

THE JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

PROTECTION OF UNDERWATER CULTURAL HERITAGE IN
INTERNATIONAL WATERS ADJACENT TO THE UK
PROCEEDINGS OF THE JNAPC 21ST ANNIVERSARY SEMINAR
BURLINGTON HOUSE NOVEMBER 2010

EDITED BY R A YORKE

PUBLISHED FOR THE JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE
BY THE NAUTICAL ARCHAEOLOGY SOCIETY

2011

Published by
The Nautical Archaeology Society
Fort Cumberland,
Eastney,
Portsmouth,
PO4 9LD

ISBN Nos
0-9533950-2-2 (ISBN 10) / 978-0-9533950-2-6 (ISBN 13)

© JNAPC and Individual Authors 2011

The Joint Nautical Archaeology Policy Committee
c/o The Council for British Archaeology
St Mary's House, 66 Bootham, York YO30 7BZ

www.jnapc.org.uk

Sponsored by:

English Heritage
The UK Commission for UNESCO
The Society of Antiquaries of London
The Nautical Archaeology Society

Printed in the UK by
Bishops Printers Limited, Portsmouth

PROTECTION OF UNDERWATER CULTURAL HERITAGE IN INTERNATIONAL WATERS ADJACENT TO THE UK

PROCEEDINGS OF THE JNAPC 21ST ANNIVERSARY SEMINAR

BURLINGTON HOUSE NOVEMBER 2010

Table of Contents

Foreword - <i>Robert Yorke</i>	ii
Introduction: Protection of Underwater Cultural Heritage in International Waters adjacent to the UK – a JNAPC perspective 21 years on - <i>Robert Yorke</i>	1
An outline of the nature of the threat to Underwater Cultural Heritage in International Waters - <i>David Parham and Michael Williams</i>	5
Underwater Cultural Heritage off England: character and significance – <i>Antony Firth</i>	15
Why the UK Should Reconsider the UNESCO Convention 2001 – <i>Sarah Dromgoole</i>	23
Objectives, benefits to States Parties, and implementation of the UNESCO Convention on Underwater Cultural Heritage (2001) – <i>Ulrike Guérin</i>	30
Spain's position having ratified the UNESCO Convention – <i>Mariano J Aznar-Gómez</i>	38
Portugal's position having ratified the UNESCO Convention on the Protection of Underwater Cultural Heritage – <i>Francisco J. S. Alves</i>	46
Update on Ireland and the UNESCO Convention on the Protection of the Underwater Cultural Heritage – <i>Seán Kirwan and Fionnbarr Moore</i>	51
United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage – <i>Ole Varmer</i>	61
An update on France's position regarding the UNESCO Underwater Cultural Heritage Convention – <i>Michel L'Hour</i>	63
A Perspective from other Countries – <i>Thijs J. Maarleveld</i>	64
APPENDIX: The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom Project Design Version 1.0 July 2011 – <i>John Gribble, Vir Dellino-Musgrave, David Parham and Antony Firth</i>	69

Cover illustration: *The cargo of mainly Lamboglia 2 type amphorae (1st century BC) near the island of Host, Port of Vis, Croatia.* Photograph © courtesy of Danijel Frka

The following papers by a group of international experts in nautical archaeology were presented at a Seminar held to celebrate the Joint Nautical Archaeology Policy Committee's 21st Anniversary in 2010 - the JNAPC has finally come of age!

The aim of the JNAPC has always been to raise the profile of nautical archaeology with both government and sea users. In doing so the Committee brings together a team of people from across the UK who have strong technical and legal skills that has enabled us to prepare and present informed opinions upon which government and other organisations may draw and, we hope, act. By 1993 the JNAPC had 11 members and observers. Now this has grown to 34.

The work of the JNAPC is summarised in the Introduction below, and it will be seen that over the years – and especially latterly - our interests, which have always been forward-looking, have gradually become more international. This is reflected in the topic chosen for the seminar held on 12 November 2010 presented here. It was partly a quinquennial update on how far things have progressed with the UNESCO Convention on the Protection of the Underwater Cultural Heritage (2001) since a comparable seminar held in 2005², and partly a look forward to what is still required from a UK perspective in the context of international experience. The delegates who met in the rooms of The Society of Antiquaries at Burlington House, London to discuss these issues came from several different countries, their backgrounds reflecting a mixture of Government departments, national heritage agencies, key voluntary bodies and interested individuals.

One of the conclusions of the Seminar was that there is a case for the UK Government to review the position it has taken to date on the UNESCO Convention. A very positive outcome from this is that the national heritage agencies of England, Scotland, Wales and Northern Ireland and the UK National Commission for UNESCO have given their support for a Project to review the Convention and to identify the implications of ratification for the UK. The Project Design for the forthcoming Impact Review is included in an Appendix following the seminar papers. The results of this Review will be presented to the Department for Culture, Media and Sport, the Ministry of Defence, the Foreign and Commonwealth Office, the Department for Transport and the devolved administrations of Scotland, Wales and Northern Ireland. The results will also be made available to all interested parties via the internet (links will be posted at <http://www.jnapc.org.uk/>).

Acknowledgements

The Seminar was convened by the Joint Nautical Archaeology Policy Committee and I would particularly like to thank the sponsors for their generous support without which it could not have taken place: the Society of Antiquaries for making available its noble apartments, and for providing lunch and refreshments; English Heritage and the UK National Commission for UNESCO for funding the costs of our overseas speakers; and all three main sponsors for contributing to the printing costs of these Proceedings. We are grateful to the Nautical Archaeology Society for their help-in-kind as publisher, preparing the text and cover design, and organising printing and distribution.

¹ Chairman, Joint Nautical Archaeology Policy Committee

² JNAPC 2006 *The UNESCO Convention for the Protection of the Underwater Cultural Heritage - Proceedings Of The Burlington House Seminar October 2005* Nautical Archaeology Society (<http://www.jnapc.org.uk/Burlington%20House%20Proceedings%20final%20text.pdf>)

Introduction: Protection of Underwater Cultural Heritage in International Waters adjacent to the UK – a JNAPC perspective 21 years on - Robert Yorke

Following a fractious and very public exchange of letters in 1988 in the columns of the Times between the Nautical Archaeology Society, of which I was then chairman, and Richard Ormond, director of the National Maritime Museum, in which I berated him about the Museum's closure of its Archaeological Research Centre, we met for tea, in a typically civilised British way, and decided to work together to develop a coherent policy to protect the UK's underwater cultural heritage. And so the JNAPC was borne.

In May 1989, the JNAPC launched its classic document *Heritage at Sea*¹ that put forward proposals for the better protection of archaeological sites underwater. Its recommendations included the following ten items:

- New legislation should be enacted to protect underwater sites and historic wrecks should be taken out of the commercial salvage regime.
- An inventory of underwater sites within territorial waters should be compiled.
- Official fees imposed by the Receiver of Wreck should be waived.
- Commercial seabed developers should be encouraged to undertake pre-disturbance surveys.
- MoD and FCO should take greater responsibility for their historic wrecks (warships and East Indiamen respectively) or transfer them to a Government Department with a cultural interest.
- Management of maritime sites should come under the same agencies as those that protect land sites, such as the Heritage Agencies.
- A government department with cultural interests should oversee the management of underwater sites rather than the Department of Transport.
- There should be strengthened reporting of finds via the Receiver of Wreck.
- There should be an integrated national collections policy and regional conservation and storage centres for maritime finds.
- There should be funding for training of sports divers to encourage respect for the maritime historic environment.

