

Underwater Cultural Heritage & UNESCO in New Orleans: An Introduction

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1. Introduction

In the course of the marine archaeology session held at the Underwater Intervention conference in New Orleans on 11 February 2010, a panel discussion was convened to explore the perceived merits and potential pitfalls of UNESCO's Convention on the Protection of the Underwater Cultural Heritage 2001 (henceforth the Convention or CPUCH).¹

Over the last decade the Convention has attracted major interest, debate and intrigue. Irrespective of which countries have and have not ratified this instrument (27 to date, with a further four going through the acceptance phase),² it has become a significant fulcrum point for discussing the management of underwater cultural heritage in the early 21st century. There is no reason to expect an abrupt sea change in the next decade.

CPUCH incites extreme opinions and, perhaps unexpectedly amongst scientists, a wide range of emotions. The New Orleans event was no different due to the co-presence of archaeologists, who have witnessed first-hand the wanton pillage of shipwrecks, and commercial archaeologists who argue that the controlled for-profit sale of some 'trade goods' (but not unique 'cultural goods') is a realistic and robust model for shipwreck archaeology. In the Odyssey Marine Exploration structure this applies particularly to deep-sea sites, where access is prohibitively expensive and technologically challenging for most academic and government entities.

Due to the 'closure' of all airports along the northeast coast of America because of a snow blizzard, several panelists were unable to attend the conference. The eight individual contributions in this paper thus unite the opinions of the original panelists, plus a few additional specialists – a diverse and eclectic range of experts, some with overlapping professions, including three archaeologists, three university professors, two lawyers and two businessmen involved in commercial archaeology:

- Prof. Filipe Castro – Center for Maritime Archaeology and Conservation, Texas A & M University, USA.
- Prof. David Bederman – K.H. Gyr Professor of Private International Law, Emory University School of Law, USA.

- John Kimball – International and Maritime Litigation and ADR Practice Group Leader, Blank Rome, LLC; Adjunct Professor, School of Law, New York University, USA; US delegate to CPUCH.
- Greg Stemm – CEO, Odyssey Marine Exploration, USA, and US delegate to CPUCH.
- James Sinclair – Director, SeaRex Inc., USA.
- Daniel De Narvaez – Naval Historian and Investigator, Colombia.
- Dr Sean Kingsley – Director, Wreck Watch Int., United Kingdom

2. CPUCH Versus Treasure Hunters

UNESCO's initiation of the Convention in 2001 has been interpreted as a defensive strategy with three goals: to eliminate the undesirable effects of the law of salvage; the exclusion of a 'first come, first served' approach to heritage found on the continental shelf; and to strengthen regional cooperation (Scovazzi, 2002: 154). Top of this list is the international community's concern over advances in deep-sea technology during the last 20 years, causing the Convention to be geared specifically to "provide a detailed legal regime for controlling the activities of treasure hunters in international waters" (Dromgoole, 2006: xxvii).

This remains a central tenet, although reading between the political lines, CPUCH also seems to be a reaction to past generations' unbridled recovery of artifacts and structural remains. The resource has been perceived as having been exploited without sufficient concern about conservation, storage, curation, display or publication.

The recovery of substantial wooden hull remains may be pinpointed as an additional motivation underlying these newly formalized policies. Behind closed doors there is a general consensus that certainly no European country wants, or can afford, another *Mary Rose*, despite its enormous educational and touristic benefits. Its titanic expense

– some £500,000 every year since 1982 for preserving the timbers, and an extra £35 million for completing the curation of its artifacts and building a dedicated ship museum – still haunts many heritage managerial meetings. The extrapolation that every wreck lifted might turn into another *Mary Rose* money pit is an inaccurate yet extant perception.

Dr Colin White, a former Director of the National Maritime Museum at Greenwich (White, 1994: 180), has argued that ship preservation went wild after 1949, when history was ransacked to provide reasons for preservation as crowd pullers. He proceeded to caution against raising ships with great exuberance: “The fact is that underwater camera and satellite-link technology now exists which renders the tearing of wrecks from their sea-beds as obsolete an operation as the ripping out of infected tonsils.”

Collateral motivations aside, it is the stereotype of uncontrolled, large-scale shipwreck plunder or recovery for the commercial sale of artifacts as the primary objective that united many countries under the CPUCH banner. The extent of the negative reaction to ‘treasure hunting’ has been particularly strongly expressed by Robert Grenier in an ICOMOS publication (Grenier, 2006: x):

“An inventory of all the wrecks who have been subject to excavation or salvage since the invention of the aqualung (autonomous deep-sea diving suit) half a century ago demonstrates that no historic wreck has ever been saved by commercial contractors or treasure hunters; only archaeologists have succeeded in this task. At the very most, treasure hunters have “saved” objects of commercial value at the cost of the destruction of the archaeological context, which is the real danger. These people exploit historic wrecks as if they were mines of precious metals. The countries that compromise with them, attracted by the promise of receiving 10% and even up to 50% of the spoils, in fact, recuperate only a minimal part of the historic value of the wreck, as 90 to 95% of this value is destroyed in most cases. These wreck salvagers are in fact like proverbial wolves guarding the flock. Why not conserve 100% of what belongs to the nation?”

Dr. Grenier assumes an extremist, though far from unique, position. The issue UNESCO faces, and which dominated discussions at the New Orleans conference in February 2010, is the reality that unbridled treasure hunting is simply not considered a legitimate activity by any of the legitimate stakeholders in underwater cultural heritage management. The new breed of commercial marine archaeologist may rely on capital investment, stocks and private investment, and the lure of profit from the sale of select artifacts, but some commercial companies have proven highly proficient at excavating, recording and interpreting shipwrecks.

Today some commercial companies undeniably possess the combined sophistications of technology, personnel and experience to fuse for-profit ventures with science, whereby wreck contexts are respected and recorded and site plans and pottery statistics compiled. Nanhai Marine Archaeology, for instance, has worked closely with the Malaysian government to record and recover elements of ten wrecks dating between the 11th and 19th centuries (Brown and Sjostrand, 2002; Sjostrand, 2007). Artifacts are transparently available for sale, with government sanction. If the site plan of the cedar and pine Desaru wreck’s hull of *c.* 1830, 34 x 8m, typifies this company’s archaeological capabilities across the board, then their recording exceeds most contract-led projects and equals university standards. The site’s 69,726 ceramic wares have also been comprehensively quantified. Artifacts from the Desaru ship are on display at the Maritime Archaeology Malaysia exhibition at Muzium Negara in Kuala Lumpur.³

The discovery of the *Henrietta Marie* by the Armada Research Corporation in 1972 on New Ground Reef, 56km west of Key West in Florida, has literally opened a new chapter in understanding the 17th-century triangular slave trade. More importantly, it has become a sociological focus for the West’s modern confrontation of its shameful past. Initially funded through commercial investment for underwater surveys searching for the 1622 Spanish fleet, site research continues to this day. Although the project has been criticized by some scholars because the results have not been principally disseminated through academic papers, but through the Mel Fisher Maritime Heritage Society website (Webster, 2008: 10),⁴ extensive scientific data has been obtained, ranging from 90 sets of iron shackles to over 300 English pewter wares, 11,000 trade beads, six elephant tusks and 28 examples of ‘voyage-iron’ bars. These are now recognized as ‘signature assemblages’ of the slave trade (Moore and Malcom, 2008).

Finally, the commercial archaeology company Odyssey Marine Exploration is recording deep-sea wrecks (spatially accurate photomosaics, site plans, descriptions of contexts, artifact catalogues) to standards that facilitate detailed historical interpretations of sites. The survey work on the wreck of HMS *Victory*, lost in the English Channel in 1744 (Cunningham Dobson and Kingsley, 2010), and the excavation of site E-82, the possible wreck of HMS *Sussex* in the Straits of Gibraltar, reveal that such organizations match, and in cases exceed, standards set on shallow-water sites. The environmental and marine biological non-intrusive work on site E-82, in particular, coupled with contextual recording, has set new standards for deep-sea shipwreck archaeology (Cunningham Dobson *et al.*, 2010).

This careful and concerned approach to underwater

cultural heritage is a world apart from the hit and run image depicted above by Robert Grenier, although it must be acknowledged that standards are far from uniform across the entire commercial marine archaeology field. In light of the above new brand of commercial marine archaeology, a significant element of the debate in New Orleans centered around defining the ethical fine line between science and commerce. Many panelists and members of the audience felt that UNESCO has failed to recognize and encourage debate of this new world order.

3. Crossing the Lexicon

Anybody with a passion for the sea and its submerged archaeological heritage should support the basic premise of the UNESCO Convention of striving to shore up protection and dissemination of knowledge about our shared past. Profound differences in philosophy surround the Convention, but at its core it has the potential to serve society in the right spirit by promoting the existence and perilous condition of underwater cultural heritage. The protocol unites a collage of ideas and ideals that have been debated and applied for decades. Almost all of the initiatives have a long track record of being tried and tested. Without wishing to be even remotely comprehensive, these include inter-regional cooperation, the creation of marine parks for controlled public access and outreach, sanctions, public outreach, personnel training, the formulation of project plans and the establishment of appropriate centralized authorities.

Publications and discussions, as aired in New Orleans in February 2010, are making it increasingly clear that a rift exists, however, between the objectives of the Convention, as UNESCO intends it to be utilized, and its interpretation within the scientific and cultural heritage community. A problem of language, rationale and meaning exists, particularly in regard to the following ambiguous points (excluding areas of fundamental philosophical differences):

1. Who is CPUCH designed for: government heritage organizations and contract archaeology companies or also university-led projects?
2. The concept of *in situ* preservation (Article 2.5; Annex Rule 1) has assumed the status of a sacred cow in many circles and elicits strong reactions. Again, for whom is this conceived? To mentor countries with fledgling marine archaeology units or also sophisticated organizations with a track record of successfully organizing and publishing major excavations, such as NOAA, English Heritage, DRASSM and the Israel Antiquities

Authority? Are major universities that have pursued research-led projects for decades and contribute to the writing of long-term history expected to adhere to *in situ* protocols, such as the Institute of Nautical Archaeology, Texas A&M University; the Leon Recanati Institute for Maritime Studies, University of Haifa; the Centre for Maritime Archaeology, Southampton University; or the Centre for Maritime Archaeology, University of Oxford, to name but a few.

