# The Protection, Preservation and Repatriation of Marine and Underwater Cultural Heritage: Lessons and Opportunities for Africa

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This article is based on research related to the NIHSS-funded project, 'Seeing the Sea: Promoting BRICS cooperation for development and security in Africa

**DOI: https://doi.org/10.35293/srsa.v47i1.6182**

## Abstract

Marine and Underwater Cultural Heritage (MUCH) is potentially an integral part of the cultural heritage of humanity. Protecting MUCH is, therefore, crucial for preserving and enriching one's understanding of history and safeguarding knowledge for future generations. However, despite the existence of international legal frameworks, namely the Law of the Sea (UNCLOS), and UNESCO's Convention on the Protection of Underwater Cultural Heritage (CPUCH), there remain several challenges surrounding the preservation and ownership of marine and underwater cultural heritage sites and artefacts. This article argues that issues related to the ownership and management of MUCH remain highly contested, particularly in the context of the evolving dynamics between European and African countries. It frames MUCH as a 'frontier' which manifests in three dimensions: a spatial frontier reflecting emerging disputes over marine resource management; a knowledge frontier highlighting the role of maritime archaeology and an ocean governance frontier influencing international legislation and economic activities. By critically evaluating the international legal regimes' responses to MUCH, this article underscores the importance of African involvement in safeguarding its own underwater cultural heritage.

**Keywords:** Marine and underwater cultural heritage; maritime archaeology; legal frameworks and regimes; protection, preservation and repatriation

## 1. Introduction

The advent of sophisticated marine technological capabilities and archaeological tools present both challenges and opportunities for broader marine cultural heritage governance. On the one hand, marine and underwater cultural heritage (MUCH) offers a unique chance to preserve and share the stories of maritime societies, trade routes and global cultural exchanges, thus, enriching our understanding of human history. Additionally, efforts to protect MUCH can also serve to align with broader environmental and sustainability goals, such as safeguarding fragile marine ecosystems intertwined with cultural sites. On the other hand, many of these underwater sites are threatened by environmental degradation and commercial exploitation, as well as by piracy, looting and modern-day treasure hunts, which often include the unauthorised salvage and looting of tangible artefacts. More recently, these threats have translated into broader 'ocean politics', whereby there has been an increase in disputes between countries over title to sunken vessels, and in extreme cases, several countries now see the exploitation of MUCH as a means for claiming sovereignty over disputed territory (Sarid 2017).

For Africa, the issue of MUCH is of particular importance considering that the continent's maritime history is awash with archaeological symbols, including treasures looted from ancient civilisations and items of craftsmanship. The world's oceans and seas are replete with objects originating from the African continent. Similarly, in and around Africa's continental waters, there are a plethora of cultural heritage sites and artefacts that reveal a complex web of actors and narratives on ancient societies, their ways of life, subsistence and belief systems. Duarte (2012), for example, highlights that the East African coast is a rich domain for underwater cultural heritage, with recent archaeological remains starting to reveal the extent of indigenous nautical technology, regional and international social contacts and far-reaching maritime trade routes which have been navigated for millennia (Duarte 2012: 63).

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The World Heritage Convention (WHC) which was adopted by UNESCO in 1972 is underpinned by the idea that heritage which displays 'outstanding and universal values for humankind' must be the shared responsibility of the world community. Since its adoption, the WHC has been ratified by close to two hundred countries, and over a thousand heritage sites, which reflect Outstanding Universal Value for humankind, have been placed onto the World Heritage Register. The WHC makes provision for countries to call upon UNESCO and the World Heritage Fund for assistance in meeting their obligations to protect and manage globally relevant sites. According to Parthesius (2020: 1), "a belief in shared responsibility for the identification and protection of world heritage makes the WHC a significant globalising power, especially when intent, resources and actions are aligned". Weinert (2017) further suggests that framing local forms of cultural heritage in the internationalist terms of duty and responsibility, and by universalising human values and identity, the importance which the international community and UNESCO have ascribed to cultural heritage is demonstrated; so that UNESCO's various cultural heritage conventions[2] related to the preservation, conservation, safeguarding and promotion of cultural heritage, "produces, re-produces and deepens an understanding of the world as partly a shared socio-cultural space that transcends national patrimonies" (Weinert 2017: 420).

It may indeed be suggested that UNESCO's cultural heritage conventions have served to shift the cultural heritage 'protection discourse' towards international responsibilities and stewardship. This has ostensibly been achieved by couching the conventions in the universal terms of representativeness and 'outstanding value'. Similarly to the WHC, UNESCOs Convention on the Protection of Underwater Cultural Heritage (UNESCO CPUCH 2001) considers underwater heritage as, '"an integral part of the cultural heritage of humanity" and as a common heritage which has the potential to connect people and countries. According to Lehman (2018: 292), "marine cultural heritage both names a historical and enduring relationship between human society and the ocean and recognises the value of the physical traces of this relationship". What is peculiar, however, is that despite the ostensibly universalising qualities inherent in UNESCO CPUCH, the Convention has subsequently only been ratified by 78 countries, of which 22 are African.