Government subsequently published a White Paper, *This Common Inheritance* (December 1990) in which it announced that:

- The Receiver's fees would be waived.
- The Royal Commission on the Historical Monuments of England would be funded to prepare a Maritime Record of sites.
- Funding would be made available for the Nautical Archaeology Society to employ a full time training officer to develop its training programmes.
- Responsibility for the administration of the 1973 Protection of Wrecks Act would be transferred from the Department of Transport, where it sat rather uncomfortably, to the then heritage ministry, the Department of the Environment. Subsequent responsibility passed to the Department of National Heritage, which has since become the Department for Culture, Media, and Sport.

That was four out of ten, not a pass mark, but a significant and a welcome beginning. Underwater, or nautical archaeology as it was then called, had pinned its colours to the mast. Since then many

¹ For this and all other JNAPC publications cited below visit <http://www.jnapc.org.uk/publications.htm>

of the other objectives have also been achieved, including the transfer of management responsibility to English Heritage.

Three years then passed without much further movement from government and so we launched some new initiatives:

- *Still at Sea* – an update of *Heritage at Sea* drawing Government's attention to outstanding issues – was published in 1993.
- *The Code of Practice for Seabed Developers* – targeting commercial development – was launched in 1995.
- *Underwater Finds - What to Do* – an archaeological leaflet for divers – was published in 1998 in collaboration with the Sports Diving Associations: the British Sub Aqua Club, the Professional Association of Diving Instructors and the Sub Aqua Association – and it is worth emphasizing here how important the diving organisations have been in helping JNAPC to achieve its objectives.
- *Underwater Finds - Guidance for Divers* – a definitive assessment of the legal position in relation to wrecks and diving – was produced in 2000 and re-published in 2007. *Wreck Diving – Don't Get Scuttled* – a further educational brochure for divers – was published in 2000 in collaboration again with BSAC, PADI and SAA.

Our attention then turned to the lack of proper legislation for the protection of underwater cultural heritage within territorial waters and how this could, and should, be improved:

- *Heritage Law at Sea* reviewed the problems with the current legislation in 2000.
- *An Interim Report on The Valletta Convention & Heritage Law at Sea* made detailed recommendations for legal and administrative changes to improve protection of the UK's underwater cultural heritage in 2003.
- In 2003 acting on behalf of English Heritage, JNAPC undertook a major review of marine archaeological legislation.
- JNAPC worked closely with DCMS in drafting *Protecting our Marine Historic Environment: Making the System Work Better*, published in 2004.
- In 2006, JNAPC was a member of the DCMS Salvage Working Group prior to the launch of the Government's *Heritage Protection Bill*.
- In 2006, jointly with the Crown Estate, we published the completely revised current version of the *The Code of Practice for Seabed Development*.

Unfortunately the *Heritage Protection Bill* was not enacted but even if it had been it would not have brought great improvement to the protection of marine historic sites, or historic assets to give them their current terminology, because the Bill failed to address the fundamental issues of 'Salvage' and 'Reporting of finds'. Although this was a missed opportunity, it does leave the Government free to take a more considered look at the protection of underwater cultural heritage in the future.

The emphasis of JNAPC's work so far had been on legislation within UK territorial waters over which the UK Government has sovereignty and jurisdiction to control activities directed at underwater cultural heritage. But a question of growing importance in recent years is how can the Government – and others – protect underwater cultural heritage that lies in international waters beyond the 12 nautical mile territorial limit, where it does not have sovereignty and jurisdiction?

And that is the subject of the papers presented below, where the focus of attention is the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (hereafter the Convention). The papers will review the Convention in more detail but the general principles in the Annex to the Convention state in Rules 1 and 2:

1 The protection of underwater cultural heritage through in situ preservation shall be considered as the first option.

2 The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.

In 2001 the incumbent UK Government abstained from voting for the Convention when it was adopted in Paris and after that it showed little appetite to undertake the important step of ratification. In the meantime, the Convention came into force in January 2009 with 20 members and since then the number of countries has risen to 38².

We warmly welcome the Government's formal adoption of the Rules of the Annex to the Convention as a matter of policy since 2005³. It is gradually emerging how this applies across all Government departments, but for example it is firmly part of the best practice principles applied to managing wrecks in UK territorial waters designated under the Protection of Wrecks Act 1973. Also, in its recent Consultation on HMS Victory, sunk in the Channel in 1744, the Government made it a requirement that any future management of the wreck should to be in accordance with the Annex. Here we have the Annex being applied outside territorial waters. Both these are important steps forward.

As a major seafaring nation for hundreds of years, Britain has a legacy of sunken naval and merchant vessels lying on seabeds throughout the world. Until now the enormous water depths and the limitations of technology have been the great protectors of these historic wreck sites. However, the recent advances in diving technology, underwater survey techniques, positioning systems and remote excavation have effectively stripped away this protection.

Technical divers now have the capability to reach depths unimaginable ten years ago, when the Convention was adopted, to collect souvenirs from wrecks on the Continental Shelf. Commercial salvage companies are currently targeting 'high value' historic wrecks in international waters adjacent to the UK. Given the chance, they could salvage the wrecks, winch the artefacts to the surface and auction them off for profit. As well as losing vital archaeological information we do not know what collateral damage will also be done to these historic sites in the process – or what longer term effects, such as hastening processes of natural erosion, such disturbance may trigger.

Most of these wrecks lie in deep water and excavation techniques at depth using remote operated vehicles (ROVs) are still in their infancy despite the claims of the salvors. The painstaking archaeological excavation of the Mary Rose took over 22,000 man-hours, which is the equivalent of more than 2.5 years working full time underwater. Using a ship borne ROV the cost to the salvor would be many tens of millions of pounds and along with the extended timescale would be quite incompatible with the financial imperatives of a commercial salvage company.

There is only one opportunity to gather the unique evidence of our past from these 'time-capsules' of history and this should not be squandered for short-term financial gain or personal gratification. Beyond territorial waters there is very little that the UK Government can do to protect these historic wreck sites unless they are naval warships, such as HMS Victory. Fortunately, as warships, these are classed as sovereign immune vessels and may only be salvaged with the Government's permission.

² The full text of the UNESCO Convention for the Protection of the Underwater Cultural Heritage can be found at http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml

³ Hansard, House of Commons, Written Answers for 24 January 2005, Col. 46W

However for the thousands of wrecks of historic merchant vessels carrying valuable cargoes to and from these shores there is little or no protection and it is open season for treasure hunters. For instance, if the English vessel, *Merchant Royall*, which sank in 1641 forty miles off Lands End and was reported to have been carrying silver and gold to a value of hundreds of millions of pounds sterling at today's values, were to be located, the Government would have no legal means to prevent her being salvaged. The wreck could be pillaged just off our coast and we might have to stand by helplessly as cultural heritage with which we have close links was auctioned off around the world.

Fortunately, there is a ready-made solution. The Government could ratify the UNESCO Convention on the Protection of the Underwater Cultural Heritage.