3. How is the encouragement of “the public awareness, appreciation, and protection of the heritage” (Article 2.10; cf. also Annex Rule 7) practically possible beyond territorial waters, where site monitoring – even in marine parks – is physically complex and financially expensive? What models exist for comparison? Can and will awareness of underwater cultural heritage finally make its way into the UK Marine and Coastal Access Act 2009? The absence of any mention, let alone policy, regarding underwater and coastal cultural heritage in UNESCO’s own World Heritage Marine Programme (Douve, 2010), stands as a warning about the very real logistics of getting wrecks, submerged prehistoric camps and Roman ports onto governmental and organizational agendas.
4. Within which legal and financial structures can countries be expected to protect or prohibit access to underwater cultural heritage in the Exclusive Economic Zone and on the Continental shelf (Articles 9.1, 10.2)?
5. The idea that State parties should “notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention” (Article 18.3) may prize Pandora’s Box off its hinges. For instance, would this permit Lebanon to influence fieldwork on Phoenician wrecks being excavated off Spain, or Greece to claim rights over statuary looted by Roman aristocrats and lost during transshipment overseas in the 1st century AD? Would France be permitted to claim the return of the 700kg Neupotz hoard of 1,000 silver and bronze bowls and other vessels wrecked down the Rhine in Germany after being looted by the Alamanni tribe in the late 3rd century AD (Kingsley, 2006)?
6. How will UNESCO objectively manage decisions, data flow and databases, and on what criteria will the Scientific and Technical Advisory Body (STAB) operate (cf. O’Keefe, 2009: 58)? Who will fund this initiative?

No doubt much of the above will come out in the wash, based on real-time practical experiences. For now, a feeling

remains in many heritage and scientific circles that sections of the Convention are an unenforceable set of Utopian rules and regulations compiled by legal teams who incorporated minimal fundamental input from archaeologists. If the initiative is compared to terrestrial archaeology, where countries would react with outrage to any supposition that they need to be centrally supervised so intimately from abroad, many marine archaeologists with decades of experience and contribution are highly concerned about why they are suddenly being forcefully re-educated in their core competencies.

The Utopian argument matters because it is likely to lead to inappropriately politically-motivated managerial strategies. The primary example of a misreading of the Convention, which has already led to its use as political propaganda in some circles, is the reading of Article 2.5 on applying *in situ* preservation as the first managerial option. In the UK, for instance, the Joint Nautical Archaeology Policy Committee (JNAPC) has strongly promoted Article 2.5 as the obligatory rationale for preserving *in situ* the wreck of HMS *Victory* (1744) in the English Channel and leaving it untouched. Their language refers to the Article as the 'preferable' route (Williams, 2006), or virtually obligatory (Yorke, 2009: 21), thus using artistic license to extrapolate the Article's true meaning (see Kingsley, 2010: note 1). UNESCO's perceived preoccupation with *in situ* preservation is considered by some people to be the "main principle" of the Convention (Sokal, 2005). This is simply not the case, and is not borne out by the history of negotiations behind the Convention.

Many of the profound differences that currently divide maritime archaeology user groups are not insurmountable, especially if the spirit of cooperation rightly championed by UNESCO is truly respected. On the matter of inclusiveness, Williams (2009: 66) has speculated about the possible mutual benefits of UNESCO nominating observers to the Convention's Scientific and Technical Advisory Body from the Western Maritime States that have not ratified the Convention, especially those with indigenous deep submergence technology:

"Such participation in the implementation of the Convention could only serve to promote a greater understanding of its value and potential by those States that view it with such misgivings. Considered in this light, the relatively slow adoption of the Convention, especially by the leading maritime States, should not be seen as an immediate failure."

Many participants in the Underwater Intervention 2010 marine session shared this sentiment and hoped that the doors of Paris are not closed to their passion and the scientific contributions of the private sector.

4. Underwater Intervention 2010, New Orleans: Differences of Opinion

The seven papers presented below represent a cross-section of legal, academic and commercial-oriented opinions about the origins, inspiration and workability of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001).

Filipe Castro cautions that besides the problem of the often too rapid dispersal of the collections, the business model of commercial archaeology has an internal contradiction that is difficult to address: as objectives, maximizing profit and maximizing the quality of the recording, recovery and conservation of all artifacts are difficult to reconcile. The net result is all too often site destruction and an absence of publications to 'cold store' knowledge for present and future generations. However, Prof. Castro also expresses concern about the repressive emphasis in the UNESCO Convention on some points, notably an insistence on *in situ* preservation, and the establishment of unrealistic goals. Whilst welcoming the Convention as a step in the right direction, Castro warns that prohibitions rarely stimulate the desired end result.

David Bederman emphasizes that contrary to the high profile of the UNESCO Convention in current underwater cultural heritage managerial circles, it actually currently speaks for a small and geographical selective number of countries. Focusing on UNESCO's Draft Operational Guidelines (DOG's), adopted at the Meeting of Convention of the Protection of the Underwater Cultural Heritage States Parties in December 2009, Prof. Bederman argues that putting these recommendations into practice is potentially impossible. Unclear definitions of State vessels and the expansive demand for protection of all underwater cultural heritage over 100 years old leaves extensive room for real-time managerial concern at the national level. Some of the limits of the Convention's language are contradictory and the Convention fails to legislate for circumstances where intrusive intervention is unavoidable to save heritage from myriad threats other than from 'treasure hunters'.

John Kimball highlights significant flaws in the implications of CPUCH that are likely to limit its effectiveness, in particular the creation of new coastal State rights and regulatory authority over underwater cultural heritage located in Exclusive Economic Zones and on continental shelves. Prof. Kimball argues that the Convention fails to provide adequate protection for military shipwrecks consistent with customary international law. In light of such new coastal State regulatory authority that

improperly alters UNCLOS' carefully constructed balance of rights and interests, it is unlikely that many major Western Maritime States, such as the USA, will sign the Convention.

Greg Stemm considers the UNESCO Convention's 'one size fits all' policy for State signatories an unrealistic form of management. As well as questioning the practicalities and ethics of blanket designating every trace of mankind over 100 years old as culturally significant, Stemm proposes getting the public actively involved in curatorship through private ownership as a means of managing sprawling museum and excavation collections that otherwise rarely, if ever, see the light of day. Odyssey's wreck of the *SS Republic* is presented to exemplify the advantages of this model. Stemm cautions that eradicating the age-old system of salvage to reward groups for risking their capital and resources will deincestivize anyone from taking this initiative, except using government resources, potentially leaving major sites and regions unexplored and susceptible to looting or natural destruction.

Based on his decades of fieldwork in marine archaeology, James Sinclair considers UNESCO's zealous preoccupation with treasure hunters to be a highly biased managerial tool. The days of the uncritical extraction of 'booty' from shipwrecks has passed and modern professional salvage and commercial archaeology companies impose sets of scientific objectives on sites, in which the contextual recovery of high-value material is just one. Sinclair considers the neglect of additional impacts on shipwrecks (natural, electrochemical, physical deterioration and trawler damage) that are more extensive in scope to be a serious weakness of the Convention. He again regards the preoccupation with *in situ* preservation to be a failure to understand the realities of underwater preservation and advises that current initiatives to manage museum collections and archives through deaccessioning in the USA are likely to promote the private stewardship of artifacts and commercial models following recording and the creation of permanent digital records.

Sean Kingsley perceives much common sense and wisdom within the UNESCO Convention, which is essential for developing national regimes in need of 'off the shelf' managerial solutions. However, he cautions that single strategy solutions are unlikely to work for all regions due to varying geographical and constitutional circumstances. A positive outcome of the renewed consideration of *in situ* methods has been a growing awareness that the underwater heritage resource has to be qualified before it can be managed. Dr Kingsley proposes that UNESCO needs to go further by reducing ambiguities about what needs protecting by formulating a formal value system to qualify sites' importance. With the old-fashioned era of treasure hunting

effectively dead, Kingsley advises that UNESCO would be better served to distinguish between commercial companies that produce accountable reports and pure salvage companies with little interest in history or archaeology.

Daniel De Narvaez presents a deeply considered example of how the UNESCO Convention cannot work as 'all things to all men' through a case study of Colombia. De Narvaez expresses caution that the Convention flies in the face of former well-established laws and protocols. Covering 926,660 square kilometers of sea and touching the borders of nine other countries, some of which are involved in ongoing disputes over marine territories, it is instead localized looting in remote regions and the unrecorded natural exposure and deterioration of sites that is a major challenge for Colombia. The combination of unusually extensive high-value cargoes in its waters, coupled with their shallow location in depths of under 20m, is the major threat. Colombian law already claims ownership of all shipwrecks within its Economic Exclusive Zone, while the Supreme Court does permit some commercialization of maritime artifacts. For Colombia to sign the UNESCO Convention would thus actually run contrary to its own legal constitution, a factor that might affect other countries' participation once they look at CPUCH in light of their own constitutions.

Notes

1. The author extends his sincere gratitude to Greg Stemm, Mark Gordon, Laura Barton and John Oppermann for convening the New Orleans session on the UNESCO Convention on the Underwater Cultural Heritage in New Orleans 2010 and for ensuring its smooth running, and to Odyssey Marine Exploration for sponsoring the event. This set of reports was edited by Sean Kingsley, Wreck Watch Int.
2. See: <http://portal.unesco.org/la/convention.asp?KO=1520&language=E&order=alpha>.
3. See: <http://www.mingwrecks.com/Desaru.html>.
4. See: <http://www.melfisher.org/henriettamarie.htm>.

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Fig. 1. The cover of UNESCO's booklet publicizing its Convention on the Protection of the Underwater Cultural Heritage.

Archaeologists, Treasure Hunters, and the UNESCO Convention on the Protection of the Underwater Cultural Heritage: a Personal Viewpoint

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Differences between archaeologists and treasure hunters often stem from a misunderstanding about what archaeologists do. We try to reconstruct past cultures through the study of their material remains. We are interested in archaeological sites and contexts, and the most interesting artifacts we study seldom have market value. In other words, archaeologists are not antiquarians.

I have spent almost 20 years fighting treasure hunters. My involvement in this fight started in Portugal in the early 1990s when treasure hunting was legalized there. My first reaction was trying to understand the treasure hunter's viewpoints and objectives, but that was not easy. Some dismissed us altogether as natives of a poor country. Others promised to raise an entire caravel and put it in an aquarium. Others claimed that they were going to salvage fabulous treasures and give us half of everything they would find. To my astonishment, people believed most of these tall stories.