The central proposition of this article is that despite the presence of international legal regimes such as the United Nations Convention on the Law of the Sea (UNCLOS) (1982) and UNESCO CPUCH (2001), which aim to protect and govern MUCH, questions continue to arise in respect of what sites and artefacts have cultural and historical relevance, who owns submerged heritage, who is responsible for preserving it, and how the potential commercial benefits accrued from it should be distributed. The article, therefore, interrogates the universalising potential of MUCH, to show that as it stands, when it comes to the issue areas of the preservation, ownership and repatriation of MUCH, the domain remains contested and divisive. This article, therefore, concurs with Lehman's (2018) contention that the dynamics surrounding MUCH are much better understood as a frontier which manifests in many ways. As a spatial or resource frontier, MUCH reflects an emerging set of sites and objects which have become associated with evolving contestation over management, ownership and access in the marine environment. As a knowledge frontier, MUCH emphasises the historical connection between humanity and the sea, whilst concurrently being co-created with emerging disciplines such as maritime archaeology and new sets of knowledge practices, analyses and literatures. Finally, as a frontier for ocean governance, MUCH represents an object of international concern, however, at the same time it potentially serves as a productive catalyst for the development of new intergovernmental legislation which has implications for territorial control, organising frameworks and economic activities (Lehman 2018).

The objective of this article is to shed light on MUCH as the representative of this frontier and its attendant manifestations. It assesses the relevance which international legal regimes are attaching to MUCH, by focusing on the specific matters of ownership, regulation and the responsibility to protect MUCH from prevailing threats. The article begins by exploring MUCH as a knowledge frontier with a particular focus on how maritime archaeology is serving to investigate, preserve and interpret the sites and artefacts which make up MUCH. Thereafter, the focus shifts to highlighting the prevailing threats to MUCH as well as the international legal frameworks which have been implemented to protect and preserve underwater archaeological sites. From this, the article then problematises issues of legality and ownership, characterising these as both zones of contestation and of potential cooperation between predominantly European and African countries. It concludes in advocating for enhanced African agency in safeguarding the continent's MUCH.

## 2. Overview of Maritime Archaeology and Marine and Underwater Cultural Heritage

Lehman (2018: 295) defines maritime archaeology as "the academic and professional field largely tasked with investigating, preserving and interpreting the sites and artefacts that comprise marine cultural heritage. The discipline is occupied both with the particulars of specific sites and artefacts, and with what they might reveal about the societies to which they relate".

2 These include the 1954 Hague Convention; the 1970 Convention on the illicit transfer of cultural property; the 1972 World and Natural Heritage Convention; the 2001 declaration on cultural diversity; the 2001, underwater cultural heritage Convention; the 2003 Convention on intangible cultural heritage; the 2005 Convention on the diversity of cultural expressions.

Whilst archaeology has long been recognised as a scientific discipline, maritime archaeology is a relatively new area that emerged as a subdiscipline within archaeology in the late 1960s (McKinnon *et al*. 2014). The use of the term maritime archaeology as opposed to marine archaeology, facilitates a broadened analysis of the field, beyond environmental-ecological factors. It enables a critical interpretation of historic, socio-cultural and ethnographic components of maritime cultures, landscapes and communities. Henderson (2019: 3), however, suggests that despite early pioneering efforts to enhance maritime archaeology's status beyond being a distant cousin to archaeology carried out on land, it is still widely regarded as an exotic add-on to mainstream terrestrial research, so that, "archaeologists continue to be labelled 'underwater' or 'maritime' archaeologists if their research involves work in the sea....something glamorous and adventurous but not fundamental to the discipline, something not to be taken too seriously".

As a result, and despite recent advancements in the field, maritime archaeology faces criticism, especially in respect of its scientific rigour. For example, where stratigraphy is one of the core principles of terrestrial archaeology since it allows one to study the layering of deposits that helps to date artefacts and to establish their historical sequences, underwater environments are often lacking in stable stratigraphy because of water currents, sediment shifts and site disturbance—thus, making chronological analysis more challenging. There is also the criticism that maritime archaeological projects focus too heavily on the recovery of artefacts—especially shipwrecked treasures—as opposed to studying their broader historical and cultural context. Additionally, the relationship between maritime archaeology and commercial salvage operations—where artefacts are recovered and sold, rather than studied and preserved—has led to criticism that this association risks undermining the discipline's integrity by prioritising financial gain over scholarly inquiry. Finally, maritime archaeology's reliance on sonar mapping, remote sensing, and robotic exploration has led some to question whether maritime archaeology is more of a technical field than a scientific discipline.

Certainly, maritime archaeology has traditionally been best known for its focus on shipwrecks. In the last century alone, swathes of wreckage have been found. Hydrographical marine surveys have also aided in the discovery of cargo vessels and submarines long thought lost to history. There is the argument, however, that maritime archaeology's propensity to associate MUCH with 'shipwrecks' means that the latter are usually inaccessible without specialist training and equipment, and that shipwrecks are normally accidentally present by their nature, so that they may not always be perceived as the heritage of the country in which they are situated (Parthesius 2020). There are also those scholars who caution that suspicions might arise when shipwrecks are classified as cultural heritage *resources* since this implies that they are things to profit from, things to exploit, things to commodify (Rich *et al*. 2022). Rich *et al.* (2022) instead prefer to speak of cultural heritage *sources-* of community, of biodiversity, of nutrients, of toxicity, of hazardous waste, of contemplation, of knowledge- so that maritime archaeology should become better placed to intervene where it is needed, as opposed to the perception that MUCH is a passive underwater landscape for the plucking.