An outline of the nature of the threat to Underwater Cultural Heritage in International Waters - David Parham¹ and Michael Williams²

The threat to Underwater Cultural Heritage³ is manifold. Natural erosion, of wrecks and seabed, trawling, construction of offshore installations and pipes and cables, all pose threats of varying intensity. However, within the last three decades a principal threat has emerged with the radical evolution of deep water technology, both in terms of remote controlled underwater vehicles⁴ and mixed gas diving technology⁵. Both these capabilities have undergone a rapid evolution since the 1980's and now permit commercial organisations and recreational divers not only to access depths previously inaccessible but to conduct recovery operations at these depths. Married with a quantum leap in remote sensing capabilities⁶, using technologies developed for the offshore oil and gas industry, a point has now been reached where conceivably any UCH, previously protected by depth of water, undetectable and inaccessible, can be both located and accessed. Inevitably this has led to the exploitation of such UCH, both for commercial purposes and for personal souvenir collection. This commonly takes the form of unsystematic, unrecorded excavation and recovery, often under the salvage regime, resulting in the loss of important contextual knowledge and the deposition of artefacts in private ownership, where they are not appropriately conserved, archived nor accessible to researchers or the public. Such has been the rapid pace of this technological evolution that the existing regulatory structure protecting UCH located beyond territorial waters has proved woefully inadequate, especially in comparison to the more comprehensive regulatory provisions customarily put in place in territorial waters by coastal States.

In order to comprehend the threat to UCH located beyond territorial waters, which the UNESCO Convention on the Protection of Underwater Cultural Heritage⁷ seeks to address, it is necessary to examine in outline the nature of the threat posed by these technology driven activities directed at such UCH and the regulatory lacuna that has been exposed. This lacuna has two principal causes. Firstly, the international jurisdictional framework laboriously negotiated in the early 1980's in respect of coastal and offshore waters and secondly, the limitations of underwater technology extant at that time, which rendered UCH in deeper waters inaccessible⁸. Both these factors are interrelated and have combined to create this regulatory omission⁹.

The International Maritime Jurisdictional Framework

The jurisdictional maritime framework recognised by most States was established in 1982 by the United Nations Law of the Sea Convention¹⁰. This established a number of maritime zones of

¹ Senior Lecturer in Marine Archaeology, Bournemouth University

² Hon. Professor, Institute of Archaeology, UCL and Visiting Research Fellow, Plymouth Law School, University of Plymouth

³ Hereafter 'UCH'.

⁴ Commonly referred to Remotely Controlled Vehicles ('ROV's').

⁵ Commonly referred to as 'technical diving'.

⁶ Using side scan sonars, sub-bottom profiling and magnetometry.

⁷ Hereafter 'the UNESCO Convention'.

⁸ This in itself was considered to afford adequate protection to such UCH.

⁹ For a discussion of the provisions of the UNESCO Convention see O'Keefe, P 'Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage' (2002) Leicester.

¹⁰ Commonly referred to as 'LOSC' or 'UNCLOS' and hereafter 'UNCLOS'.

prescribed extent, ranging seaward from the coastal baselines¹¹ of a State. Within each zone the jurisdictional capabilities of a coastal State were prescribed, the extent of such rights diminishing with distance from the coastal State's baseline. Although not all States are party to UNCLOS, most States abide by its provisions and to that extent the Convention could now possibly be said to reflect customary international law. Under UNCLOS the following maritime jurisdictional zones were delineated:

- a Territorial Water of up to 12 nautical miles¹² from the baseline¹³;
- a Contiguous Zone (CZ)¹⁴, extending from the seaward boundary of Territorial Waters out a further 12 nautical miles from the baseline (i.e. commencing 12 nautical miles from the baseline and terminating 24 nautical miles from that baseline)¹⁵.
- an Exclusive Economic Zone (EEZ)¹⁶, extending 200 nautical miles from the baseline¹⁷;
- a Continental Shelf (CS)¹⁸, extending 200 nautical miles from the baseline¹⁹, or, where the CS physically exceeds 200 nautical miles, to the boundary with the continental margin, i.e. the boundary with the deep sea bed.

Territorial Waters

Within territorial waters a coastal State enjoys criminal and civil jurisdiction, comparable to that exercised on its land²⁰. Such jurisdiction is fettered only by the rights granted to foreign flagged vessels by international Conventions or customary international law, such as that of innocent passage²¹. Consequently, a State may make such provision as it wishes for protection of UCH within its territorial waters and in the United Kingdom²² protection is afforded to UCH by the following Acts:

- Protection of Wrecks Act 1973
- Ancient Monuments & Archaeological Areas Act 1979
- Protection of Military Remains Act 1986

Other than to note the existence and nature of such controls, the issue of jurisdiction within territorial waters is not germane to our present discussion.

Contiguous Zone

This zone extends 12 nautical miles from the limit of territorial waters²³ seaward out to 24 nautical miles from a State's baseline²⁴. The existence of such a zone is not automatic. A coastal State must

¹¹ Many coastal States have an indented coastline. To avoid such irregularities in the border of such zones, as measured from a State's coast, each coastal State may establish a series of baselines, which have the effect of straightening out its coastline for the purpose of calculating distance off its coast.

¹² A nautical mile, customarily used in maritime navigation, is 2,000 imperial yards.

¹³ Articles 3, 4 & 5 UNCLOS

¹⁴ Hereafter 'CZ'.

¹⁵ Article 33 UNCLOS

¹⁶ Hereafter 'EEZ'.

¹⁷ Article 57 UNCLOS

¹⁸ Hereafter 'CS'.

¹⁹ Article 76 UNCLOS

²⁰ Articles 27 & 28 *ibid.*

²¹ Article 17 *op. cit.*

²² Hereafter 'the UK'.

²³ i.e. 12nm from a coastal State's baseline.

²⁴ Article 33 UNCLOS

declare a CZ and to-date the UK has not done so, although the possibility of such a zone being declared by the UK in the near future is understood to be under review. Within a CZ a coastal State has rather limited rights in comparison to those within its territorial waters. These rights allow it to exercise control to prevent infringement of its customs, fiscal, immigration and sanitary controls²⁵. The CZ in effect acts as a 'buffer' zone, allowing coastal States some increased geographical distance to prevent infringements of these specified matters within its territorial jurisdiction. However, there is also a measure of protection for UCH within this CZ. Under Article 303(2)²⁶, in order to control traffic in objects of an archaeological and historical nature, a coastal State may presume that removal of UCH from the seabed within the CZ infringes such customs, fiscal, immigration and sanitary controls. This is a 'legal fiction', i.e. an artificial device which allows a measure of control by a coastal State over removal of UCH from the seabed within the CZ. As such it is perhaps an unnecessarily clumsy device, which raises some uncertainties as to its correct interpretation and scope²⁷, but it does confer in respect of UCH a degree of extended jurisdiction upon a coastal State beyond the limit of its territorial waters²⁸. It is also important to note that the provision is only applicable to removal of objects from the seabed within the CZ. Surveying of, diving upon, recording of and even the damaging of UCH would not be covered by the provision, so long as no removal was undertaken.