My experience with treasure hunters was therefore not a positive one. I saw them lying for money, destroying archaeological sites without a thought for what they were doing, fooling their investors and bragging about it, stifling local populations, and scamming politicians with invented stories and fake promises. I saw them claiming the right to do whatever they wanted, as if they owned the planet. I met the kind that is more prone to make declarations to the media than to actually dive. And I met treasure hunters that worked in silence, salvaged real cargos, sold them discretely, and made real money.

At times archaeologists work with treasure hunters in order to fulfill contractual obligations to governments or lend some expertise to their work. Some come out and complain about the frustrations of working in for-profit ventures: to maximize profit and to do good archaeology are directly opposite objectives. Few publish reports. Everywhere secrecy has been the rule, even when reports are produced and sometimes even published. The quality of most reports is poor: fuzzy data, bad or incomplete site plans, no sections, no complete artifact catalogues, no

recording of hull remains, and no conservation of artifacts without market value.

Like me, other archaeologists cringe before this reality. Imagine us patiently working to try to understand vanished cultures and the differences and similarities between them and those of the present, gathering data, studying the expressions of humanity contained in every different society, looking for patterns that may enhance our knowledge of what it means to be human... and being asked to accommodate the reasons of those who want to destroy the fragile, rare and non-renewable archaeological evidence for profit, or for fun, or for both.

It is easy to imagine how treasure hunters' interests may come across as shallow, or ignorant, or naive, or selfish, and this situation fosters the development of a holier-than-thou attitude. Together with a professional tribal feeling, this attitude may blur reality into an Orwellian vision: archaeologists good/treasure hunters bad, and develop an unhealthy self-righteousness among archaeologists. Who can sympathize with those that want to destroy archaeological sites for short-term profit, and leave a planet without history to their own children?

These high moral grounds called for a holy war and in the process we stopped asking a few important questions: what is the difference between a treasure hunter and an archaeologist who does not publish his or her excavations? Why have so many bureaucrats become prohibitionists in their old age? Why do we still allow 19th-century nationalistic feelings to linger among the community? Why is the circulation of primary data so hampered outside the United States?

It was in this context that from the 1970s onwards a growing number of archaeologists gathered around organizations such as ICOMOS and UNESCO, and in 2001 produced a Convention on the Protection of the Underwater Cultural Heritage. In March 2010 it had been ratified by 27 states.

The legitimacy of its authors is not in question: they were appointed by their governments, the majority of

which are parliamentary democracies. But perhaps because a significant number of archaeologists involved in its drafting were bureaucrats, the resulting text can be interpreted as a repressive tool that pushes conservation *in situ* with a blind and stubborn optimism. Worse, together with a commendable call for an end to the destruction of the world's submerged cultural heritage, it sets the bar too high for archaeologists: Rule 1 of the Annex states: that "...activities directed at underwater cultural heritage... may be authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage." I am afraid that as all repressive rules, this Convention may invite arbitrary behavior, nepotism, and even corruption.

Despite all criticisms, I am actually glad that there is a Convention, and I find that most of the text of the Annex is well crafted, fair and relevant. But we must not stop here. We need a generation of young archaeologists and excavations to train them. We need to emphasize Rules 30 and 31 of the Annex, which focus on schedules and destinations for reports, and fight for a rapid and clear flow of information worldwide. The culture of secrecy that so often surrounds archaeologists is hurting us. Treasure hunters are decades ahead of archaeologists when it comes to public relations strategies. The world of nautical archaeology is a small world: we need ethical standards that make principles applicable to everybody and not only treasure hunters and those who do not have friends in their country's bureaucracies.

The next years will show us whether the Convention will help protect anything. Prohibitions alone seldom stop activities that are socially accepted, such as looting and treasure hunting.

In the meantime, Odyssey is changing the landscape, publishing reports and submitting them to public scrutiny. This is a development that we should follow closely. In documenting and publishing their salvage operations, they are placing themselves above the archaeologists that do not publish their excavations on the archaeology decency scale. Having spent the best part of the last two decades complaining against treasure hunter's secrecy, I applaud Odyssey's new policy and look forward to starting a constructive dialogue, solidly based on printed and published reports. In a democratic world we may all disagree, but we must acknowledge the opinions of our opponents and take close note when they use private resources that are of public interest and benefit.



Fig. 1. The Pepper Wreck under excavation in 1999: a Portuguese Indiaman lost at the mouth of the River Tagus, Portugal, and probably identifiable as the Nossa Senhora dos Milhares, lost in 1606. Photo: Guilherme Garcia.

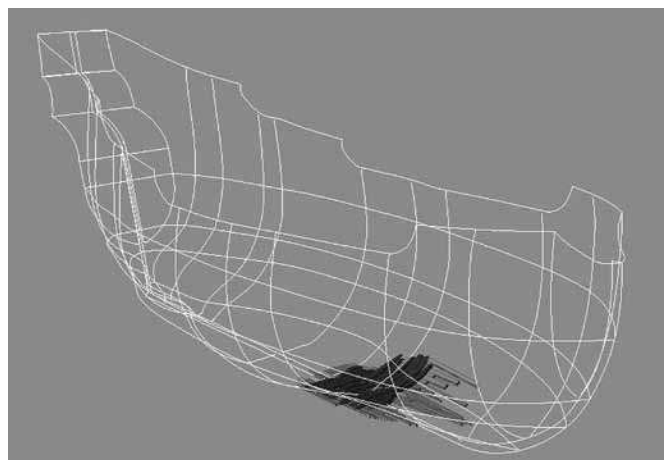


Fig. 2. The hull remains of the early 17th-century Pepper Wreck feature inscribed carpenter marks, which allowed a tentative reconstruction of the ship based on contemporary ship treatises. Traditionally such subtle primary data is lost or neglected during projects conducted by treasure hunters, who ignore elements of social archaeology in favor of trophy hunting. Photo: Kevin Gnadinger.

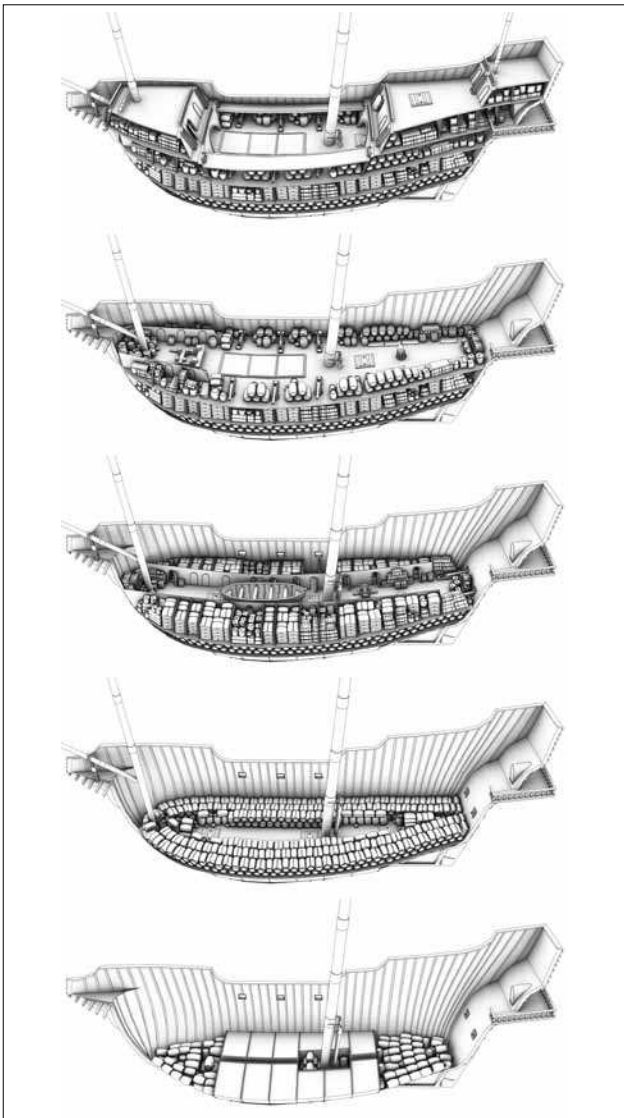


Fig. 3. A 3D reconstruction of the Pepper Wreck. Tentative load configuration studies reveal how small the inhabiting space was for the 450-person crew and passengers who departed from India to Lisbon on the Nossa Senhora dos Milagres in 1606. Photo: Audrey Wells.



Fig. 5. A small collection of Wan-li porcelain plates was found still packed, with straw mats between them, on the early 17th-century Pepper Wreck. Photo: Center for Maritime Archaeology and Conservation, Texas A&M University.



Fig. 6. A pair of earrings found on the early 17th-century Pepper Wreck by avocational archaeologist Carlos Martins, who declared the site to the authorities in 1992. Photo: Center for Maritime Archaeology and Conservation, Texas A&M University.

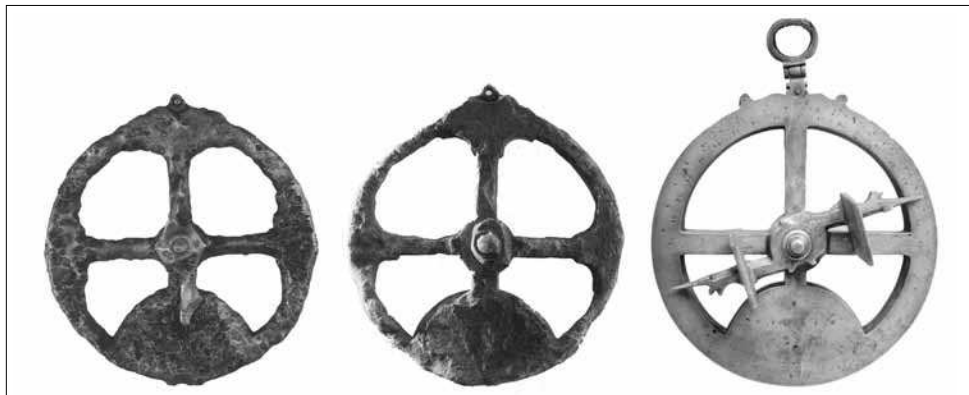


Fig. 4. Three astrolabes from the early 17th-century Pepper Wreck found on and near the shipwreck site. Such crucial artifacts are typically sold by treasure hunters, rather than retained and studied. Photo: Center for Maritime Archaeology and Conservation, Texas A&M University.