Green (2004) notes though that since the late 1990s, maritime archaeology as a discipline, has become increasingly involved in broader cultural resources management. The National Oceanic and Atmospheric Administration Office for National Marine Science (2023) now describes maritime archaeology as the study of everything related to seafaring and maritime culture including technological, socio-economic, political and religious aspects.

No doubt, humans have a long and deep connection to the maritime domain, as seafarers, traders, explorers, coastal dwellers and fishers, and maritime archaeology (despite its critics) can be said to be enhancing the study of this history and humanity's connection to the maritime domain. Advances in Remotely Operated Vehicle and Autonomous Underwater Vehicle technology now allow maritime archaeologists to explore deeper waters with unprecedented precision. High-resolution 3D modelling techniques are revolutionising how underwater sites are recorded and analysed. These tools allow researchers to create detailed digital reconstructions of wrecks and submerged settlements without the need for direct human contact. DNA extraction techniques are being used to study shipwreck contents, including cargo remains, human remains, and even microbial life that interacts with submerged artefacts. This has broadened the understanding of ancient trade networks, diets and population movements. The field is also starting to shift beyond shipwreck-centric studies to examine how entire maritime landscapes functioned in the past, incorporating submerged prehistoric settlements, harbour structures, and ancient sea routes. Maritime archaeology is also increasingly intersecting with climate science, oceanography, and even artificial intelligence to better analyse and protect submerged heritage sites, particularly those at risk from climate change and rising sea levels.

It is important to note, however, that in the African context, maritime archaeology is very much in its infancy. Lane (2007) attributes this to the factors of cost and inadequate training, but more specifically to a general lack of appreciation of the research potential of maritime environments and the importance which the sea has for many African societies (Lane 2007). Within the African context, maritime archaeology earns less attention compared to maritime security issues, such as piracy, illegal fishing, waste dumping and smuggling. Suffice

to say that advances in marine technological capabilities, and developments within the field of maritime archaeology, are now potentially enhancing international legal debates and prompting the need for national policies regarding the ownership, conservation and exploitation of underwater archaeological finds.

## 3. Threats to Marine and Underwater Cultural Heritage

Underwater archaeological sites are rarely monitored and as a result, threats that are human-induced as well as naturally occurring, persist relatively unmanaged. Lane (2007) confirms and notes the difficulty in controlling and preventing damage to underwater archaeological sites, particularly where they occur as a result of natural processes. Chief among the threats is environmental degradation, commercial exploitation and even looting of maritime archaeological sites.

### *3.1. Environmental degradation and commercial exploitation disturbing archaeological sites*

For years, climate scientists have warned that climate change is destroying archaeological sites faster than they can be studied. The presence of salt water tends to intensify the process of corrosion and degradation (Maarleveld 2020). The rate at which damage is done to underwater sites and artefacts depends on a range of factors. By and large, environmental degradation, including but not limited to, issues such as ocean acidification and pollution are major risks to underwater archaeological sites. The risk is not only to sites in the deep sea, but also to those in and around coastal areas. According to Erlandson (2012), coastal archaeological sites have invaluable data about ancient coastal societies, fisheries and ecosystems. Both Erlandson (2012) and Rowland (1999) stress the potential adverse effects of global warming on coastal archaeological sites. Phenomena such as rapid coastal erosion, rising sea levels and more frequent mega-storms are bound to cause destruction to maritime archaeological sites (Gregory *et al*. 2022; Reeder-Myers and McCoy 2019). In the past, major climate events have indeed caused catastrophic damage to archaeological sites. Hurricane Katrina, for example, resulted in the destruction of roughly 1000 archaeological sites in the low-lying and vulnerable deltaic coastline in the Gulf of Mexico (Erlandson 2012). Like coastal erosion, the rapid coastal development coupled with growing coastal populations, the inevitable strain on marine resources and climate change has adverse effects on coastal archaeological sites (Breen 2013). Erlandson (2012) highlights that it is not only archaeological sites that are at risk, but also other historical and paleontological sites located along the island and littoral areas. These warnings have largely been disregarded by the broader maritime community, as other issues, among them piracy, offshore maritime terrorism and illegal fishing to name a few, have been assigned greater priority.

In addition to environmental threats, another risk is the destruction of artefacts as a result of human activity, specifically the commercial exploitation of marine resources. Activities such as laying pipelines, drilling and seabed mining operations are beneficial economically speaking, however, risky where MUCH and archaeological objects are concerned. Similarly, the modern-day fishing practices of industrial trawlers, which prioritise profit and efficiency over sustainability, jeopardise the integrity of MUCH sites. According to Jarvis *et al.* (2023), bottom trawling poses a major risk to archaeological and historical heritage in the maritime domain. The authors note that for centuries, fishery scientists and ecologists have been concerned with bottom trawling and dredging. Much like bottom trawling, deep seabed mining carries significant risks for maritime archaeological sites and artefacts (Jarvis *et al*. 2023). Presently, the International Seabed Authority (ISA) exploration and exploitation draft regulations do not adequately protect underwater cultural heritage.[3] Both bottom trawling and deep seabed mining can cause serious damage to archaeological material, small artefacts and even shipwrecks can be dislodged and altogether irreparably destroyed. Artefacts that are destroyed or dislodged from the seabed, can be swept up and carried oceans away making it difficult to determine the regional origin of said objects. This may subsequently affect efforts to study the artefacts and even repatriate them.