Exclusive Economic Zone

This extends 200 nautical miles from a coastal State's baselines²⁹ and gives a State Sovereign Rights in the water column and the seabed, but only for the purposes of exploring and exploiting *natural* resources³⁰. Natural resources do not encompass cultural resources, so a coastal State may not impose controls upon activities directed at UCH per se within an EEZ. It is possible that indirect controls may be imposed over UCH, as disturbance of the seabed or UCH may adversely impact upon marine flora and fauna. However such impacts are difficult to establish and can be de minimis. Consequently, such indirect regulation is rarely an effective regulatory mechanism for UCH.

Continental Shelf

The CS encompasses the shelf, its slope and rise but excludes the deep oceanic floor³¹. Under UNCLOS it is deemed to extend for a minimum distance of 200 nautical miles from a coastal State's baselines³². This is intended to compensate those coastal States which possess a narrow continental shelf. However, if a coastal State's continental shelf physically extends beyond 200 nautical miles then under UNCLOS specific rules provide for calculating its actual width. Upon the Continental Shelf a coastal State has Sovereign Rights in the seabed but only for the purpose of exploring for and exploiting the *natural* resources of the seabed³³. To the extent that the EEZ and the CS coincide (i.e. for 200 nautical miles) then the jurisdiction over the EEZ and the CS is co-existent, but the CS may

²⁵ Article 33 UNCLOS.

²⁶ UNCLOS

²⁷ For a discussion of these uncertainties see Forrest, C ' *International Law and the Protection of Cultural Heritage*' (2010) Abingdon pp323-329; O'Keefe op. cit. pp 18-19.

²⁸ For a discussion of the use of Article 303(2) see Dromgoole, S *International Law and the Underwater Cultural Heritage*, Cambridge University Press, forthcoming, Chap 7, Section 3.3.

²⁹ Article 57

³⁰ Article 56 UNCLOS. This includes minerals as well as biological life forms.

³¹ O'Keefe op. cit. pp 3-4.

³² Article 76 UNCLOS

³³ Article 77 *ibid*.

physically extend beyond 200 nautical miles. As with the EEZ, no direct regulation of activities directed at UCH on the CS is possible, although indirect regulation due to adverse impact upon marine flora and fauna is theoretically possible.

A Regulatory Overview

The consequence of this jurisdictional framework adopted by UNCLOS and mirrored in customary international law has left a significant jurisdictional lacuna for directly regulating activities directed at UCH. Within their territorial waters coastal States have full jurisdiction over activities directed at UCH. Beyond that, for a further 12 nautical miles, provided they declare a CZ, coastal States have a degree of jurisdiction over UCH, limited to regulating removal of UCH from the seabed. Beyond 24 nautical miles, within the EEZ and upon the CS, no regulation of activities directed at UCH is possible, save for two circumstances. The first is the theoretical possibility of indirect regulation due to adverse impact upon marine flora and fauna. The second is the application of Sovereign Immunity³⁴.

Customary international law has long afforded certain immunities to sovereign vessels i.e. vessels owned or operated by a State for non-commercial purposes³⁵. The applicability of the Doctrine of Sovereign Immunity to such vessels has been recognised by international Conventions, e.g. the immunities from arrest or detention granted to warships by UNCLOS³⁶, or the immunity from salvage without the consent of the Flag State afforded to such vessels by the International Convention on Salvage 1989³⁷. Some States, especially those which have been termed the 'western maritime States', contend that this immunity prohibits interference with Sovereign Immune vessels that have been sunk, irrespective of the lapse of time since the sinking. The UK and the United States of America have been strong advocates of this interpretation of the Doctrine and have used it to secure protection from interference with wrecks of their State vessels globally, some of which constitute UCH. Where the neighbouring coastal State shares this interpretation of Sovereign Immunity such protection has been effective³⁸. However, not all jurists or States accept that the Doctrine applies to a wrecked vessel (as opposed to a functioning one) or possibly to a vessel that has been submerged for a considerable number of years³⁹.

³⁴ Sovereign Immunity will also potentially apply within Territorial Waters and the CZ but see further the caveats discussed post.

³⁵ The most cited example being a warship but any State owned or operated vessels used for non-commercial purposes could potentially qualify.

³⁶ Articles 95 & 96

³⁷ Article 4(1); see also Article 14 Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910.

³⁸ For example, the UK has invoked the Doctrine to prevent interference with the wrecks of *HMS Prince of Wales* and *HMS Repulse* (sunk in 1942 in international waters off Malaysia) and of Second World War aircraft lost in the internal waters of the United States of America. The UK has also invoked the Doctrine to require consent for the recovery of artefacts from *HMS Victory*, sunk in 1744 on the UK's CS.

³⁹ For a discussion of this issue see further Forrest op. cit. pp. 335-338; Calfish, L 'Submerged Antiquities and the International Law of the Sea' (1982) 13 *Netherlands Lawbook of International Law* 20; Roach, J A 'Sunken warships and military aircraft' (1996) 20 *Marine Policy* 351; Bederman, D J 'Rethinking the Legal Status of Sunken Warships' (2000) 31 *Ocean Development and International Law* 97; Forrest, C 'An international perspective on Sunken State Vessels as Underwater Cultural Heritage' (2003) 34 *Ocean Development and International Law* 41; Migliorino, L 'The Recovery of Sunken Warships in International Waters' in Vukas, B (ed.) *Essays on the New Law of the Sea*, (1985) Zagreb.

In these circumstances, where the relevant coastal State takes either of these views, the UK has been unable to secure immunity from interference⁴⁰. What is clear is that while the Doctrine of Sovereign Immunity can afford protection to UCH both within the territorial waters of another coastal State and beyond them in international waters, the geo-political reality is that beyond the UK's CS the UK (and other States in a similar situation) is dependent upon the co-operation of other coastal States to enforce the Doctrine and this co-operation is not always forthcoming. Therefore the Doctrine of Sovereign Immunity produces variable results, a successful outcome being conditional upon the co-operation of another coastal State(s).

That there is a lacuna in regulation of activities directed at UCH situated outside territorial waters is beyond dispute. This was not thought to be significant when UNCLOS was negotiated, since the depth at which much of this UCH is situated made the difficulties of locating and accessing it extremely formidable and this alone afforded protection. Sadly, technological evolution has radically changed this. What then is the exact nature of the threat from this greatly enhanced underwater technology now facing UCH located beyond territorial waters, which the UNESCO Convention is designed to counter?

The Evolution of Underwater Technology and the Threat Posed by Activities Directed at UCH Located Outside Territorial Waters

The threats to UCH beyond the 12nm limit are extensive and are divided by UNESCO into three major categories:

1. Environmental Threats (e.g. marine life/erosion)
2. Activities that may incidentally affect it (e.g. construction/fishing)
3. Activities directed at it (e.g. looting/salvage)

Of these, environmental threats fall outside the scope of the convention. Human threats that may incidentally affect UCH (such as construction or fishing) are best dealt with via decision making structures such as an Environmental Impact Assessment; or by robust policy and management systems such as those applied to fishing and biodiversity, which are important, but not the subject of this paper. This leaves activities directed at UCH.