The UNESCO Convention on the Protection of Underwater Cultural Heritage: Operational Guidelines & Implementation Challenges

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The UNESCO 2001 Convention on the Protection of Underwater Cultural Heritage (CPUCH) entered force in January 2009, with the deposit of the twentieth ratification, accession or acceptance of the treaty instrument. The number of States Parties remains small, and the group of countries bound rather selectively from the perspective of geography and commitment to maritime heritage. Nevertheless, it is important to examine the prospects for future implementation of CPUCH's provisions. This very short contribution does so from the institutional perspective of UNESCO's Draft Operational Guidelines ('DOGs'), adopted at the Meeting of CPUCH States Parties in December 2009 (UNESCO, 2009). At the same time, I examine here the very real – and what I regard here as potentially insuperable – difficulties in practically fulfilling the Convention's goals of protecting underwater cultural heritage.

One glaring deficiency of the DOGs is that they fail to refine further the definition of 'underwater cultural heritage' as set forth in CPUCH (UNESCO, 2001 art. 1(1) (a)). The expansive treatment of underwater cultural heritage (UCH) as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years" has been vigorously criticized in the literature (Bederman, 1999: 30; Forrest, 2002: 31). Nor did the DOGs give further guidance as to the definition of "State vessels", either for purposes of immunity from salvage and coastal state protection, or from the requirements of shipwreck reporting and other response measures (UNESCO, 2001 arts. 1(8), 7(3), 10(7), 12(7), 13). This set of provisions was amongst the most controversial in CPUCH, and largely led many maritime powers to decline to sign or ratify the instrument (Bederman, 2000: 31; Blake, 1996: 45; Carducci 2002: 96; O'Keefe, 2002).

But even insofar as the DOGs seem to be limited to sketching out the modalities of the 'State cooperation mechanism' and the 'operational protection of UCH' in CPUCH, they really do not achieve that objective (UNESCO, 2009: 15, 21). A stated goal of CPUCH is to bar the

"commercial exploitation" of underwater cultural heritage (UNESCO, 2001 art. 2(7), Rule 2). This is confirmed in the DOGs (UNESCO, 2009: 9). But these do not even attempt to amplify on the language of CPUCH Rule 2 that allows "provision of professional archaeological services or necessary services incidental thereto" in the recovery of underwater cultural heritage, as well as permitting "deposition of underwater cultural heritage... provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal" (UNESCO, 2001 Rule 2). "Deposition" in the sense used by CPUCH Rule 2 means the ultimate disposal of recovered underwater cultural heritage. This was a crucial piece of compromise language in CPUCH, and acknowledged the practical reality that States would need to rely on private enterprise and incentives in order to optimally protect underwater cultural heritage (Bederman, 2004; Dromgoole, 2003: 18).

Even more shockingly, the DOGs appear to ignore willfully the fact that underwater cultural heritage is presently in danger in some regions and situations, yet elsewhere establishes a threshold for action that may be too high, given the circumstances. The DOGs do allow "safeguarding measures" to be taken when heritage is "in immediate danger" (UNESCO, 2009: 21). But "immediate danger" is then defined in this convoluted fashion: where "convincing and controllable conditions exist which can reasonably be expected to cause damage or destruction... within a short delay of time and which can be eliminated by taking safeguarding measures" (UNESCO, 2009: 22). This provision is transparently aimed at the threat of looting, but utterly ignores other ongoing, long-term, and systemic threats, including trawl damage and environmental degradation. This exposes the distinction between "activities directed at" underwater cultural heritage, as opposed to those merely "incidentally affecting" it, as false and meaningless (UNESCO, 2001 art. 1(6) & (7)).

As for CPUCH's State cooperation mechanism, some elements are helpfully elaborated in the DOGs. The goals of the mechanism to encourage reporting, declarations of

interest, consultation, and action are noted (UNESCO, 2009: 7-8). But, in truth, the main focus is on reporting and the roll-out of a new database (at www.unesco.org; UNESCO, 2009: 8, 33-48). The concept is that States Parties to CPUCH will record underwater finds through the database and then countries will “declare” their status as an “interested State.” Only time will tell if this streamlined reporting mechanism for discoveries, activities, and declarations of interest will function effectively.

Ironically enough, even in proffering these modest reporting modalities, the DOGs expose some crucial theoretical weaknesses in the CPUCH regime. One of these relates to how interested States Parties establish – in the ubiquitous phraseology of CPUCH – a “verifiable link, especially a cultural, historical or archaeological link, to... underwater cultural heritage” that is to be managed (UNESCO, 2001 arts. 6(2), 7(3), 9(5), 11(4), 12(6), 18(3)&(4)). In this regard, the DOGs merely noted that a “link” can be “verified” by “scientific expertises [sic], historic documentation, or other adequate documentation” (UNESCO, 2009: 17) And, rather obviously, the DOGs observe that if a State Party discovering UCH “gives only little information on [a]... site... or artefact in a report, it can only [expect] a small amount of proof concerning the verifiable link from another State Party that declares its interest in being consulted concerning its protection” (UNESCO, 2009: 17). The proposed UNESCO database is singularly unhelpful in eliciting definitive details about the “supposed [cultural] origin” of underwater cultural heritage, lumping it all as being of either African, Asian, European, Arab, American, or Australian origin (UNESCO, 2009: 39).

Lastly, the DOGs leave maddeningly vague the process by which “coordinating States” are appointed under CPUCH, and their decision-making authority (UNESCO, 2001 arts. 10 & 12). This problem is especially acute for underwater cultural heritage situated beyond any nation’s exclusive economic zone (EEZ) or continental shelf, but (in such circumstances) the DOGs indicate the appointment of a coordinating State will be “by consensus” and that, after appointment, that State “is responsible for... further consultation... and the coordination and implementation of the protection measures decided” (UNESCO, 2009: 21). The DOGs suggest that the coordinating State acts as a kind of fiduciary for all interested States in underwater cultural heritage, but “does not gain new jurisdiction from its position...” (UNESCO, 2009: 23).

This language – as with many of the other aspects of the CPUCH DOGs discussed above – is virtually guaranteed to cause mischief in the future. The prospects for practical implementation of CPUCH by States Parties thus remain in doubt.

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Living with the Convention on the Protection of the Underwater Cultural Heritage: New Jurisdictions

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Despite its laudable aims, the Convention on the Protection of Underwater Cultural Heritage (CPUCH) has significant flaws that are likely to prevent it from being effective either in the short term or over the long haul. All of these points were known when the Convention was drafted and its adoption reflects a considered decision by UNESCO to accept the text nonetheless.

The Convention creates expansive new coastal State jurisdiction over underwater cultural heritage-related activities in wide areas outside of the traditional limits of national jurisdiction. It also fails to provide adequate protection for military shipwrecks consistent with customary international law. As a result of these provisions, the United States and other major maritime nations do not support the Convention and likely will not become parties, thereby limiting its effectiveness.

For vessels flagged in States that have ratified the Convention, their activities will be subject to significant new regulations and reporting requirements. The Convention's provisions may also have an effect on the operations of vessels flagged in non-State Parties. CPUCH contains the broad requirement that States Parties take "all practicable measures" to ensure that their nationals and vessels flying their flag not engage in activities which are not in conformity with the Convention's provisions and the Rules of the Annex, and establishes broad authority to impose sanctions for violations of measures a State has taken to implement the Convention, "wherever they occur."

The Convention also broadly requires States Parties to "use the best practicable means" at their disposal to prevent or mitigate activities which may inadvertently or incidentally physically disturb or otherwise damage underwater cultural heritage. Also, included within the Convention's regime for activities occurring within a State's Exclusive Economic Zone, on the Continental Shelf and on areas of the seabed outside of national jurisdiction, is the requirement that the master of any vessel flagged by a State Party who discovers or intends to engage in activities directed at underwater cultural heritage report such discoveries or activities to the State Party in whose waters the activities take place.

It remains to be seen how signatories to the Convention will implement these provisions, especially those concerning inadvertent or incidental activities. For example, vessels which inadvertently drag an anchor or a trawl net through a shipwreck could be at risk of sanctions. At a minimum, shipowners and managers of vessels flagged by States Parties should expect flag State inspections to include reviews of measures involving underwater cultural heritage activity and reports. Until some practice has been developed in this area, shipowners and managers of vessels flagged by, or operating in the jurisdiction of, States Parties should be aware of the potential risks and exercise caution when planning and conducting any underwater activities.

The Convention also contains control-of-entry and non-use provisions that affect all vessels. It requires State Parties to prohibit the entry into their territory or the possession of underwater cultural heritage that was not recovered in compliance with the Convention's provisions. The use of a State Party's territory, including its maritime ports, by vessels which engaged in activity directed at underwater cultural heritage (not conducted in compliance with the Convention) is also prohibited. The Convention further authorizes the seizure of underwater cultural heritage found in a State's territory that has been recovered in a manner not in conformity with the Convention.

Accordingly, shipowners and managers of vessels involved in activities directed at underwater cultural heritage must be aware of which nations are States Parties when planning their vessel's movements, including the designation of potential ports of refuge. Otherwise they run the risk of inadvertently bringing their vessels within the Convention's authority. Vessels that transport artifacts recovered underwater, even possibly container vessels, also should be aware of the possibility of having cargo seized and sanctions imposed if they enter the jurisdiction of State Parties. Shipowners should consider the extent to which these requirements may affect their operations. One solution for avoiding them is to reflag in a country that has not ratified the Convention.

The Convention contains several key provisions that are unacceptable to the United States and the other maritime

nations that voted against its adoption or abstained from voting. In particular, these nations object to the Convention's creation of new coastal State rights and regulatory authority over underwater cultural heritage located in Exclusive Economic Zones and on continental shelves, and are concerned that the Convention does not provide adequate protection for sunken warships.

With respect to jurisdiction, the United States and other maritime nations oppose the Convention because, in effect, it establishes a "cultural heritage zone" beyond 24 miles and the outer edge of the continental shelf, in which coastal States have direct authority to regulate access to underwater cultural heritage. The view of the United States and other maritime nations is that such new direct coastal State regulatory authority would improperly alter UNCLOS' carefully constructed balance of rights and interests.