### *3.2. Piracy, looting and modern-day treasure hunts*

Whilst naturally occurring incidents are a major concern; another issue is the actions of nefarious actors. Despite being a crime punishable under the law in numerous countries, looting and modern-day treasure hunts of underwater artefacts continue to the present day. This is not a new phenomenon. Since the golden age of piracy, pirates and privateers have looted the stores of sunken vessels in search of treasures, such as gold from the New World, and other valuable artefacts (Soulat and De Bry 2019), sometimes under the guise of scientific marine research (see, e.g., M/V Louisa International Law Report 2012).

3 ISA, an intergovernmental organisation comprising 167 member states and the European Union, was established in 1994 upon the entry into force of UNCLOS. ISA is responsible for ensuring the effective protection of the marine environment from the harmful effects of deep-sea mining and other related activities (International Seabed Authority 2025).

According to Campbell (2016), some commercial operators, working legally to salvage vessels, often supplement their business by illegally retrieving artefacts. Upon arriving in "culturally rich areas", such as the site of naval battles, these salvage vessels turn off their automatic identification system to evade detection whilst they perpetrate the theft of archaeological objects (Campbell 2016: 18). Like other regions around the world, Africa's maritime domain, in particular its MUCH, is not immune to these threats. According to Lane (2007), treasure hunting disguised as maritime archaeology is present in the Western Indian Ocean region. The author cites instances of theft having occurred off the coast of Zanzibar (Tanzania), Mauritius, Madagascar and Mozambique (Lane 2007). In the same vein, Mahumane (2020) explores the prevalence of modern-day treasure hunting in the waters surrounding the Island of Mozambique, pointing out that many of the archaeological sites in the area are unprotected and threatened by both human activity and environmental factors.

The theft of archaeological artefacts creates a two-fold threat: Looted artefacts can be trafficked and sold on the black market, bartered for other goods and used as a form of payment for services. In some exceptional cases, looted underwater artefacts may be used to fund terrorist activities (Financial Action Task Force 2023). There is a direct link between illicit trafficking of antiquities and terrorist financing (Pineda 2018). Embedded in this network are non-state actors such as modern-day pirates, armed groups and criminal syndicates. In exchanging stolen artefacts, traders employ a variety of methods including smuggling routes to transport looted objects and even falsifying the provenance of artefacts (Pineda 2018), in essence committing fraud. In cases where stolen artefacts had not yet been discovered or logged whilst at the bottom of the sea, tracking their location once traded can be difficult, primarily because their existence is unknown.

## 4. Legal Frameworks for the Protection of Underwater Cultural Heritage

The cumulative risks to maritime archaeological sites have prompted the establishment of legal frameworks to ensure their protection. This speaks to a broader trend towards marine cultural heritage governance. The most prominent regimes include Articles 149 and 303 of UNCLOS , and the 2001 UNESCO CPUCH .

### *4.1. Articles 149 and 303 of the Law of the Seas (UNCLOS)*

UNCLOS encompasses several provisions regulating the discovery of historical artefacts at sea; these stipulations have been long in the making. The prevailing UNCLOS was preceded by two other reports, namely UNCLOS I from 1958 and UNCLOS II from 1960. At the time of the negotiations, the protection and preservation of MUCH was not given much attention. In the prefatory report of UNCLOS I, Article 68 on coastal states' sovereign rights to exploit natural resources within their territory, excluded rights to archaeological finds. The commentary on Article 68 established that said rights do not include "objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil" (International Law Commission 2005: 297-298).

The topic of MUCH was raised once again at the third UNCLOS (III) conference, held between 1973 and 1982 (Derudder 2019: 10). Pursuant to the negotiations, two provisions on MUCH were introduced under Articles 149 and 303. Article 149 of the UNCLOS on *Archaeological and Historical Objects* states that:

All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole; particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin (UNCLOS 1982).

Derudder (2019) makes a keen observation regarding the linguistic framing of the article. The first issue is that Article 149 refers to objects of an archaeological and historical *nature* as opposed to *interest.* This framing leaves much to interpretation, since it can be applied to a large number of objects, without specifying the importance of particular objects. The second issue stems from the stipulation that archaeological finds should be used for the 'benefit of mankind as a whole', however, falling short of specifying how this should be done.

