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MUSEUMS & THE PROTECTION OF UNDERWATER CULTURAL HERITAGE:

SOLVING THE PIRATE'S DILEMMA

VALENTINA SARA VADI*

*'Pirates are rocking the boat... Are pirates here to scupper us, or save us? Are they a threat to be battled, or innovators we should compete with and learn from? ...This is the story of how pirates might save this sinking ship... The answer to the Pirate's dilemma lies in the stories of pirates sailing into waters uncharted by society and the markets...'*²

SYNOPSIS

Museums have traditionally played an important role in the conservation of cultural goods within the national boundaries of states, sometimes constituting reliquaries of national memories and history. Besides maintaining their usual function of custodians of national treasures, they have recently come at the forefront of international relations and cultural heritage law. Indeed, besides the worthy conservative function, they have increasingly become the catalyst for negotiating and settling disputes concerning the ownership and/or the restitution of cultural objects.³

The dilemma which underlies many disputes concerning cultural goods is whether these goods should be returned to the original owners who produced them, or whether

* PhD candidate, researcher (European University Institute). The author may be contacted at valentina.vadi@eui.eu. The author wishes to thank Professor Francesco Francioni, Dr Ana Vrdoljak and Professor Mel Marquis for their comments. The usual disclaimer applies.

² M. Mason *The Pirate's Dilemma – How Youth Culture is Reinventing Capitalism* (2008), 4.

³ See A. F. Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (2006).

the actual possessors should be privileged simply by virtue of their possession. In many circumstances, dramatic historical events characterize the history of certain cultural objects. For instance, during World War II, Jewish communities all around Europe were persecuted and their precious artworks and even religious objects were stolen.⁴ Analogously, albeit in a different manner, underwater cultural heritage often presents a spiritual dimension, as in many cases these ancient vessels represent a sort of collective burial for the sailors who lost their life at the time of the shipwreck.⁵ Recovering a shipwreck means resolving an historical jigsaw, a collective disappearance which happened centuries before.

The advancement of technology has recently made it possible to find, visit and remove artefacts from shipwrecks that have been kept remote in the abyss for centuries. The increasing capability of reaching these archaeological treasures has intensified the debate on related ownership and management issues. *First*, what should be done with the recovered artworks? Should the finders be ‘keepers’ and the losers ‘weepers’? Would this solution not be simplistic and unfair with regard to the people who perished because of dramatic circumstances? What about the danger of dispersing the memory of these historical events? *Second*, what remuneration should private actors obtain for locating and recovering the shipwreck? *Third*, what role interested states play in the recovery of a shipwreck?

In order to solve all these different but related questions, this study offers an enquiry into the role that museums may play in preserving the memory of certain events and the

⁴ The literature is extensive. See, *inter alia*, S. Mann, ‘What’s A Survivor to Do? An Inquiry into Various Options and Outcomes for Individual Seeking Recovery of Nazi-Looted Art’ (2007-2008) *Loyola University Chicago International Law Review* 191.

⁵ As one author puts it, ‘in a technical sense, many shipwrecks are in fact gravesites’. See C. R. Bryant, ‘The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle over Salvaging Historic Shipwrecks’ (2001-2002) *65 Albany Law Review* 97, at 100 note 21. For instance, after the passenger carrier *M/S Estonia* sank taking more than 800 passengers and crew with it in 1994, Estonia, Finland and Sweden concluded an agreement and designated the wreck as a maritime grave. See M. Jacobsson and J. Klabbers, ‘Rest in Peace? New Developments Concerning the Wreck of the *M/S Estonia*’ (2000) *69 Nordic Journal of International Law* 317.

related artefacts by focusing on underwater cultural heritage (UCH). The argument will proceed as follows. *First*, it will define the multifaceted concept of underwater cultural heritage. *Second*, it will critically assess the *regime complex* that governs the exploration and management of ancient shipwrecks. *Third*, it explores the role that museums may play in the preservation of underwater cultural heritage.