With respect to sunken warships, military aircraft and other national vessels, the view is that the Convention would alter customary international law and practice regarding title to such vessels. It also permits coastal States to recover such vessels located in internal waters or territorial seas without the consent of the flag State or even an obligation to notify them. The United States' position is that the Convention should instead codify customary principles of international law, which provide that title to sovereign vessels and aircraft, wherever located, remains vested in the original flag State unless expressly abandoned and is not lost through the passage of time. The US does not wish to see the salvage or recovery of such vessels or aircraft permitted without the express consent of the flag State.

As the late Robert Blumberg, the head of the United

States delegation to the panel of experts who negotiated the Convention's text, put it, "Ultimately, the Convention will not be effective unless it is broadly ratified and implemented throughout the international community, including by countries in which the most advanced undersea technology resides and whose nationals are most active in regard to underwater cultural heritage" (Blumberg, 2006). Because of their objections to expansive jurisdictional provisions or concerns about the lack of warship protection, many leading maritime nations most likely will remain outside the CPUCH regime. As a result, the Convention's Rules and other positive provisions may ultimately have only limited impact on the protection of underwater cultural heritage.

Notes

1. The author is a partner of Blank Rome LLP and an Adjunct Professor at New York University Law School. The author chaired the Study Group established by the Maritime Law Association of the United States to consider UCH and served as a member of the United States delegation to the working sessions of experts at UNESCO where UCH was drafted. The author also served as Rapporteur of the Working Group established by the Comité Maritime International to study UCH.

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Protecting the Past: UNESCO Versus the Private Collector

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The UNESCO Convention contains some valid archaeological principles, but loses its way when it tries to dictate a one size fits all policy for State signatories. This flies in the face of the legal rights of countries that might choose to consider the sale of select duplicate artifacts as part of their deaccessioning and collections management policy, and creates problems for States, including Australia, France,

Ireland and the UK, that retain a reward system, either monetary or in kind (Firth, 2002: 72; Le Gurun, 1999: 54, 59; Jeffery, 1999: 8).

The Odyssey Marine Exploration commercial model is one that achieves the archaeological goals and principles behind CPUCH, but is nevertheless potentially outlawed, depending on the interpretation of the Annex rules. We

distinguish between ‘Trade Goods’ and ‘Cultural Artifacts’ internally as a matter of policy. Only artifacts that fit our Trade Good definition are offered for sale. This is a category characterized by large quantities of mass-produced objects, such as coins, bottles, pottery and other mass-produced cargo (Figs. 1-2). Our company policy is to retain a representative sample of Trade Goods. Duplicates are only sold to private collectors after thorough study and recording, which makes all information that can be collected available for study in the future (Figs. 3-6). Everything else is defined as the cultural collection, which is strictly retained in permanent collections and never irretrievably dispersed.

In my opinion, the general concept of CPUCH, which states that every trace of mankind over 100 years old is culturally significant, is unrealistic and cannot be justified intellectually, be policed or afforded by society. On land it would be absurd to consider that all traces of man are so culturally significant that they could never be privately owned or traded. Why does it change because an object has ended up underwater?

I do not believe that most museums or institutions have an interest in retaining giant collections of tens or hundreds of thousands of bottles, coins, bricks or plates in perpetuity. The real cost of storage must take into account the prices of real estate in areas where the archives are stored. For instance, in the British Museum’s neighborhood of Bloomsbury, rental space costs an average of £50 per square foot per year. Our cultural collection from the SS *Republic* shipwreck (1865), comprising 14,414 artifacts, including 8,429 bottles (Gerth, 2006), as well as plates, cutlery, tools and unique personal possessions like tea sets, grooming items and keys (Cunningham Dobson *et al.*, 2010; Cunningham Dobson and Gerth, 2010; Vesilind, 2005), is all stored and conserved to the highest museum standards. The majority of the collection takes up about 1,000 square feet of space in our conservation lab.

The UNESCO Convention would require (Article 2.6, Annex Rules 32-34) that sufficient funds for storing the *Republic* artifacts in perpetuity would need to be funded in advance of excavation. At £50,000 per year, just setting aside funds for the next 50 years (much less in perpetuity) would demand £2.5 million in funding just for space for the *Republic* collection if it were stored in the British Museum. Of course, there are less expensive places, but in many cases where artifacts are stored in public buildings in high-rent city districts, the real cost of storage is hidden.

What happens when hundreds or thousands of similar shipwreck collections need homes? I believe that the only rational solution to this dilemma is to allow the public to get actively involved in curatorship. UNESCO’s bizarre prohibition against “commercial exploitation... for trade



Fig. 1. A sample of 2,775 ironstone wares was excavated from the Republic shipwreck site and has been retained within Odyssey’s permanent collection. Photo: © Odyssey Marine Exploration.



Fig. 2. Brown and green glass beer or ale bottles in situ on the wreck of the Republic. Odyssey defines the thousands of glass bottles excavated from the shipwreck as trade goods, but keeps representative samples in the permanent collection. Photo: © Odyssey Marine Exploration.



Fig. 3. During excavations on Odyssey projects a virtual grid is generated over live video coverage of shipwrecks, such as here on the Republic site, so the exact locations and contexts of all of artifacts whether trade goods or cultural artifacts can be mapped. Photo: © Odyssey Marine Exploration.

or speculation” (Annex Rule 2) seems to be related more to a misguided collectivist policy than any practical real-world model, and is virtually impossible to define legally.

Much of the archaeology conducted in the world today is accomplished by for-profit companies, typically through rescue excavations conducted to ‘remove’ sites standing in the way of commercial development. The very nature of being in business is an act of trade and speculation – and archaeology is big business. In 2003-04 private developers sponsored the vast majority of UK archaeology, spending £144 million, compared to £19 million spent by the central government and the European Union, and around £25 million by local government. In each case, these activities were the result of “commercial exploitation”, albeit of the real estate where the site was located, but certainly driven by “commercial exploitation” nonetheless.

The greatest weakness in the principles behind CPUCH is the blatant prejudice against private ownership and collectors as a viable cultural heritage management tool. On land, in most countries a thriving and vital regime for managing historically and culturally significant property and buildings exists by allowing people to own culturally significant structures – and care for them as their own private property.

It is a simple fact of human nature that people cherish and take care of the objects they own. A wide choice of models exists to examine the positive results of private ownership and curatorship in other fields. Fossils, coins, stamps, art, bank notes, antiques – virtually every trace of nature and mankind that is collected by humans – demonstrate the success of an active and vital community of collectors who conserve, document and, most importantly, publish as much information as possible on their collections.

I believe that the coins we recovered from the SS *Republic* have achieved maximum protection. We documented the X, Y and Z position of every artifact on the site (Fig. 3). We have conserved, recorded, quantified and documented the coins with high-resolution photos that will allow any coin aficionado of the future to inspect every die variation and scratch without paying a fortune for storage and insurance (Figs. 4-6). Then we placed them in the hands of collectors who are passionate about studying and sharing knowledge from them.

The *Republic* excavation led to the recovery of over 8,000 liberty-seated half-dollar silver coins that were minted in New Orleans in 1861 (Bowers, 2010: 90-1). This allowed experts to look at every single coin and identify the tiniest traces of die variations, a painstaking exercise that was accomplished by private collectors and funded by Odyssey (cf. Wiley, 2005 for the die form’s complexity). These results were published in the *Gobrecht Journal*,



Fig. 4. The numismatic team documenting and conserving some of the 51,404 gold and silver coins recovered from the wreck of the SS *Republic*.
Photo: © Odyssey Marine Exploration.



Fig. 5. Gold coins under conservation by a numismatic expert in the laboratory of Numismatic Conservation Services.
Photo: © Odyssey Marine Exploration.

dedicated to the study of coins that feature the sculptural art of Christian Gobrecht, a die engraver at the US Mint (Wiley, 2006: 36-7). This journal is published by private collectors and is one of thousands published by the dedicated private collecting community. I do not think you can justify that these coins would be better off unseen in a museum vault than in the hands of these passionate collectors, with a virtual record retained in perpetuity on a dedicated website, easily available for future study.

Private ownership encourages study and publication. If you visit the website Amazon.com and search for books on ‘coins’, you will find over 15,000 entries. Change the query to ‘shipwrecks’ and only 5,000 entries come up. Interestingly, the majority of these 5,000 books relate to shipwreck projects that were commercial in nature and funded by the private sector. ‘Underwater Archaeology’ generates about 750 entries. While this is not a conclusive scientific study,

it demonstrates the existence of a vibrant market for the exchange of knowledge in the coin collecting world that has apparently not suffered from private ownership. Where is the justification for claims that private collectors are not diligent and responsible curators?

Odyssey has discovered hundreds of shipwrecks ranging from Punic to Roman sites and privateers to Colonial trading ships. Our policy is to record the site, and then either pick up a small selection of diagnostic artifacts for study and permanent retention or, in the majority of cases, leave the site undisturbed *in situ*. A typical example of our operations in action is the Atlas Shipwreck Survey Project (2005-2008). Other than highly endangered material on site 35F, a mid-17th century armed merchant vessel lost in the Western Approaches with a rare cargo of elephant tusks and copper *manilla* bracelets, and heavily damaged by scallop dredges (Kingsley, 2010: 220, 223, 228-30), from which 58 artifacts have been recovered, a total of 60 other artifacts from 267 shipwrecks (bricks, bottles, hull spikes, bells) have been recovered during this survey project in the English Channel covering thousands of square miles, all recorded properly and reported to the UK Receiver of Wreck as required by law.

The purpose of salvage law has always been to reward individuals and groups for risking their capital, resources and even lives to return items lost in the sea to the benefit of society. Doing away with any reward system or private ownership will serve to de incentivize anyone from taking this initiative, except using rare government resources. Based on my own observations this is not a use of public funds that is endorsed by the public, especially in today's economy. We can only hope that one day, faced with the reality of the benefits of private curation, UNESCO and CPUCH signatories will adjust their policies to redefine "cultural, historical or archaeological character" and "commercial exploitation" to develop a more rational policy for managing shipwrecks and collections – and give the public and the private sector their due for being responsible and able curators of our underwater cultural heritage.