Practitioners of maritime law, other legal scholars and academics, among them Derudder (2019), have pointed out the ambiguity and impreciseness of Article 149 as related to its practical application. Much like Article 149, Article 303 on *Archaeological and Historical Objects Found at Sea* leaves room for interpretation. Ferri (2012) states that the scope of Article 303 is far broader than that of Article 149. Under Article 303, states have the "duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose" (UNCLOS 1982). Derudder (2019: 12) states that Article 303(1) does not clarify which states, littoral or landlocked, are obliged to the "duty to protect". The author further notes that the so-called duty to protect can be loosely interpreted, with states determining what said protection should entail. Another aspect which Article 303 fails to address is the matter of cooperation between states, particularly over jurisdictional issues as well as cooperation between states and non-state actors, namely salvage teams, vis-a-vis the

application of the law of salvage. According to Merialdi (2022), the law of salvage is not necessarily antithetical to the obligation to protect MUCH for the broader public good. Recognising the difficulty in assigning responsibility, UNESCO drafted the 2001 CPUCH to bridge some of these gaps.

### *4.2. UNESCO CPUCH*

In November 2001, at the 31st General Conference of UNESCO, the CPUCH was adopted. Presently, the UNESCO Convention is the only legal international framework that is wholly dedicated to the protection and preservation of MUCH. The Convention constitutes a regime of international cooperation, which establishes a common framework prescribing the rules and principles for managing marine archaeological sites, in various maritime zones. Its primary purpose is to regulate the protection of MUCH beyond territorial state jurisdiction. The Convention urges States to take all appropriate measures to protect and preserve underwater heritage. The Convention defines underwater cultural heritage 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 such as:

- sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context and
- objects of prehistoric character.

Consistent with state practice and international law, the UNESCO Convention cannot be "interpreted as modifying the rules of international law and state practice pertaining to sovereign immunities" (UNESCO 2001: 4). The Convention stipulates that acts taken under it cannot "constitute grounds for claiming, contending or disputing any claim to nations sovereignty or jurisdiction" (UNESCO 2001: 4).

Even with the overarching international regimes regulating the conduct of state and non-state actors, vis-à-vis maritime archaeological finds, it is ultimately the prerogative of states to prescribe or enact laws governing archaeological finds at sea. Resultant of the open interpretation, issues have emerged, key among these is the matter of ownership, particularly in relation to salvage law. According to Article 4 of the UNESCO Convention, activities related to MUCH are not subjected to the law of salvage primarily because it is not considered a suitable instrument for protecting MUCH (UNESCO 2001). The UNESCO Convention, however, permits the application of the law of salvage where three conditions are fulfilled, (1) where salvage "is authorised by the competent authorities, (2) is in full conformity with the Convention, and (3) ensures that any recovery of the underwater cultural heritage achieves its maximum protection". In accordance with the law of salvage, where a salvaged object belongs to an entity other than the salvor, the latter is entitled to compensation, however, they have no ownership of the property. This, however, does not prevent salvage companies from making claims to recovered objects. An apt example which demonstrates this is the case between the Republic of South Africa and a private entity, Argentum Exploration Ltd.:

In 2017, the wreck of a commercial vessel, the *SS Tilawa* was recovered by British-owned Argentum Exploration Ltd, and raised from the Indian Ocean seabed, 930 nautical miles northeast of Seychelles (Brown 2020). The vessel is said to have been sunk after it was torpedoed by a Japanese submarine in November 1942 during World War Two (Breen 2024). Sailing from Mumbai (then Bombay), India to Durban, South Africa, the vessel was carrying 732 passengers, 222 crew and 6472 tons of cargo, including 2364 bars of silver bullion (The Maritime Executive 2024). The silver was sold by the Indian government to South Africa, where the silver was intended to be used for coinage. For years, the wreck was believed to be unsalvageable. However, in 2017 when Agentum Exploration Ltd recovered the bars of silver worth more than 37 million British Pounds, from a depth of 2,5 kilometres, issues of ownership of the silver arose.

The salvage of the wreck gave rise to a *maritime lien*,[4] that is, "a privileged claim ... over a thing belonging to another ... to be carried into effect by legal process ... and a subtraction from the absolute property of the owner in the thing (United Kingdom Supreme Court 2024: 20). In 2018, the South African government claimed ownership of the silver and applied to "strike out Agentum's claim for salvage on the basis that it is immune from the jurisdiction of the UK under the State Immunity Act 1978" (United Kingdom Supreme Court 2024: 2). Thus, the UK Supreme Court declared it would "rule on whether state immunity applied when the cargo was 'in use or intended use for commercial purposes' - an exception under the act" (United Kingdom Supreme Court 2024: 4). In May 2024, the United Kingdom Supreme Court ruled in favour of South Africa regarding the US43 million dollars of silver discovered in the *SS Tilawa*.

4 A maritime lien arises by operation of law, resulting from a maritime claim and/or under circumstances in which a vessel has been damaged. Once created, it is enforceable against purchasers of the property, irrespective of their notice, and it takes priority over all other claims (Lawrence 2019: 97).

The case of the *SS Tilawa* is a notable example of the complexities of ownership, particularly in the context of an African country, in this case, South Africa. Firstly, despite the vessel and its cargo having been salvaged by a private entity, Argentum Exploration Ltd, the company had no legal right to claim the items it salvaged. Secondly, though the wreckage was discovered near Seychelles' territorial water, it too had no right to claim the wreck or its contents. Thirdly, although India was a colony of Great Britain at the time the silver was purchased by the Union of South Africa, neither India nor the UK had a basis to claim the silver that was recovered. In this case, the court ruled that South Africa had the rightful claim since the silver was "a non-commercial cargo owned by a state and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law" (United Kingdom Supreme Court 2024: 44).