The key issue with risk to UCH is accessibility, the ability for humans to access it and therefore have a direct impact upon it. This impact can be through positive factors such as scientific investigation and public enjoyment or more negative ones such as commercial exploitation and looting. There have been in excess of 160 major cases worldwide of commercial exploitation of UCH in the last 30 years and incidental looting is very common. Most accessible wrecks are now devoid of small finds. When UNCLOS was negotiated between 1973 and 1982, the depths at which UCH outside territorial waters lies made accessing it extremely formidable, indeed effectively impossible, for anyone but a very few government or scientific organisations. This section briefly explains the development of human ability

⁴⁰ For example, in the case of *HMS Swift*, sunk in the 18th century in what are now Argentinian territorial waters. It should be noted that in this case the vessel was the subject of a professional excavation by fully competent national archaeological authorities in complete compliance with the Rules of the Annex to the UNESCO Convention. The relevant point merely being that Argentina takes the view that the vessel, due to lapse of time, does not attract Sovereign Immunity and consequently the consent of the Flag State, the UK, is not required to conduct such professional archaeological investigations.

to access UCH, and demonstrates how that position has changed during the years in which UNCLOS was being negotiated and further deteriorated during 1993 and 2001 when the UNESCO Convention on Underwater Cultural Heritage was being drafted

Throughout history human ability to access to the underwater environment has been very limited. The development of the standard diving dress in the 19th century altered this and allowed humans for the first time to spend time on the seabed and achieve considerable salvage feats. An example of this is the work of the Deane Brothers in salvaging the wreck of HMS *Royal George* and incidentally discovering the archaeological wreck of the *Mary Rose* as a by-product of this⁴¹. Standard dress was improved upon by the development of observation chambers in the early 20th century, SCUBA in the mid 20th century, deep submergence vehicles and remote operated vehicles in the mid to late part of the 20th century. This development has gradually increased the depth to which people can directly access the seabed to depths that were inconceivable a few decades ago, as is shown in Table 1 and the graph below (Fig 1).

It should be borne in mind that the average depth of the deep ocean is around 4,200m, a depth exceeded in the 1980s for salvage operations and that the deepest surveyed point in the oceans, with a depth of 10,911m is the Challenger Deep in the Mariana Trench located in the western Pacific Ocean. This was reached by a manned deep submergence vehicle, the *Trieste* in 1960⁴², and whilst that event has not been repeated Challenger Deep has been dived by unmanned vehicles since.

Table 1: Famous 20th century shipwreck salvages					
No	Year	Wreck	Depth	Method	Purpose
1	1902	Antikythera Wreck ⁴³	60m	Diver	Archaeology
2	1915	USS <i>F-4</i> ⁴⁴	93m	Diver	Submarine Salvage
3	1932	SS <i>Egypt</i> ⁴⁵	125m	Observation chamber and Grab	Bullion Salvage
4	1966	Palomares incident ⁴⁶	880m	Deep Submergence Vehicle	Lost Nuclear Weapon
5	1969	DSV <i>Alvin</i> ⁴⁷	1,500m	Deep Submergence Vehicle	Submarine Salvage
6	1985	Air India Flight 182 ⁴⁸	2,042m	Remote Operated Vehicle	Air Crash Investigation
7	1987	RMS <i>Titanic</i> ⁴⁹	3,810m	Deep Submergence Vehicle	Object Salvage
8	1987	SSA Flight 295 ⁵⁰	4,450m	Remote Operated Vehicle	Air Crash Investigation
9	1989	United Airlines Flight 811 ⁵¹	4,572m	Remote Operated Vehicle	Air Crash Investigation
10	1996	MV <i>Rio Grande</i> ⁵²	5,762m	Remote Operated Vehicle	Study Deepest Wreck

⁴¹ Bevan, J 1996 *The Infernal Diver*

⁴² Piccard, P and Dietz R S 1961 *Seven Miles Down The Story of the Bathyscaph Trieste*.

⁴³ Du Plat Taylor, J 1966 *Marine Archaeology*

⁴⁴ Masters, D. 1938 *Divers in Deep Seas*

⁴⁵ Scott, D 1932 *The Egypt's Gold*

⁴⁶ Lewis, F 1987 *One of Our H-Bombs is Missing*

⁴⁷ <http://www.whoi.edu/page.do?pid=10737> Retrieved 1st November 2010

⁴⁸ SUBSALV US Navy 1992 *Commercial Aircraft Salvage Operations*

⁴⁹ <http://www.rmstitanic.net/index.php4?page=55> Retrieved 1st November 2010

⁵⁰ SUBSALV US Navy 1992 *Commercial Aircraft Salvage Operations*

⁵¹ SUBSALV US Navy 1992 *Commercial Aircraft Salvage Operations*

⁵² <http://www.bluewater.uk.com/achievements.htm> Retrieved 1st November 2010

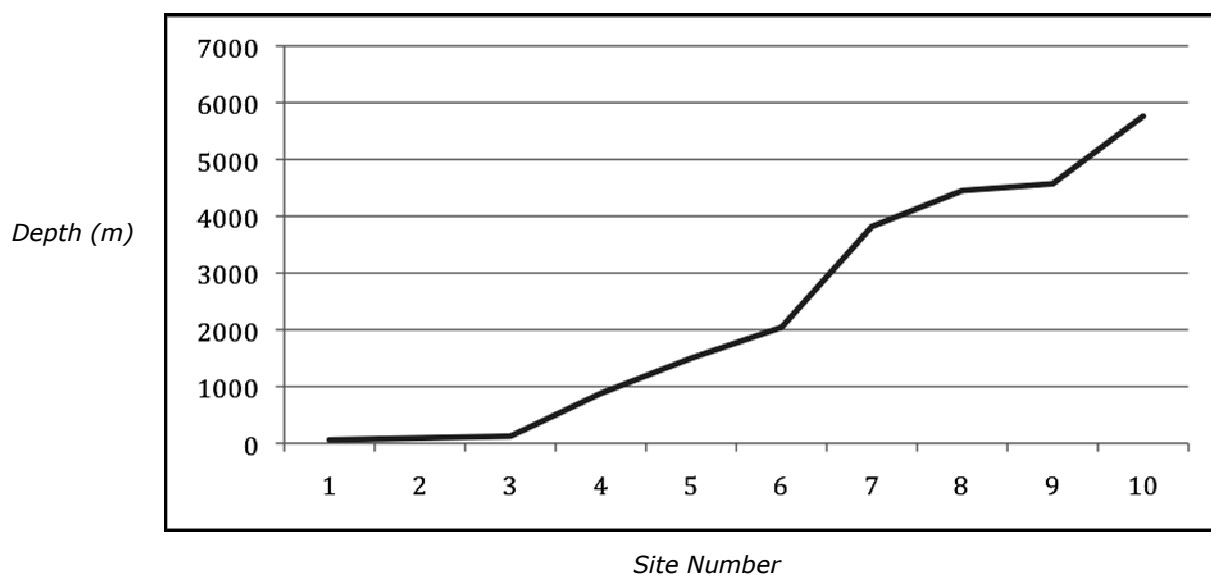


Figure 1: Increasing depth of salvage operations

For the first half of the 20th century these developments were driven by a number of goals, principally the salvage of valuable recent cargoes, the saving of submariners' lives, the investigation of aircraft and shipping disasters and the development of underwater science. In the 1960s development of the offshore oil and gas industry provided a new driver for the development of deep water technology and the funds with which to do this⁵³. By the early 1980s these investments had developed a safe and commercially viable means for accessing shipwrecks in the deep ocean. Indeed a paper published in 1984 in the *Marine Technology Society Journal* explained how the technological challenges surrounding salvage in the deep ocean were on their way to being solved⁵⁴ and heralded in the era of deep water shipwreck exploration that began publicly with Dr Robert Ballard's discovery of the RMS *Titanic* in 1986 in 3,810m of water, 450 miles southeast of Newfoundland.