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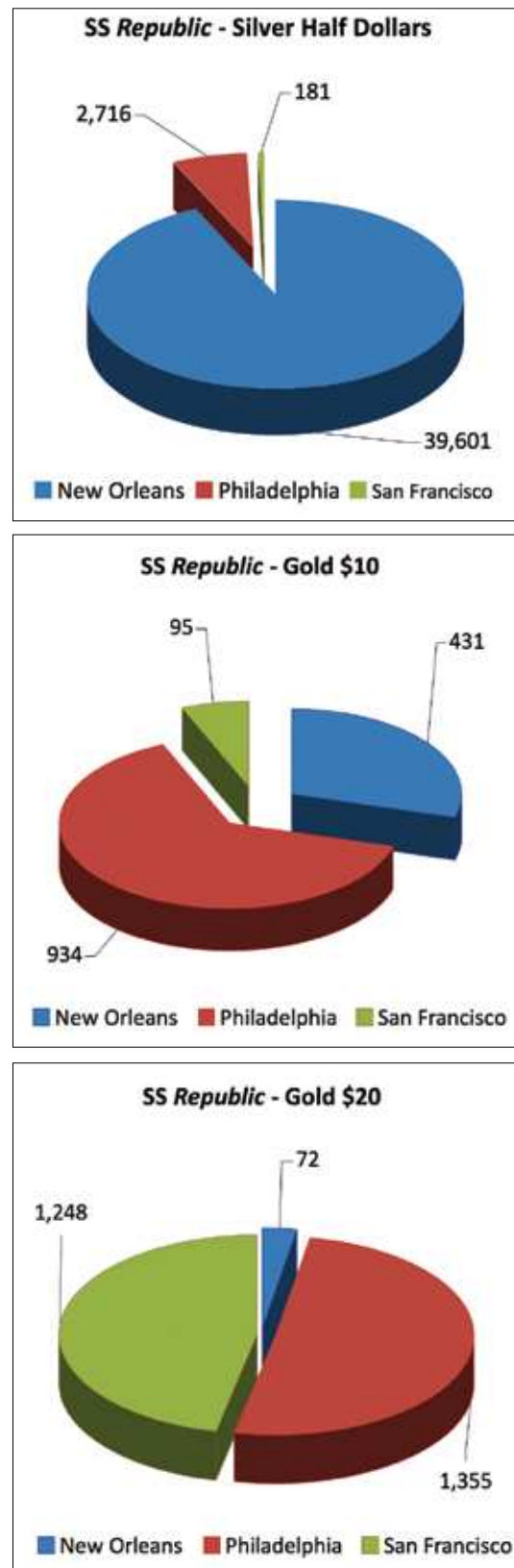


Fig. 6. Photography, cataloguing and quantification of the Republic coin collection enabled the relative types of all coins from the wreck to be quantified by mint and die varieties. Photo: © Odyssey Marine Exploration.

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Threats to Underwater Cultural Heritage – Real & Imagined

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1. The UNESCO Convention: Antiquated Ideas

The UNESCO Convention on the Protection of Underwater Cultural Heritage is based on ideas that are already antiquated. The thought that the greatest threat to the resource is the professional salvage industry is absurd – the professional historic shipwreck salvage industry is extremely selective in its efforts and targets very specific shipwrecks. Realistically, the overwhelming majority of shipwrecks in the world are of little interest to most professional salvors.

While regulations are necessary for activities aimed at a resource with perceived financial, historical and emotional value, the CPUCH rules are burdensome, punitive in nature and without the ability or will to enforce them. Rules such as these tend to have the exact opposite effect. Divers who find artifacts of real intrinsic value are now much less likely to report them for fear of the legal ramifications. Experience demonstrates that a system that rewards finders of such material/sites is much more likely to produce the effect that the current Convention is seeking to promulgate.

2. Threats to Underwater Cultural Heritage - Real & Imagined

The image projected by the authors of the UNESCO Convention is that of a 'cultural resource' under threat. However, the focus of this 'treaty' is not on those threats that are the true scourge of these resources and properties. Instead, serious consideration should be given to natural environmental threats, as well as those anthropogenically inflicted.

Shipwrecks and lost cargos are predominantly man-made objects that, with few exceptions, undergo rapid chemical and natural deterioration once lost in the sea. After an undetermined amount of time this process slows, but does not – as far as can be determined – cease completely. The oceans are enormous planetary engines of weather, biology and geology – the greatest recycling engine in the world. The action of the seas on cultural objects is an entire complex field within corrosion sciences.

One of the most outrageous statements that the UNESCO Convention advocates is that *in situ* preservation should be considered as a first option. This runs

counter to what the overwhelming reality of shipwreck situations demand. If the working committees involved in the drafting and promulgation of this treaty had included any corrosion scientists in their fact-finding research, this idea would have been immediately discarded as a realistic first option for management.

The hard data behind corrosion studies in material science confirms the reality regarding chances of preserving cultural objects lost to marine environments through purely electrochemical and physical site qualifications. Increasingly, we are also observing vast amounts of damage already caused by commercial fishing/trawling activities. If we truly want to 'protect and save' underwater cultural heritage, we need to find creative ways of managing these sites, which must include the recovery and preservation of objects associated with them. All options should remain on the table.

3. 'Treasure Hunting' as an Evolving Endeavor

The UNESCO Convention is attempting to eradicate "treasure hunting and indiscriminate salvage". I heartily agree that 'treasure hunting', as historically defined by the archaeological community, needs to be ended, even though blanket prevention is an impossibility. But the Convention fails to discriminate between the reality of different forms of commercial activities. The traditional image of treasure hunting groups is no longer valid. In their wake professional shipwreck recovery groups have evolved in a milieu of ever-stricter regulations and oversight. Those entities that now seek to do this work are nothing like their 20th-century ancestors.

Despite the fact that the shipwreck salvaging of the previous century has greatly changed (technologies, methodologies, motivations of companies involved in the commercial recovery and management of underwater cultural property and resources), the same rhetoric denigrating private sector efforts remains. The situation is highly reminiscent of the struggle for legitimacy by commercial contract archaeology groups within the wider field of academic and institutional archaeology 20 years ago. Those who held positions of power within the broader field demeaned contract archaeology as inferior to their standards. Yet now the same companies that struggled so mightily perform the majority of archaeological work in nearly every industrialized country.

The challenge for commercial shipwreck exploration and recovery groups today is to show the various agencies tasked with oversight that no single strategy is correct for the entire UCH/Submerged Historic Properties resource. Indeed, managers must consider a pallet of options for management before final decisions are reached.



Fig. 1. The copper-sheathed bows of the wreck of a 23m-long English merchantman of c. 1810, with MIR II in the foreground, investigated in 2001 by SeaRex Inc s James Sinclair at a depth of 4,800m in the North Atlantic Ocean. This is the deepest pre-modern shipwreck found to date and reflects the contribution that commercial companies make to exploring and understanding cultural heritage in deep seas. Photo: courtesy & © Woods Hole Oceanographic and Deep Ocean Expeditions 2001.



Fig. 2. The bows of the wreck of the deep-sea English merchantman of c. 1810 contained a cargo of coconuts and glass bottles. Photo: courtesy & © Woods Hole Oceanographic and Deep Ocean Expeditions 2001.



Fig. 3. Detail of domestic assemblage wares in the stern of the deep-sea English merchantman of c. 1810, including ceramic plates, a stoneware bottle and an hourglass. Photo: courtesy & © Woods Hole Oceanographic and Deep Ocean Expeditions 2001.

4. Collections Management Issues

One of the greatest false premises that the Convention codifies is the rule against the “barter, trade or sale” of underwater cultural heritage. In this the realities of modern collections management challenges are discounted. In the USA many archaeologists have been very carefully taught the credo that the archaeological record is not for sale at any price. Any irretrievable dispersal of parts of a collection has been envisioned to degrade somehow the meaning and thus archaeological value of the whole assemblage. As a result some often seemingly absurd collections have been preserved; from bags of soil for ‘future analysis’ to thousands of fragments of a type of mayonnaise jar from the 1960s, for such was US Federal Law.

We are now at the end of the first decade of a new century and the global economic situation is less secure. Budgets have been slashed across all spectrums of the heritage industry, and some of the hardest hit programs are those tasked with storing excavated artifacts. Each artifact in a museum or archive takes up space and therefore represents an expense. Financial managers are looking very hard at how these archives are used and by whom. There is a growing realization that it is no longer tenable to retain everything for perpetuity.

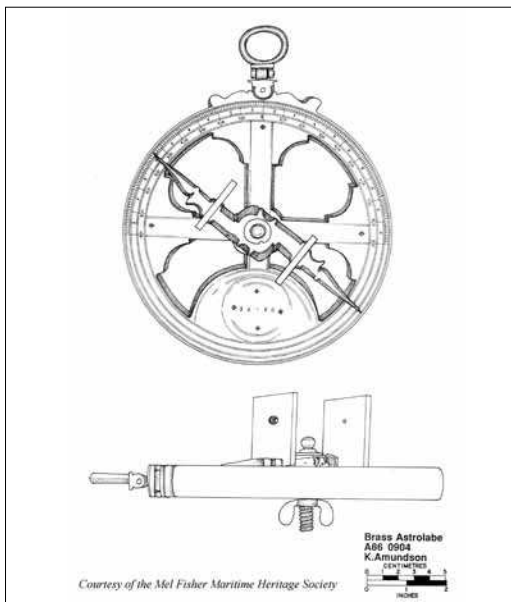


Fig. 4. The wrecks of the *Nuestra Señora de Atocha* and *Santa Margarita* from the *Tierra firme* fleet lost off the Florida Keys in 1622 have yielded the largest collection of Colonial Spanish artifacts recovered and studied from the sea. A significant part of the collection, such as this well-preserved astrolabe, has been professionally drawn. Photo: © Mel Fisher Maritime Heritage Society, Inv. No. 86a-0904a.