## 5. Legality: Who Owns What and According to Whom

As it stands, the Law of the Sea does not make clear the rights of ownership. This dilemma is left to the relevant parties to contest and deliberate. The law of maritime archaeology is the law of a particular state regarding the conduct of underwater archaeology and the resultant property interests in any objects that are found (Oxman 1987). The question of who (which party) has the rightful ownership claim to objects and artefacts found at sea, remains a perplexing one. There have been several cases where objects have been found and various competing claims of ownership followed. These claims often cite several reasons as to why ownership should be granted or artefacts be returned, ranging from the wreck's location and cargo to the actors responsible for salvaging the objects.

A critical point worth pondering is whether states use archaeological artefacts as bargaining chips, in a manner similar to the practice of hostage diplomacy. In basic terms, when a state refuses to repatriate an artefact to the rightful owner unless it receives something in return. A similar noteworthy question is whether states intentionally suppress the discovery of archaeological objects in order to retain possession of them? Alternatively, what is the probability of a state concealing the discovery of a particular artefact which denotes their complicity in controversial historical events or exonerates another party? Another question is whether a state can deny access to an archaeological site in its territorial waters, regardless of the origin of the discovered objects and whom they belong to?

Oxman (1987: 353-354) raises three questions about the duties of states and jurisdiction over archaeological finds at sea:

- What is the power of a state to determine the title to and disposition of objects of archaeological interest found at sea?
- What are the duties of a state regarding the disposition of objects of archaeological interest found at sea?
- What is the power of a state to regulate the conduct of marine archaeology?

The first question is two-pronged; on the one hand, it is about a state's power over objects discovered within its territorial waters. Article 303 of the Law of the Sea stipulates that "coastal states may, in applying Article 33,[5] presume that the removal of archaeological objects from the seabed in their contiguous zone without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article." (UNCLOS 1982: 138). In such cases, anyone invoking the removal of archaeological objects must prove that the object does not originate on a particular state's territory in order to evade the jurisdiction of said state (Forrest 2010). On the other hand, while states have exclusive rights to regulate activities related to MUCH in their territorial waters, they have less authority over objects found beyond their maritime zones in international waters. A case of this nature occurred in 2005, when French customs officials in Mayotte seized a container consisting of elephant tusks, bronze cannons and other objects looted from an unknown site in the Western Indian Ocean (Zamora 2008). At the centre of this case was known French treasure hunter Francois Clavel, who was found to be working on a vessel registered under a South African tourist company. Clavel claimed that the objects were retrieved from an unknown site which lay outside national territorial waters. Ultimately, Clavel and his team were permitted to leave the island of Mayotte; however, the objects were left in Madagascar and the precise coordinates of the wreck remained undisclosed.

This case demonstrates the difficulty in assigning responsibility and holding perpetrators accountable, particularly where perpetrators are varied, and the archaeological objects are salvaged from areas beyond national jurisdiction. Moreover, the undisclosed or unknown location of the wreck, make the management, preservation and protection of the site almost impossible.

5 Article 33 on the Contiguous Zone stipulates that: In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to: (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea; (b) punish infringement of the above laws and regulations committed within its territory or territorial sea. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured (UNCLOS 1982: 35).

The challenge here is overtly evident where archaeological sites lie far beyond coastal limits, and Article 303 does not sufficiently cover this. Article 303 stipulates that it does not affect "the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges" (UNCLOS 1982: 138). In this case, cooperation between the relevant parties is required. The UNESCO Convention has an established mechanism for international cooperation on MUCH, mainly applicable to areas outside a state's exclusive economic zone and continental shelf. The framework is based on information sharing, consultation between states and joint protection efforts. Finally, Article 303 asserts that it is "without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature". The question is to what extent does this provision apply to meso- and micro-level non-international agreements and frameworks, such as those of the African Union and African sub-regional organisations? The framing of this clause suggests that Article 303 does not supersede or diminish existing agreements on archaeological objects. However, there is an ill-defined component, namely the omission of non-international, that is, continental, regional and/or bilateral agreements on MUCH. This oversight requires redress, lest it spur misinterpretations and legal loopholes.

## 6. Prospective Lessons and Opportunities for Africa: Confronting the Inadequacies of the Existing Regimes

The advent of international regimes has been a consequence of humankind endeavouring to find pragmatic solutions to genuinely global problems, representing "a reaction to increasing complexity, coupled with an accelerating rate of change, which has threatened to overwhelm humankind's capacity to respond to new economic, social and political conditions" (Evans and Wilson 1992: 330). To this end, the logic underpinning international regime formation has been premised on collectively 'managing' change on behalf of our 'only one earth'. Yet, as highlighted earlier, only 22 African states have ratified UNESCO's CPUCH (UNESCO 2025).[6] In the African context, it is also surprising that there is no overarching continental framework aimed specifically at MUCH. Nowhere in the African Union's 2050 African Integrated Maritime Strategy nor in its Blue Economy Strategy, is there a mention of MUCH and archaeological objects. The African Union's Agenda 2063 Framework Document only briefly mentions "reclaiming Africa's maritime heritage" (African Union Commission 2015: 106). The African Union has, however, more recently drafted a Model Law on the Protection of Cultural Heritage which makes provisions for protecting undiscovered underwater heritage, but it has yet to be adopted (African Union 2021).