When Ballard found the wreck in 1986 it was a pioneering feat, since only three submersibles could dive this deep at that date. He saw that now found, the greatest threat to the site of the *Titanic* was man and he asked that the site be respected and unmolested⁵⁵. Prior to this discovery little attention had been paid to shipwrecks in the deep ocean beyond that of recently lost nuclear submarines. Ballard's expedition had been part of this activity, being funded by the US military to survey the wrecks of nuclear submarines, the USS *Thresher* and USS *Scorpion*⁵⁶, but his discovery awoke an interest in other deep ocean wrecks⁵⁷. Technology had now reached the point where it was available for commercial hire and this was only a few years after Ballard had made his fears known. Titanic Ventures Limited Partnership (now RMS *Titanic* INC) visited the site and recovered some 1,800 objects⁵⁸.

⁵³ <http://subsea.ddict.co.uk/index.php> Retrieved 1st November 2010

⁵⁴ Crothall, A.C. 1993 *Wealth From the Sea*

⁵⁵ Ballard, R. 1987 *The Discovery of the Titanic*

⁵⁶ http://www.timesonline.co.uk/tol/news/world/us_and_americas/article3994955.ece Retrieved 1st November 2010

⁵⁷ ⁵⁷ Ballard, R 2005 Deep Water Archaeology in *Terra Marique* Pollini, J (ed)

⁵⁸ <http://www.rmstitanic.net/index.php4?page=43> Retrieved 1st November 2010

Table 2: Shipwreck Discoveries in Water over 1,000m Deep (Pre WWI vessels <u>underlined</u>)				
Found	Lost	Site	Depth	Reason for Location
1963	1963	USS <i>Thresher</i> (SSN-593) ⁵⁹	2,600m	Survey of lost nuclear submarine
1968	1968	K-129 ⁶⁰	5,000m	Part of hull recovered by CIA in 1974
1969	1968	USS <i>Scorpion</i> (SSN-589) ⁶¹	3,000m	Survey of lost nuclear submarine
<u>1985</u>	<u>1912</u>	<u>RMS <i>Titanic</i></u> ⁶²	<u>3,810m</u>	<u>Over 5,500 objects salvaged up to 17 tons</u>
<u>1986</u>	<u>1857</u>	<u>SS <i>Central America</i></u> ⁶³	<u>2,600m</u>	<u>Bullion salvage, c\$125 million recovered</u>
1988	1986	K 219 ⁶⁴	6,000m	Russian survey found missiles missing
<u>1988</u>	<u>c1900</u>	<u>Four masted schooner (?)</u> ⁶⁵	<u>5,000m</u>	<u>Found during search for <i>Bismark</i></u>
1989	1941	<i>Bismarck</i> ⁶⁶	4,791m	Location and filming of battleship
1989	1989	K-278 ⁶⁷	1,680m	Survey of lost Russian nuclear submarine
<u>1990?</u>	<u>c100</u>	<u>Roman Trading Vessel</u> ⁶⁸	<u>2,400m</u>	<u>Found during a search for another site</u>
1990	1977	MV <i>Lucona</i> ⁶⁹	4,200m	Insurance fraud and murder investigation
1994	1980	MV <i>Derbyshire</i> ⁷⁰	4,210m	Location to establish cause of loss
1995	1944	I-52 ⁷¹	5,180m	Location and filming of lost submarine
1996	1944	MV <i>Rio Grande</i> ⁷²	5,762m	Deepest Shipwreck Found
<u>1996</u>	<u>1869</u>	<u>SS <i>General Abbattucci</i></u> ⁷³	<u>2,650m</u>	<u>Commerical salvage of a packet ship</u>
1997	1943	SS <i>Alpherat</i> ⁷⁴	3,770m	Deepest cargo salvage, 179 tons of metals
1998	1942	USS <i>Yorktown</i> ⁷⁵	5,000m	Location and filming of aircraft carrier
<u>1999</u>	<u>c300BC</u>	<u>Hellenistic Trading Vessel</u> ⁷⁶	<u>3,048m</u>	<u>Deepest ancient shipwreck found</u>
1999	1969	INS <i>Dakar</i> ⁷⁷	2,900m	Location of lost submarine
1999	1961	<i>Liberty Bell 7</i> ⁷⁸	4,500m	Recovery of an early spacecraft
2001	1941	HMS <i>Hood</i> ⁷⁹	2,804m	Location and filming of battlecruiser
2002	1941	HMS <i>Ark Royal</i> ⁸⁰	1,066m	Location and filming of aircraft carrier
<u>2002</u>	<u>c1815</u>	<u>Mardi Gras Shipwreck</u> ⁸¹	<u>1,220m</u>	<u>Deepwater pipeline survey</u>
2004	2002	<i>Prestige</i> ⁸²	3,830m	Recovery of oil cargo
2008	1941	HMAS <i>Sydney</i> ⁸³	2,468m	Location and filming of cruiser
2008	1941	HSK <i>Kormoran</i> ⁸⁴	2,580m	Location and filming of cruiser
2008	1943	AHS <i>Centaur</i> ⁸⁵	2,060m	Location and filming of hospital ship

⁵⁹ Ballard, R 2008 *Archaeological Oceanography*

⁶⁰ <http://www.qwu.edu/~nsarchiv/nukevault/ebb305/doc01.pdf>. Retrieved 1st January 2011

⁶¹ Ballard, R 2008 *Archaeological Oceanography*

⁶² <http://www.rmstitanic.net/index.php4> Retrieved 1st November 2010

⁶³ Kinder, G. 1998 *Ship of Gold in the Deep Blue Sea*

⁶⁴ Huchthausen, P; Kurdin, I & White, A.R. 1997 *Hostile Waters*,

⁶⁵ Ballard, R 2008 *Archaeological Oceanography*

⁶⁶ Ballard, R 2008 *Archaeological Oceanography*

⁶⁷ <http://www.globalsecurity.org/military/world/russia/685.htm> Retrieved 1st January 2011

⁶⁸ <http://www.bluewater.uk.com/gallery.htm> Retrieved 1st January 2011

⁶⁹ <http://www.bluewater.uk.com/gallery.htm> Retrieved 1st November 2010

⁷⁰ <http://www.north-country.co.uk/derbyshire.htm> Retrieved 1st November 2010

⁷¹ <http://www.nauticos.com/I-52.htm> Retrieved 1st January 2011

⁷² <http://www.bluewater.uk.com/achievements.htm> Retrieved 1st November 2010

⁷³ http://www.sonistics.com/smer_update_ind.php?id=37 Retrieved 1st January 2011

⁷⁴ <http://www.bluewater.uk.com/achievements.htm> Retrieved 1st November 2010

⁷⁵ Ballard, R 2008 *Archaeological Oceanography*

⁷⁶ <http://www.nauticos.com/press/02-20-01.htm> Retrieved 1st January 2011

⁷⁷ <http://www.submarines.dotan.net/dakar/> Retrieved 1st November 2010

⁷⁸ Madaras, E.I. & Smith, W.L. 1999 *Liberty Bell 7 Recovery Nondestructive Testing* NASA/TM-1999-209824