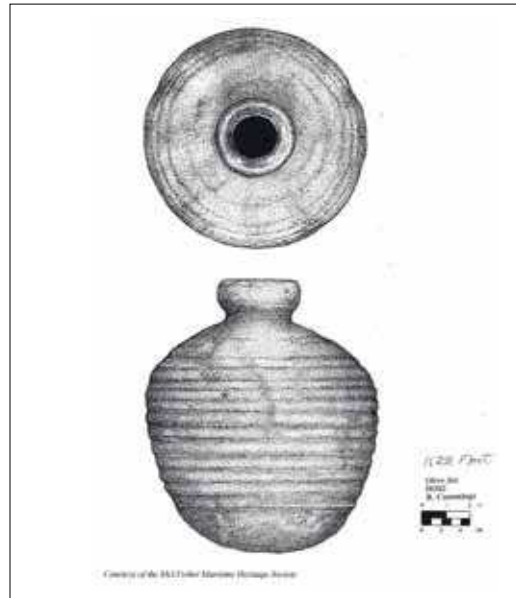


Fig. 5. The wreck of the *Atocha* has produced an important collection of olive jars that contribute to understanding of the development of the container's typology. Photo: © Mel Fisher Maritime Heritage Society, Inv. No. 58582a.



Fig. 6. A decorated silver fork from a wreck associated with the 1722 Spanish fleet off the Florida Keys. Photo: © Mel Fisher Maritime Heritage Society, Inv. No. 04-1715-66210.

In fact in the USA national collecting policies are presently being rewritten (cf. Warner, 2009; Warner and Sonderman, 2010). Many objects once defined as part of a permanent collection will now be deaccessioned. The culling of 'redundant' collections will force archaeologists and curators alike to make value judgments about the relative worth of objects, something that for a very long time they have been loath to do.

Fortunately, technological advances will greatly mitigate the specter of loss. Systems for the capture and storage of data are today at a level that could only be dreamed of a decade ago and will continue to develop. We can now create a virtual collection or assemblage archive of sufficient detail to more than satisfy most researchers. So one of the greatest arguments against the private sector utilization of these cultural properties through sale or dispersal will soon become a standard part of nearly all archaeology in the USA.

The future may lie in innovative ideas, such as private

curatorship, with large numbers of private citizens serving as owners and caretakers of parts of the collective heritage of mankind, all interconnected through modern technology and financial self-interest to the museums that hold the master virtual archive. Instead of being a static collection on shelves, these artifacts will become more of a living, breathing heritage co-managed by varied private owners and collectors.

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UNESCO, Commerce & Fast-Food Maritime Archaeology

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1. 'Fast Food' Archaeology

No marine archaeologist working today could contest the merits of taking a 'time out' to assess where the discipline is heading in the 21st century. As an incentive for soul searching and fresh ideas, the UNESCO Convention on the Protection of the Underwater Cultural Heritage is a force for good. Myriad countries with non-existent or unstructured underwater heritage programs desperately need an 'off the shelf' guide as the Convention provides.

A problem arises when UNESCO is seen to speak with the authoritarian voice of a global watchdog. Different countries inhabit localized geographic realities, varying degrees of looting, funding streams and established managerial traditions that make any idea that all underwater cultural heritage can be managed using unitary policies unrealistic.

This is where the Convention demands clarity. Single solutions create 'fast-food' archaeology. For instance, the territorial waters of Israel are notoriously shallow. Almost

all of the 200 wreck sites along the 230km-long coastline lie in depths of under 10m and, in the case of over 15 Canaanite to Early Islamic wrecks in the port of Dor, in less than 4m (Figs. 2-4). Such sites are easily accessible by all. Some 60% of wrecks have already been looted across Israel and by 2012 little maritime heritage will survive *in situ* in these shallows (Kingsley, 2004: 27-33).

For this reason the marine branch of the Israel Antiquities Authority favors artifact recovery (Fig. 1). Coupled with academic research, which necessitates the removal of assemblages, *in situ* would be both a destructive and scientifically unenlightening tool. It is no coincidence that the optimum data available anywhere in the Mediterranean about the transition from shell-first ships built with mortise and tenon technology towards a frame-first philosophy around the 6th century AD comes from Israel courtesy of intrusive exploration (Kingsley, 2002: 86-94; Mor and Kahanov, 2006).

2. Quantifying the Past

One positive side effect arising from CPUCH's promotion of *in situ* preservation as a primary managerial option is a move towards quantifying regional underwater heritage.¹ Countries including Australia, Ireland, France, Israel, Italy, the UK and USA hold extensive databases that have quantified the resource by location, date and form. Such knowledge is just a beginning.

UNESCO could make conceivably its most important contribution to underwater cultural heritage by establishing a worldwide standardized value system for qualifying 'importance', along the lines developed by English Heritage in the UK. Period, rarity, documentation, group value, survival/condition, fragility/vulnerability, diversity and potential are all integrated non-statutory criteria adopted by the Advisory Committee for Historic Wreck Sites and the Department for Culture, Media and Sport to assess the importance of wrecks.² A further layer of high level values is also considered (Dunkley, 2008: 24-5):

- Evidential: a wreck's potential to yield primary evidence about past human activity.
- Historical: how the present can be connected through a wreck to past people, events and aspects of life.
- Aesthetic: how people derive sensory and intellectual stimulation from a wreck site.
- Communal: the meanings of wrecks for the people who relate to them and whose collective experience or memory it holds (eg. commemorative and symbolic values).

The first phase needed worldwide today for underwater cultural heritage management by national organizations and contract companies alike is without doubt this regional quantification of the resource and the formal qualification of its value. This would create a relatively objective means of assessing what may be left *in situ*, to a degree abandoned to time and tide, and what simply must be protected or recovered for present and future science, education and indeed recreation and entertainment.

3. Hunting 'Treasure Hunters'

One of the most hostile initiatives of the UNESCO Convention is its undisguised broadside on 'treasure hunters'. This is an area of veritable over-emphasis. The bad old days of unrestricted large-scale plunder and the quarrying



Fig. 1. A vast hoard of Mamluk and Hellenistic metal wares and coins was recovered from shallow water wrecks off Megadim along the Carmel coast, Israel, to prevent them being looted. Intrusive excavation is an essential managerial tool in the marine archaeology of Israel.



Fig. 2. Recovery of an early 7th-century AD Byzantine bronze steelyard from Dor, Israel, bearing Greek inscriptions, enabled the Christian owner to be identified as 'Psates of Rhion'.
Photo: Sean Kingsley.

of high-value cargoes is a thing of the past. It began to fade in the 1980s with the *Atocha* and *Margarita* shipwreck project, which were the first 'treasure hunting' operations to employ academically-trained archaeologists as part of their team.

Curiously, however, far more information has been published about Spanish wrecks in the 'Americas' initially discovered or managed through commercial models, including final reports and studies of pottery and gold bars (cf. Barto Arnold and Weddle, 1978; Craig and Richards, 2003; Earle, 1979; Lyon, 1979; Marken, 1994;

Mathewson, 1986; Pearson and Hoffman, 1995), than for any Colonial-era wreck of 16th-19th century date in Spanish waters. One is hard pressed to identify any preliminary report from Spain, let alone a final publication.

There is no doubt that commercial companies including Arqueonautas (Mirabel, 2006), Maritime Explorations (Blake and Flecker, 1994; Flecker, 1992), and Nanhai Marine Archaeology (Brown and Sjostrand, 2002; Sjostrand, 2007) are making major contributions to the field today, while Odyssey Marine Exploration has set new standards for pioneering custom-tooled technology and recording using Remotely-Operated Vehicles in the deep (Stemm and Kingsley, 2010). All of these companies rely on select artifact sales to cover costs of operations and indeed to generate profits. By the letter of the UNESCO Convention law, these activities are taboo and should be outlawed.

A major issue of false perception prevails. All of the above companies conduct contextual archaeology and do not rip high-value cargoes out of wrecks. Their reports reveal that the recovery of mass-produced 'trade goods' for sale is just one – albeit highly significant – set of interlocking scientific objectives. Further, the governments of Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam consciously embrace commercial models based on the split share of cargoes as a core model to save shipwreck heritage long-term (Flecker, 2002). In parts of Southeast Asia, where finances are particularly limited, this is the most robust way to combat looting, trawling and site dynamiting. The West has to be cautious not to preach to governments who have specifically and legally chosen this path.

Commerce is not as perilous as some interpreters of the UNESCO Convention promote. Witness the five unique oared galleys of the late 3rd-4th centuries AD excavated in Mainz, Germany, during the construction of an extension to the Hilton Hotel and now on display in the custom-designed Museum of Ancient Ships (Pferdehirt, 1995).

Meanwhile, the foundations for a new control center for the Rome-Genoa national railway in Pisa exposed 30 wrecks dating between the 1st century BC and the 7th century AD in December 1998 at a cost of £9.3 million (Sedge, 2002: 158-70). Gino Nunes, the President of the Provincia di Pisa, has realistically observed (Bruni, 2000: 9) that:

“The archaeological, historical and artistic heritage contained and partly concealed in Pisan territory could constitute an inexhaustible resource with potential benefits which are not solely cultural. For this reason we believe that private companies should also be actively involved in operations for the preservation and appreciation of the area's historical and artistic heritage. Safeguarding a cultural heritage is an operation that entails investment, but can also create wealth.”



Fig. 3. Recording hull remains beneath ballast on the late 6th century AD Dor D shipwreck, Israel. Over 15 wrecks lie within this harbor and many are exposed naturally after winter storms, when they become vulnerable to looting. Recording and select recovery is the preferred regional managerial option. Photo: Sean Kingsley.



Fig. 4. Tenons on the hull of the late 6th century Dor D shipwreck were left loose in mortises and were unpegged. The same harbor has yielded 6th-century wrecks that are of entirely frame-first construction. The commercialization of the Holy Land wine trade was a major stimulus behind the shift away from shell-first shipbuilding. Photo: Sean Kingsley.



Fig. 5. The 'Jesus Boat', a 1st-century Roman fishing boat excavated and recovered from the western shore of the Sea of Galilee has provided key information about inshore seafaring at the time of Jesus and also stimulated the local economy. Photo: Sean Kingsley.



Fig. 6. The port of Byzantine Constantinople under excavation at Yenikapi, Istanbul, during a \$2.6 billion project to build a metro link between the European and Asian shores of the Bosphorus. Some 32 shipwrecks of the 5th-11th centuries AD have been identified during the \$24 million rescue excavation. Several hulls will be lifted for study and eventual display. Profit and archaeology are inevitable and natural bedfellows.