I. UNDERWATER CULTURAL HERITAGE

Historic sunken vessels constitute the essence of underwater cultural heritage (UCH). The concept of underwater cultural heritage is much broader though, as it can be defined as ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously’⁶, for a certain amount of time.⁷ There are several reasons that make UCH a worthy object of international legal protection. Ancient shipwrecks contribute to our understanding of history, providing a glimpse into different epochs and societies. Furthermore, UCH may contribute to the formation and preservation of cultural identity, and, by fostering people’s sense of community, can hold associative value. UCH constitutes ‘multicultural heritage’ *par excellence*, because of its cosmopolitan character. The ships that sank – at long distances from their origin or destination – were typically engaging in international and regional trade. In addition, the shipwreck may be located in international waters. The cosmopolitan character of UCH ‘promotes understanding among nations’⁸ and constitutes a worthy object of protection by international law.

⁶ United Nations Educational, Scientific and Cultural Organization, Convention on the Protection of the Underwater Cultural Heritage, Article 1.1.

⁷ This amount of time is expressly specified by certain international law instruments while it is left undetermined by others. For instance, the UNESCO Convention of the Protection of Underwater Cultural Heritage indicates a period of at least 100 years. UNESCO Convention of the Protection of Underwater Cultural Heritage, Article 1.1.

⁸ A. Strati, ‘The Implications of Common Heritage Concepts on the Quest for Cultural Objects and the Dialogue Between North and South’, 89 Am. Society Int’l L. Proc. 439 (1995).

II. THE REGIME COMPLEX GOVERNING UNDERWATER CULTURAL HERITAGE

The fragmentation among different treaty regimes and the existence of maritime customs have led to new forms of *piracy*, thus undermining underwater cultural heritage preservation.⁹ While private actors are extremely successful in locating and recovering ancient shipwrecks, they often sell the artefacts in order to cover their expenses. Thus, commercial ‘salvage’ may cause irremediable losses from an archaeological and historical perspective. However, governments often do not have the resources required for undertaking ambitious projects of shipwreck recovery. Even when they have such resources, complex legal issues arise with regard to the ownership of the vessel. Depending on the different circumstances of the case, admiralty courts have adjudicated these cases differently.¹⁰

Given the increasing risks of dispersion and looting, the UNESCO Convention on Underwater Cultural Heritage,¹¹ which has entered into force on 2 January 2009, introduces important guidelines for the protection of undersea heritage. The Convention recommends *in situ* preservation of underwater cultural heritage¹² and provides a rule against its commercialization for trade or speculation.¹³ The idea behind these provisions is to foster tourism development related to the archaeological discoveries. Ideally, once the resource has been sold, particularly in a foreign state, it is no longer

⁹ For an in depth analysis of this complex legal framework, see for instance, V. Vadi ‘Investing In Culture: Underwater Cultural Heritage and International Investment Law’ (2009) *Vanderbilt Journal of Transnational Law*, 1-52.

¹⁰ See for instance, V. Vadi, ‘The Protection of Underwater Cultural Heritage in International Law: Challenges and Prospects’ in A. Vrdoljak and F. Francioni (eds) *Illicit Traffic of Cultural Objects in the Mediterranean Region*, EUI Law Department Working Paper (2009) *forthcoming*.

¹¹ The Convention on the Protection of Underwater Cultural Heritage (CPUCH) was adopted on 2 November 2001 at the thirty-first session of the UNESCO General Conference, 41 ILM 40 (2002). The Convention entered into force three months after the deposit of the twentieth instrument of adherence. At the time of this writing, 24 countries have ratified the Convention, <http://portal.unesco.org/la/convention.asp?KO=13520&language=E&order=alpha> (last visited 17 April 2009).

¹² Convention, Preamble, Article 2(5), and Rule 1 of the Annex

¹³ CPUCH, Article 2(7).

capable of providing any further economic benefit to the State in which it was found. Consequently, admiralty law i.e., the law of salvage and the law of finds are retained in the Convention but in an attenuated form. Under Article 4, salvage activities relating to underwater cultural heritage may apply only *if they are authorized by the competent authorities*, in full conformity with the Convention.

Perhaps the most important achievement of the Convention is represented by its Annex. Having a technical nature and having been drafted by archaeologists, the Annex benefited from a rather unanimous support at the time of its adoption and restates the need to preserve underwater cultural heritage *in situ*, but also the possibility to adopt different measures for protecting or diffusing the knowledge of underwater cultural heritage.¹⁴ Also the Annex reaffirms the idea that cultural objects should not be considered as mere commodities.¹⁵ With regard to the legal status of the Annex, it is not legally binding, as it clearly follows the Convention's status. However, as the Annex is widely recognized as embodying professional standard guidelines, it may be replicated in national legislations *without* the need of ratifying the Convention.