⁷⁹ Mearns, D. 2009 *Hood and Bismark*

⁸⁰ <http://news.bbc.co.uk/1/hi/uk/2585887.stm> Retrieved 1st November 2010

⁸¹ <http://www.gomr.mms.gov/PDFs/2008/2008-037.pdf> Retrieved 1st January 2011

⁸² www.pcs.qr.jp/doc/esymposium/2005/2005_Fontolan_E.pdf Retrieved 1st January 2011

⁸³ Mearns, D. 2009 *The Search for the Sydney*

⁸⁴ Mearns, D. 2009 *The Search for the Sydney*

⁸⁵ <http://www.couriermail.com.au/news/queensland/shipwreck-hunter-david-mearns-confirms-ship-is-the-centaur/story-e6freoof-1225812236136> Retrieved 1st January 2011

Since 1987 RMS *Titanic* INC have mounted seven expeditions to the wreck recovering over 5,500 objects, the largest weighing 17 tons⁸⁶. Prior to the discovery of the *Titanic* the US Navy had used the deep submergence vehicle *Trieste* in the late 1960s to locate and survey the wrecks of the lost nuclear submarines USS *Thresher* and USS *Scorpion* (details in Table 2 above) soon after their loss. As can be seen in Table 2, since the discovery of the *Titanic*, the number of deepwater shipwrecks sites discovered has increased notably as the technology to work in these depths has expanded and become more affordable. This was particularly due to the development of fibre optic cables which allowed humans to stay on the surface and view the seabed below, making the operation not only safer but cheaper⁸⁷. Most of these sites are 20th century in date, however around 21% of those listed in Table 2 predate the outbreak of the First World War, found as a by-product of searches for more modern sites or as targets for commercial salvage.

Alongside the development of commercially viable means of accessing wrecks in deep water has come the advance of the depth capability of divers. This advancement has been driven by the same goals as listed above and required a need for divers to operate in depths well beyond the range possible whilst breathing air, 50m being the recommended limit for air diving in the UK. This advance, the development of breathing mixtures other than air, known as mixed gas diving, started prior to the Second World War and was accelerated by the development of the offshore oil industry from the 1960's, which vastly increased the depth to which naval and commercial divers could dive. Perhaps the most famous activity directed at UCH resulting from this development was the salvage by divers, from a depth of 245m, in 1981 of 4,570 kg of gold from the wreck of the cruiser HMS *Edinburgh*, lost in the Barents Sea in 1942⁸⁸.

Mixed gas technology found its way to the recreational diving industry in the late 1980s and has become known as 'technical diving'. Whilst a relatively small number of recreational divers use the technology it has vastly increased the depth to which some recreational divers can reach. In the 1980s 50m was considered a deep dive, but now dives to 150m are not unusual⁸⁹. The deepest technical wreck dive was on the *Milano* at 236m in Lake Maggiore, Italy and the deepest wreck dive in open sea is 205m on the *Yolanda* in the Red Sea⁹⁰.

These developments opened up a new era of shipwreck exploration. Many previously unexplored wrecks, excluded from divers because of the depth of water in which they lie, were first dived in the 1990s /2000s. There is no doubt that a significant driver for some of those involved was the interest in identifying and researching the wrecks concerned and discoveries have been made that are historically important. However it cannot be denied that many of these discoveries have been followed by unsystematic, unscientific recovery of material, as a glance through the recreational diving press of the time confirms. An example of this is the wreck of the RMS *Carpathia*, the Cunard Liner made famous as the *Titanic*'s rescue ship. She was torpedoed in 1917, 150 miles SSW Baltimore in the Republic of Ireland in 156m of water. The wreck was first dived by technical divers in 2007 and since

⁸⁶ <http://www.rmstitanic.net/index.php4?page=55> Retrieved 1st November 2010

⁸⁷ Ballard, R 2005 Deep Water Archaeology in *Terra Marique* Pollini, J (ed)

⁸⁸ Wharton R, 2000 *The Salvage of the Century*

⁸⁹ www.deepimage.co.uk/diving/wreckdiving.htm Retrieved 1st November 2010

⁹⁰ www.divernet.com Retrieved 1st November 2010

that date nearly 100 objects have been recovered. A dive to these depths at this kind of location, towards the edge of the continental shelf in the western approaches to the English Channel is no small achievement and shows that the seabed in the majority of the UK's EEZ and CS is now accessible to some recreational divers.

The Current Situation in the UK's EEZ and CS

The UK's Maritime & Coastguard Agency's Receiver of Wreck estimates that around 40% of recoveries of shipwreck material reported by recreational divers are from outside UK territorial waters and that these are probably increasing as a percentage of reported recoveries. Many of the divers that regularly report recoveries to the Receiver are enthusiastic wreck researchers driven by the challenge of identifying unknown wrecks and many of these individuals are concerned that commercial salvage of wrecks off the UK coast, but outside territorial waters, is destroying wrecks that they are diving on⁹¹. These comments are supported by information publicly available on the internet by organisations such as Sub Sea Resources⁹² or in the media such as Discovery TV's *Secrets of the Silver Queen* (SS *Laconia*) and *Turning Lead into Gold*, which are TV series episodes of the *Treasure Quest* series⁹³.

Conclusion

In conclusion, the following points may be summarised:

- Commercial salvors have a proven capability to work on wrecks in up to 5,273m (3.28 miles) of water
- Archaeological wreck sites have been found in water as deep as 3,048m (1.89 miles)
- Perhaps as many as 21% of shipwreck sites in deep water (1,000m+) predate the First World War
- Dives by recreational divers to 80/90m in UK waters are not uncommon
- A very small number of recreational divers are diving wrecks in depths of up to 150m
- Commercial exploitation of wrecks around the UK, but outside of territorial waters, is not uncommon
- History shows that unregulated access leads to commercial exploitation and looting

The regulatory lacuna, which is an enduring legacy, or some would say failure, of the UNCLOS regime established in 1982, is now permitting very real damage to be inflicted upon the UCH located beyond coastal States' territorial waters. All coastal States need to address this lacuna urgently and to-date the UNESCO Convention is the only internationally negotiated mechanism for so doing.

The authors are grateful to Prof. Sarah Dromgoole, University of Nottingham for her assistance in the preparation of this paper. Any errors or omissions remain the sole responsibility of the authors.

