *Convention on the Protection of the Underwater Cultural Heritage* (adopted on 2 November 2001, entered into force on 2 January 2009) 45694 UNTS art. 11(1).

⁴⁵ Ibid art. 11(2).

⁴⁶ Ibid art. 11(3).

⁴⁷ Ibid art. 11(4).

⁴⁸ Ibid art. 12(2).

⁴⁹ Ibid.

⁵⁰ Ibid art. 12 (2), (4), (5), (6).

The terminology “States with a vertical link with the artifact” in the CPUCH hints at a broader concept than the one under Article 149 of the UNCLOS (“State of origin, State of archeological, cultural or historical organ”). Hence, under the CPUCH, a State-Party has to feel and prove a historical identification with a particular site or recovered artifact to claim its interest over an archeological artifact.⁵¹ The language of the CPUCH provides room for diverse claims, thus scholars have concluded that it better safeguards political and historical realities.⁵²

Notably, neither Russia nor Poland are Parties to the 2001 CPUCH. To date, only France has ratified the relevant underwater cultural heritage convention.⁵³ This implies that from the three States sponsoring ongoing mineral exploration in the Mid-Atlantic Ocean Ridge, solely French vessels and their nationals shall duly regard the procedural duties established under the CPUH. While Russian and Polish vessels and nationals, would only be liable if they breach their contractual duties with the ISA (to notify and stop activities until further deliberation), and the Law of the Sea rules (on preservation and cooperation for that purpose). Overall, the CPUCH is not widely ratified, particularly among States sponsoring mineral exploration on the international ocean floor and, most notably, among States potentially interested in archeological findings or with “a vertical link” to the Middle Passage and transatlantic slave trade. Such is the case of Brazil: who explore Cobalt Ferromanganese Crusts in the South Atlantic Ridge and have an unquestionable vertical link to the transatlantic slave trade. Hence, for more effective protection of underwater cultural heritage and more coordination of actions between the ISA and the UNESCO, as well as consultation among States, further ratification of the CPUCH would be necessary. In this regard, it is worth noting that the non-State-Party to the CPUCH cannot directly engage in the “consultation and preservation coalition” under the CPUCH.⁵⁴

Ultimately, when comparing the language of UNCLOS with that of the language of the CPUCH, one could identify that the UNCLOS states that “preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin”.⁵⁵ Whereas, the CPUCH states that “preferential rights of the State of cultural, historical and archeological origin”.⁵⁶ One could then deduce that whereas the UNCLOS gives clear reference to “State of origin” in contrast to “State of cultural, historical or archeological origin”, the CPUCH, by omitting the wording “State of origin”, appears to give preferential rights to the “State of cultural, historical or archeological origin”. Against this background, one could reasonably ask: which provision would prevail in the case of different States manifesting interest in studying or claiming preferential rights over an archeological discovery on the international Atlantic Ocean floor? In answer to this question, scholarship has noted that in light of Article 3 of CPUCH and in the case of any incompatibility between the two treaties (UNCLOS and CPUCH) arising, then the UNCLOS would prevail.⁵⁷ Hence, “States of origin” would have a preferential right to claim in the face of “States of cultural, historical, or archeological origin”. In that sense, it has also been noted that when action is taken by the “Coordinating-State” the rights of the “State of origin” must be taken into account to the extent that regards its preferential rights to study the artifact- even when the “State of origin” is not a Party to the CPUCH.⁵⁸

3. Concluding remarks

This paper sheds light on the *Middle Passage Memorial* proposal from the Duke University experts as a formal recognition of the victims of the transatlantic slave trade and as a means to safeguard potential archeological artifacts yet to be found on the Atlantic Ocean floor. It is unquestionable that such artifacts would help better study this chapter of human history and address current issues of inequality, injustice, and racism.

Overall, through its legal assessment, this paper has found that the duty to preserve archeological findings in marine mineral exploration licensed areas is well established, regardless of the national

⁵¹ Dromgoole, 128.

⁵² Ibid.

⁵³ CPUCH.

⁵⁴ Dromgoole, 296.

⁵⁵ UNCLOS art.149.

⁵⁶ CPUCH art. 11(4),

⁵⁷ Dromgoole, 280.

⁵⁸ Dromgoole, 297.

interests of States and the origin of the artifacts (“internationalist legal duty”). The procedural duties to notify, consult and stop mineral exploration or prospecting activities until further deliberations by the competent organization(s) are received, are also well established under the ISA Exploration Regulations. Additionally, the law provides for inter-bureau (mainly ISA and UNESCO) cooperation, each one contributing with its expertise and mandate. The law on the protection of underwater cultural heritage also rules for inter-State collaboration and consultation for *in situ* preservation in the aftermath of an archaeological discovery on the international sea floor. As regards to general obligations and procedures of flag States and their nationals to preserve underwater cultural heritage in international waters under the CPOCH, there is a need for further ratification of the relevant convention. Most notably, ratification is needed among States with a potential vertical link to the Mid-Atlantic Ocean site and archeological artifacts yet to be found there. As to the questions of who would have preferential rights to study the archeological artifacts in the exploration licensed areas if more than one State claimed an interest? The rules of the UNCLOS would prevail in face of the CPOCH. Hence, the “State of origin” would have preferential rights in the face of claims from “States of cultural, historical or archeological origin”.

A reasonable point that a Law of the Sea expert would raise is the question of law enforcement in international waters; should it be left to the discretion of flag States? In that case, an interesting suggestion has already been made by the Duke University’s group of experts. That is a cooperation between actors engaged in archeology and those engaged in mineral exploration, by having marine archeologists onboard licensed vessels surveying the mineral and metal deposits of the Atlantic Ocean floor. Within this ideal onboard cooperation picture, the marine archeology expert(s) would know exactly the first measures to be taken to preserve the underwater historical artifact in the aftermath of its discovery during mineral exploration activities. She, he or they would also help to better notify the ISA and the UNESCO about the conditions of the artifact(s). Additionally, one should note that this idea of having marine archeologists onboard mineral exploration licensed vessels may also help overcome issues of financial restrictions faced by archeological investigations of “States of origin”. Specifically, the financial restrictions regarding the high costs associated with the deployment of high-seas vessels during archeological investigations.

In conclusion, attention must be paid to engaging onboard archeologists and safeguarding the preferential rights of “States of origin”. These issues could be addressed through the forum of the ISA Assembly, for example, by the Western African or the Latin-American States. These States should also consider putting forward a motion for the *Memorial* before the ISA, i.e. the virtual ribbons charter or map.⁵⁹ There is momentum for building consciousness of the transatlantic slave trade and addressing issues of racism, injustice, and inequality. There is also advanced technology, particularly on board licensed exploration vessels to “dig” potential historical artifacts lying on the Atlantic Ocean floor. Hence, the question would be whether there is political interest to do so.

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⁵⁹ Wulfhorst.

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