At the national level though, several African states now have laws regulating the discovery, preservation and management of underwater archaeological sites. Some key examples include Egypt's Antiquities' Protection Law which extends to MUCH (Abd-el-Maguid 2012), and Namibia's National Heritage Act 27 of 2004 which recognises any remains of "fifty or more years found on or beneath the surface of land or the sea" (Aribeb 2010: 2). Presently, South African legislation provides blanket protection for underwater cultural heritage older than sixty years (Parliamentary Monitoring Group 2008). South Africa's National Heritage Resource Act 25 of 1999 stipulates that a permit is required before an individual is legally allowed to remove, damage or destroy an archaeological artefact. Failure to comply with the stipulated regulations may result in fines, imprisonment or both. Kenya's National Museums and Heritage Act provides a legal framework for the protection, conservation, management and research of the country's cultural heritage (Bita 2015). The Act extends to shipwrecks in Kenya's inland water bodies, the seabed and its territorial waters (Republic of Kenya 2012 ). Like Namibia, Kenya's National Museums and Heritage Act dictates that "any shipwreck more than fifty years old" (Republic of Kenya 2012: 8) is declared a national monument and granted automatic protection. This is at variance with the 2001 UNESCO CPUCH which provides protection for objects submerged for longer than a century. One may argue that Namibia and Kenya's recognition of objects submerged longer than five decades and the designation of these as MUCH, is not only proactive, but also offers greater protection and enhances preservation efforts.

Considering the expense, as well as the highly advanced and technical tools used by maritime archaeologists, it stands to reason that many countries, especially those in Africa, lack sufficient resources to excavate underwater sites and recover artefacts. As a result, by and large, private entities, whether for accreditation or driven by altruistic motivations, continue to do the heavy lifting. Adding to this complexity, are the discoveries made by foreign private companies, who have far less incentive to return artefacts to their rightful owners. Herein lies the danger of a ' finders keepers' mentality, also perpetuated by some antiquities collectors and individuals who stumble across artefacts whilst scuba diving. The ability to effectively manage and protect underwater cultural heritage also varies between countries,therefore, it might be assumed that countries with well-established systems for managing cultural heritage may find it easier to implement UNESCO CPUCH, thus, influencing their ratification decisions. Also, as shown in this article, disputes between postcolonial territories and post-colonial powers over title to sunken vessels mean that historical relationships often influence countries' perspectives in respect of ratifying

6 The African countries that have ratified the 2001 Convention include: Algeria, Benin, Cabo Verde, Democratic Republic of Congo, Egypt, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Libya, Madagascar, Malawi, Mali, Mauritania, Morocco, Namibia, Nigeria, Senegal, South Africa, Togo and Tunisia.

the 2001 Convention. Additionally, many countries might perceive UNESCO CPUCH to be incompatible with UNCLOS, thus, they feel that their immediate national interests are better served by the latter.

Sarid (2017), however, contends that UNESCO CPUCH is still well suited to address the current challenges to international underwater cultural heritage governance because:

- the Convention's breadth is wide, it defines MUCH, and it regulates activities that are not only directed at underwater cultural heritage, but also those that incidentally affect it;
- the Convention regulates all maritime zones including those unaccounted for in UNCLOS;
- the Convention creates a framework for international co-operation between member states regarding the protection of underwater cultural heritage (Sarid 2017: 225).

However, Sarid (2017) also points out that the apparatus is not perfect and that it is potentially ill-equipped to deal with future threats to underwater cultural heritage, in particular, how changes in sea levels might one day submerge existing terrestrial heritage sites, or conversely, how some existing submerged cultural heritage sites may one day surface and dry out.

Parthesius (2020) also concurs that UNESCO CPUCH is the best option for MUCH engagement and management in states where legislation is absent or ambiguous. Parthesius (2020) contends, however, that there is still a contradiction in the wording and implementation of UNESCO CPUCH. The author points out that the Convention's origin was a response to the increased looting of shipwreck sites and the need to act against treasure hunters and the loss of cultural material. As a result, the drafters of the Convention needed to strike a balance between this specific challenge and the broader imperative of justifying MUCH's global nature in terms of its universal values. According to Parthesius (2020), where the Convention defines MUCH as a shared and common heritage, it does this based on time, that is, tangible underwater heritage only becomes significant after 100 years, as opposed to a collective significance being attached to the 'outstanding universal values' of this heritage; an aspect to some extent covered by the Namibian and Kenyan provisions mentioned earlier.

Several other weaknesses in the Convention pertain particularly to post-colonial and global South states and situations. Hence, for instance, the Convention is inherently rooted in the need to protect and manage mainly European shipwreck sites, so that it seems inconceivable that non-European states would be incentivised to manage shipwrecks on behalf of foreign states just because European shipwrecks exist in their waters. Therefore, rather than promoting the potential universalism of MUCH, the latter is often perceived by non-European states as inherently particularistic, and as an effort to 'universalise' European culture (Parthesius 2020). A further drawback of UNESCO CPUCH is that it does not include the consideration of indigenous communities. This issue is closely related to the Convention's inability to provide adequate protection for intangible aquatic cultural heritage. Perez-Alvaro (2023) argues that currently, many submerged paleo-landscapes are in fact places where the ancestors of contemporary indigenous cultures inhabited and used these areas and where they are interred. Ironically, today, many of these submerged lands and waters are the "territorial seas" and "exclusive economic zones"of the colonisers (Perez-Alvaro 2023: 2).