III. MUSEUMS & CULTURAL DIPLOMACY

Museums may play a critical role in the conservation of underwater cultural heritage and facilitate the exercise of cultural rights by individuals.¹⁶ On the one hand, museums are institutions in the service of society and of its cultural development. Not only museums are 'temples of heritage', but they have become important forums for dialogue

¹⁴ Annex, Rule 1.

¹⁵ Rule 2 of the Annex states: '...Underwater cultural heritage shall not be traded, sold bought or bartered as commercial goods.'

¹⁶ D. Newton, 'Old Wine in New Bottles, and the Reverse' in F. E. S. Kaplan, *Museums and the Making of "Ourselves"-The Role of Objects in National Identity* (1994), 269-290, 288.

and critical thinking.¹⁷ Maritime museums pay due consideration to the material frailty of shipwrecks and allow the public to have access to cultural heritage.

On the other hand, museums constitute a valuable leverage for economic development, as they preserve cultural capital and they foster the tourism industry and a series of competences related to the preservation of the cultural goods. As museums may be profitable, the sale of cultural objects is not the only available option to recover costs and expenses related to archaeological excavations. For instance, after recovering 6,000 artefacts from the Titanic wreck, the salvage company went on city tours to display them to the public. The huge success of the *RMS Titanic* exhibitions bears testimony to the potential profitability of a salvage operation without the sale of recovered artefacts. Remarkably, the company decided not to do much future shipwreck salvage work, 'preferring above-water cash-paying customers to chasing high risk dreams of underwater riches'.¹⁸ Other companies that are specialised in shipwreck recoveries have partially adopted a similar policy of exhibiting the recovered artefacts.¹⁹

In parallel, States have been willing to finance the creation of maritime museums. Actually, there are more than 800 nautical museums in the world mainly due to private-public partnership.²⁰ In parallel to maritime museums on land, in recent years a series of initiatives have been taken to create underwater museums. Underwater museums presuppose the conservation *in situ* of the wrecks and may be a suitable option in areas which present transparent waters and are not particularly deep. For instance, the Egyptian authorities have launched a pilot project for the creation of an underwater museum in the Bay of Alexandria.²¹ Caesarea, an ancient port created under the Herod's

¹⁷ C. Saumarez Smith, 'Museums, Artifacts and Meanings' in P. Vergo (ed) *The New Museology* (1989).

¹⁸ P. Hodson 'How to Invest in Sunken Treasures; Salvage Stocks Offer High Returns, but Big Risks' National Post, 31 May 2007.

¹⁹ Odyssey Marine, Press Release No. 177, 'Odyssey Marine Exploration Announces 2008 Financial Results', March 11, 2009.

²⁰ See F. Serafini, *Musei navali e collezioni marittime nel mondo* (2005).

²¹ See 'Underwater Cultural Heritage in Alexandria' at http://portal.unesco.org/culture/en/ev.php-URL_ID=38697&URL_DO=DO_TOPIC&URL_SECTION=201.html (last visited 1 April 2009).

kingdom, has become a dive trail for divers who can admire an ancient shipwreck from Roman times.²² In Greece, the *HMHS Britannic* wreck site is set to become a seabed museum.²³

CONCLUSIONS

Discourse on heritage management usually focuses on issues of property. This paper overcomes this traditional dichotomy, and proposes a re-conceptualization of heritage as a *cultural capital* and engine for cultural, social and economic development.²⁴ By fostering cross-cultural dialogue and understanding, museums may also constitute pillars of global co-operation and promote peaceful relations among nations. If museums are conceived as international actors and as a global network, they may allow the international community as a whole to have access to and benefit from underwater cultural heritage. Through the exercise of cultural diplomacy and the international temporary exchange of archaeological objects, museums may offer an interesting solution to the pirate's dilemma posed by the recovery of ancient shipwrecks.

²² See UNESCO 'Underwater Museums and Dive Sites', http://portal.unesco.org/culture/es/files/35206/12028970437Underwater_Museums_en.pdf/Underwater%20Museums%20en.pdf (last visited 18 March 2009).

²³ See H. Smith, 'Wreck of the Titanic Sister Ship Finds New Destiny as Tourist Attraction', *Guardian*, 29 October 2008.

²⁴ D. Throsby, *Economics and Culture* (2001) 45.