Even UNESCO acknowledges that “The attraction of the historic significance, beauty and authenticity of underwater sites can have a considerable economic importance for many regions”, naming the Roskilde, *Mary Rose*, Bodrum, Vasa and Hedeby museums as key attractions.³

The core of the commercial debate, in truth, is the same that enshrouds the Elgin Marbles: open the gates to change and a tidal wave might consume us in an unbridled free-for-all. It is a serious anxiety, but a situation that is best debated and managed, not outlawed. The history of collecting proves that an intellectual demand has always existed for ownership of part of the past. But it is not an insatiable hunger and can be controlled. Uncontrolled, it runs the risk of disappearing underground unmonitored.

If commercial archaeology companies working underwater create project plans, fully publish results after comprehensive recording and cataloguing, retain all rare cultural goods permanently, deposit statistically valid samples of assemblages in museum collections, offer complete and intact collections as the first option to museums, and promote outreach through educational programs, popular magazines and television documentaries, it would be hypocritical to suggest that they are making any less of a contribution than most national heritage organizations or contract firms that promote little and publish less than 80% of sites. As Marie Curie once wrote, “Nothing in life is to be feared, it is only to be understood. Now is the time to understand more, so that we may fear less.”

Notes

1. At a session on ‘In Situ Preservation’ convened at the Institute for Archaeologists’ annual conference on 14 April 2010, Ulrike Guérin, Secretary of the UNESCO Convention on the Protection of the Underwater Cultural Heritage, emphasized that contrary to some misinterpretation UNESCO has never proposed that *in situ* preservation should be the ‘preferred’ managerial option. It is an option that should be considered as a primary possibility. She also expressly stated that intrusive excavation is not disallowed.
2. See: <http://www.english-heritage.org.uk/server/show/nav.20794>.
3. See: <http://www.unesco.org/en/underwater-cultural-heritage/the-heritage/museums-tourism>.

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The UNESCO Convention for Protecting Underwater Cultural Heritage: a Colombian Perspective

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Colombia was one of the six nations initially selected to draft the UNESCO Convention on the Protection of Underwater Cultural Heritage, an avid promoter and wholehearted supporter as the regional leader of the GRULAC, the Latin-American and Caribbean group. Colombia's representative at UNESCO, former Minister of Culture Juan Luis Mejia, asserted his relentless effort and interest in the following way:¹

"In three aspects we can summarize the obstacles that needed to be overcome to reach an agreement: the fear of many States that this Convention would undermine the 1982 Law of the Sea Convention; the Colonial concept

of other States had that considered the rights of the "flag state" to be unlimited in time; and the third, and most difficult of all, the pressure of marine treasure hunting companies that tried to eliminate all legal barriers that limit its devastating action and whose ultimate goal is profit."

In retrospect, it is sad to say that the Convention has produced catastrophic results that have trampled venerable maritime concepts such as the Law of Finds, the Law of Salvage and property rights, necessary concepts that have remained prevalent among maritime nations since Phoenician times, rewarding the recovery of property lost at sea. As a result, the Convention has created a system that

makes the recovery of artifacts from historic wrecks virtually impossible for developing nations and, instead, exposes historic wrecks to destruction if left unprotected. The Convention is based on several assumptions, all of which have been seriously challenged, primarily in nations that have so far adhered, such as the case of Panama. Several other assumptions are clearly wrong.

1. Threats to Colombian Underwater Cultural Heritage

Colombia possesses an immense marine area covering 926,660 square kilometers, with borders touching Ecuador, Panama, Costa Rica, Nicaragua, Honduras, Jamaica, Haiti, the Dominican Republic and Venezuela. Major unresolved boundary disputes are still pending with a few of these nations, presently disputed in international tribunals. The threat to underwater cultural heritage in Colombian waters is very real: dredging, erosion, looting and the destruction of marine archeological material has resulted in the permanent loss and destruction of valuable cultural material.

Colombia's marine areas have immense potential for extracting oil and mineral deposits and also contain hundreds of historical wrecks submerged on its ocean floor. An estimated 1,200 Colonial-era documented shipwrecks lie within its territorial waters, EEZ and on its Continental shelf.² A significant proportion of these contain great amounts of gold, silver and uncut emeralds. Most of the Colonial silver from the Viceroyalty of Peru aboard the South Sea fleet, and all the gold from the very rich Chocó and Cauca districts, sailed across what are now Colombian waters, and a significant part of these sank.

The privileged confluence of the Spanish Pacific trade routes and the *Tierra Firme* fleet routes that crossed through Colombian waters has accumulated immense wealth on the seabed. The galleons concerned were menaced by innumerable shoals and reefs, producing hundreds of wrecks that have been protected until recently by the isolated location of these uninhabited landmasses. Quitasueño shoal, for example, is a totally submerged 64km-long coral reef, which became a marine cemetery harboring hundreds of historic wrecks during the eras of Discovery and Colonialism.

Most of the objects that lie on the ocean floor are fragile and rapidly decaying and to assert that these objects need to be left on the ocean floor as common cultural heritage only shows arrogance and contempt. What percentage of the Colombian population can presently dive to maximum depths to view these wrecks, compared to the thousands who could visit them inside a museum? According to the naval historian Claudio Bonifacio, 110,000 tons of gold lie

on the world's ocean floors.³ While this figure seems surprisingly high, there is no question that in general the seas contain an immense collection of valuable and historically significant artifacts.

One of the main criticisms of the UNESCO Convention is the core principle of considering 'in situ preservation' to be the first option before allowing any activity on submerged heritage. Wrecks lying, for example, in the Mediterranean Sea are better protected from looters due to the greater depth of its waters. Researchers believe that 80% of Caribbean wrecks rest in depths of less than 20m, whereas the greater majority of Mediterranean sites are likely to be located in depths of more than 30m, where they are better protected naturally from divers and looters. This principle of *in situ* preservation is obviously more applicable to European and Mediterranean nations rather than to the Caribbean.

2. Beyond Territorial Waters

Most of the countries present at the UNESCO Convention negotiations were ready to extend the jurisdiction of the coastal State to include underwater cultural heritage found on the continental shelf and EEZ.⁴ For Colombia, this extension of the jurisdiction of coastal states (in regard to Nicaragua, for example) beyond the limits of territorial waters could undoubtedly alter the delicate balance embodied in UNCLOS between the rights and obligations of the coastal state and its neighbor. Of particular negative consequence to Colombia, due to its immense treasure-rich EEZ, is Article 9, Paragraph 5 of this Convention, which states that:

"Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical, or archaeological link, to the underwater cultural heritage concerned."

Both Venezuela's and Nicaragua's continental shelves are immersed inside Colombia's EEZ, and the possibility that Colombia would be obligated to "consult" with these countries, that are currently disputing title to extensive marine areas where valuable shipwrecks are known to lie, would be a nightmare for any foreign relations ministry and would certainly create a great deal of internal political turmoil. Furthermore, a recent ruling by the Colombian Supreme Court regarding the controversial Sea Search Armada case (for the rights over the famous *San Jose* galleon)⁵ has

produced new jurisprudence that contradicts the UNESCO Convention's position by stipulating Colombian title over all shipwrecks in its EEZ.

Another transcendental consequence of this 2007 ruling is the clear differentiation the Supreme Court has made between what it has determined to be "cultural patrimony" artifacts that cannot be commercialized and those that can be commercialized, again in clear contradiction to the proposed absolute ban established in UNESCO's CPUCH.

3. Sovereign Immunity

Odyssey Marine Exploration's recent legal proceedings in Tampa, Florida, have demonstrated the vulnerability that former Spanish colonies are now exposed to by Spain's arbitrary claims as a consequence of the fine line between a military mission and a commercial mission by State ships. Spain is using this perceived ambiguity as a valuable weapon camouflaged under the concept of Sovereign Immunity, which might allow it to try to acquire new rights to the immense wealth that lies on Colombia's ocean floor. The concept of Sovereign Immunity, as applied to Spanish historic wrecks lost in Colombian waters, has gained a new dimension in the UNESCO Convention that can only be used to the detriment of the title of Colombia's underwater cultural patrimony, in clear opposition to its Constitution.

4. Commerce & Shipwrecks

Lastly, the prohibition against commercialization in Article 2.9 of CPUCH, tied to the all-inclusive controversial definition of underwater cultural heritage as "all traces of human existence", makes the recovery of exposed or threatened shipwrecks an almost impossible prospect for countries where Ministries of Culture have very limited funding and where financing would have to be at the expense of more urgent social needs.

Several Colombian historic wrecks contain huge amounts of gold and silver bars or rough uncut emeralds that possess little intrinsic cultural or museological value following recording and study, which, if they were allowed to be commercialized, would facilitate the prompt recovery of major cultural patrimony and irreplaceable historic artifacts that could fill museums and cultural centers. The commercialization of trade goods and uncut emeralds of no cultural or archeological significance is surely a small price to pay to finance the recovery and preservation of

hundreds of historic wrecks now possibly being plundered and vulnerable to disappearing forever.

5. Conclusion

Between 29 November and 1 December 2004 the Ministry of Culture of Colombia organized and hosted a Latin-American and Caribbean meeting in Bogota, with the participation of very high-level UNESCO personalities, such as Mr. Guido Carducci. Its recommendations were "To invite the governments of Latin America and the Caribbean that have not done so, to begin the internal process towards the ratification of the UNESCO Convention..."⁶ More recently, on 24 November 2008, another meeting was held in Cartagena with the participation of renowned marine archaeologists, such as Marc-André Bernier from Parks Canada and Chris Underwood from the Nautical Archaeology Society.

Despite these initiatives it would seem that concerns and contradictions remain in respect to Colombia's position on its underwater cultural heritage. If validation of the UNESCO Convention is adhered to, it would bring about countless constitutional problems with our oceanic neighbors, breaking the current balance and relative geopolitical stability.

Notes

1. See: <http://www.pensamientoiberoamericano.org/articulos/4/97/3/apuntes-sobre-las-politicas-culturales-en-america-latina-1987-2009.html>.
2. See: http://mesaculturalantioquia.files.wordpress.com/2009/03/politicas-culturales-en-colombia_marta-elena-bravo.pdf.
3. See: <http://www.buceo21.com/REPORTAJES/entrevistas/102bonifacio.htm>.
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6. Memorias Seminario-Taller Regional De America Latina Y El Caribe Sobre La Convencion De La UNESCO Para La Protection Del Patrimonio Cultural Subacuatico, 57. See: <http://www.sinic.gov.co/SINIC/Publicaciones/Archivos/Patrimoniosubacuatico.pdf>.