Closely related to the above is the fact that neither UNCLOS nor UNESCO CPUCH (UNESCO 2001) grant special preferential rights to "states of cultural, historical and archaeological origin" (UNCLOS 1982: 74), and does not include any mention of the heritage of indigenous peoples. Perez-Alvaro (2023: 5), therefore, correctly asserts that the concepts " state of cultural origin" and "state of historical origin" are not easily applicable to civilisations which existed prior to colonialism since indigenous communities, together with their cultural heritage, are in fact abiding civilisations which have survived state succession—albeit that they have lost the material expressions of their cultures. Additionally, it can be argued that because these two international legal instruments prioritise states, indigenous communities (in the absence of formal statehood) need a state to represent their interests and even then, assuming the interests of the indigenous community and the interests of the 'rest of the state' in which they 'exist' are aligned.

Regarding intangible aquatic cultural heritage, UNESCO's CPUCH only covers tangible objects such as sites, structures, buildings and vessels, thus, precluding intangible artefacts. Nonetheless, UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage goes some way in addressing this by defining intangible heritage as,

> the practices, representations, expressions, knowledge, skills-as well as the instruments, objects, artefacts and cultural spaces associated therewith-that communities, groups and, in some cases, individuals recognise as part of their cultural heritage…This intangible cultural heritage provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity (UNESCO 2003: 5).

Rule 5 of the Annex of UNESCO CPUCH (UNESCO 2001) does now refer to the term 'venerated sites' which are loosely defined as sites having spiritual meaning for certain people, however, to be clear, there is still a very clear distinction between underwater cultural heritage and intangible cultural heritage within UNESCOs legal instruments—since the 2001 Convention does not fully integrate the 2003 Convention into its framework. Overall, the inadequacies of UNESCO CPUCH regarding indigenous communities and intangible cultural heritage, perpetuate the notion that the management of MUCH is characterised by Eurocentric bias and colonial legacies.

Regarding the earlier observation that UNESCO CPUCH is ill-equipped to deal with future threats to underwater cultural heritage, perhaps the insights of Henderson (2019) are instructive. The author makes the point that the long-term cultural importance of the marine environment remains largely unrecognised. Henderson (2019: 1) highlights that the 2030 Agenda for Sustainable Development (SDGs), and especially SDG 14, Life Below Water, is committed to "conserving and sustainably using the oceans, seas and marine resources for sustainable development": Testament to this is that " cultural heritage" is only referred to twice in the text accompanying the 17 development goals and their 169 targets (Henderson 2019: 2). Practically, this oversight is compounded by the fact that within UNESCO, underwater and terrestrial heritage comprise different departments, so that the artificial separation between the two permeates its bureaucracy. As a result, one of the unintended consequences of this separation is that underwater heritage has, in fact, been diminished with respect to the wider heritage discourse (Henderson 2019).

## 7. Conclusion

Within Africa's vast maritime domain, several artefacts have been found, others remain submerged and unsalvageable, whilst many more have yet to be discovered. It is likely that underwater archaeological sites, and the access and control of these areas, will continue to constitute a source of contention. Some African countries now have laws in place to protect MUCH sites and artefacts; even so, there remains room for reinforcement and scope for Africa —through individual states in terms of domestic measures and through regional organisations —to address the weaknesses in existing international conventions and governance frameworks.

The status quo remains woefully inadequate, particularly towards protecting weaker interested parties. The uneven powers of parties in legal cases, particularly between erstwhile colonial powers and previously colonised, conquered and/or occupied countries, remains a dilemma. At the continental level, the African Union should draft a suitable framework to regulate and oversee the protection of MUCH and the management and preservation of these sites. This endeavour would not constitute a new initiative or reinvention of the wheel, rather it would build upon an existing foundation of international regulations. The revitalised legislation should focus on five key aspects: protection, preservation, management, repatriation and ownership; the latter two aspects are key to reclaiming Africa's history and archaeological objects on display in museums around the world and those held in private collections. Beyond this, African governments must develop a framework or system for effective policing dedicated to mitigating the loss of maritime archaeological sites and investigating crimes related to the destruction and theft of Africa's MUCH sites and artefacts. Such an initiative may be further strengthened by various working groups or projects committed to scientific and academic research on Africa's MUCH.

One reading of international legal regimes suggests that the rules and norms which underpin them are 'attitudinal phenomena' so that actors attach meaning to what they consider to be moral and appropriate behaviour. To this extent, as a knowledge frontier, MUCH has the potential to re-frame the meanings which arise from newly discovered underwater heritage sites. This is inherently an ethical pursuit and the field of maritime archaeology can potentially serve to signal a broader recognition that maritime heritage is not just a resource to be extracted, but a shared cultural and historical legacy that must be preserved with care.

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