⁹¹ Source Receiver of Wreck, Maritime and Coastguard Agency

⁹² <http://subsea.ddict.co.uk/index.php> Retrieved 1st November 2010

⁹³ www.yourdiscovery.com/web/treasure-quest/ Retrieved 1st November 2010

Introduction

This paper outlines a project called 'Assessing Boats and Ships'², which is a national stock-taking exercise of known wrecks in England's territorial waters, including the national preserved fleet. This assessment relates to the key historical narratives of ship construction and fitting, shipping use and shipping losses in the period 1860-1950, sub-divided into 1860-1913; 1914-1938; and 1939-50. The results have been compiled as three reports, one for each period³. The particular relevance of this project to the subject of the conference is that it is concerned with applying the concept of significance to large numbers of wreck sites, which was a key concern of the UK Government in explaining its vote on the UNESCO Convention in 2001. Specifically, the UK Government commented as follows:

*'The procedures for the protection of underwater archaeology adopted in the Annex are those which are already followed by the United Kingdom with regard to the designation of wreck sites within its territorial sea and internal waters. However, the text obliges signatory states to extend the same very high standards of protection to all underwater archaeology over 100 years old. **It is estimated that there are probably 10,000 wreck sites on the seabed under the United Kingdom's territorial sea and it would neither be possible nor desirable to extend legal protection to all of them. The United Kingdom believes that it is better to focus its efforts and resources on protecting the most important and unique examples of underwater cultural heritage.** It would simply be impossible to enforce the application of the rules in the Annex to every one of the thousands of wreck sites.'*

UNESCO UCH Convention: UK Explanation of Vote, 2001 (added emphasis)

In our day-to-day work, both for heritage agencies and for marine developers, we are often required to comment on the significance of shipwrecks. This can be a tricky task, and we have carried out a couple of projects to develop robust methodologies and guidance for ascribing significance, notably *On the Importance of Shipwrecks* (April 2006) and the *Selection Guide: Boats and Ships in Archaeological Contexts* (February 2008).

Counting Wrecks

Whilst working on the Boats and Ships Selection Guide we raised some queries of the English National Monuments Record (NMR). The NMR includes over 40,000 records of maritime sites in English territorial waters, as explained in the 2002 document, *Taking to the Water*:

'due to the combination of historically high volumes of shipping traffic, a long history of seafaring and a high energy coast, the density of shipwreck remains in English territorial waters is likely to be amongst the highest in the world – the NMR contains records of over 40,000 marine sites ...'

Roberts and Trow, 2002, *Taking to the Water*, p. 5

¹ Head of Coastal and Marine, Wessex Archaeology

² The project is being carried out by Wessex Archaeology, funded by English Heritage with the support of the Aggregate Levy Sustainability Fund (ALSF)

³ See <http://www.wessexarch.co.uk/projects/marine/assessing-boats-ships>

However, many of these records are what are known as casualties – documented ship losses. The fact that a casualty has been recorded does not, however, mean that an actual wreck has been found on the seabed. In order to address our particular concern we wanted to be able to relate an individual wreck to the overall resource of known wrecks, rather than to the record of ships that have been lost. That is to say, we wanted to address the *actual* resource, rather than the *potential* resource. So whilst there are over 40,000 maritime records in the English NMR, the number of known wrecks – actual features – was only 5307 (Sept. 2007):

Table 1: Recorded wrecks in English Waters (Source: NMR Sept 2007)	
Period Known	2,800
Period Uncertain	2,507
<i>Total</i>	<i>5,307</i>

Of these, 2,507 were known but not dated, mainly because they have not been identified. This left only 2,800 known, dated sites. The breakdown of these 2,800 wrecks by period is striking:

'Of the dated shipwrecks, about 100 are dated to periods earlier than 1860. Approximately one third of these wrecks are designated under the Protection of Wrecks Act 1973. About 500 wrecks date to the period 1860-1913. In total, 2,170 (over 77.5% of those dated) are attributable to the First World War, the inter-war period, and the Second World War.'

WA, February 2008, *Selection Guide: Boats and Ships in Archaeological Contexts*

It is widely appreciated that the resource of known wrecks is dominated by those from relatively recent decades (as, being based predominantly on hydrographic records, wrecks with substantial metal components are represented preferentially), but the steepness of the age profile is surprising:

Table 2: Number of known wrecks in English Waters by period (Source: NMR Sept 2007)			
Min Date	Max Date	Period	Count
-500,000 yrs	42 AD	Prehistoric	0
43	410	Roman	0
411	1065	Early Medieval	0
1066	1508	Medieval	1
1509	1602	Henry VIII – Eliz. I	11
1603	1641	Stuart	4
1642	1688	English Civil War / Anglo-Dutch Wars	6
1689	1763		30
1764	1815	American Independence and French Revolutionary Wars	28
1816	1859		22
1860	1913	Metal; Steam; Screw	504
1914	1918	WWI	1,051
1919	1938	Inter-War	249
1939	1945	WWII	870
1946	present	Post-War	24
<i>Total</i>			<i>2,800</i>

Only 100 wrecks are known to pre-date 1860, a third of which are already designated. About 500 date to the late nineteenth century. Over three quarters date to the twentieth century, especially to the two world wars.

Comparable figures from the relevant records of each home country in the UK show that the period profile in England is reflected also in Wales, Northern Ireland and Scotland:

Table 3: Number of recorded wrecks in UK Territorial Waters by period (Sources: English Heritage; RCAHMS; RCAHMS; CMA Coleraine, Oct 2010)						
Broad Period	England	Wales	N Ireland	Scotland		Total
<i>pre 1859</i>	102	35	15	18	pre-1800	170
<i>1860-1913</i>	518	118	30	100	C19th	766
<i>Total pre-1914</i>	620	153	45	118		936
<i>1914-1938</i>	1,358	104	74			
<i>Total pre-1938</i>	1,978	257	119			
<i>1939-1950</i>	862	126	28			
<i>Total 1914-1950</i>	2,220	230	102	748	C20th	3,300
<i>Total dated</i>	2,840	383	147	866		4,236
<i>Undated</i>	2,252	514	150	744		3,660
<i>Total wrecks</i>	5,092	897	297	1,610		7,896

The overall number of known wrecks in these archaeological records is about 8,000. This accords reasonably well with figures from the UK Hydrographic Office, of about 9,900 known wrecks in UK territorial waters from 1870 onwards, and is in line with the 2001 statement of about 10,000 wrecks. However, the number of wrecks known to be over 100 years old – and therefore subject to the Convention – is less than one thousand.

Although many more wrecks will become eligible as we approach the centenary of the First World War, which resulted in large numbers of losses, by 2018 the number of wrecks known to be over 100 years will be about 2,800. For the purposes of our work, it was possible to conclude that wrecks dating prior to 1860 were so rare that they were highly likely to be significant for one reason or another,

Assessing Boats and Ships

Attention turned, therefore, to the less certain issue of ascribing significance to more recent wrecks, not least because these were the ones we encounter most commonly in our work for marine developers. It is also the case that the mid-C19th to mid-C20th encompassed numerous and radical changes in shipping, of which wrecked examples could prove highly significant. Furthermore, it is a period for which there are examples still afloat – ‘in preservation’ – which ought also to be taken into consideration when addressing the significance of individual wrecks. Our task, therefore, was to develop ways of considering the significance of numerous wrecks. Gauging the importance of environmental receptors such as shipwrecks is essential to carrying out Environmental Impact Assessment, so we could not simply put this task aside as ‘impossible’. Every day, we are asked how important such-and-such a wreck or feature is: it is not a question to be dismissed.

In completing 'Assessing Boats and Ships,' we sought to break down the record of known wrecks into smaller groups to understand more fully what the archaeological record comprises, and how it relates to historical narratives and how this might be linked directly to questions of historical significance. It is notable that whilst the wrecks in the periods we are examining are numbered in their hundreds, records suggest that a high proportion have been broken up or dispersed.

The 'Significance' Paragraph in the UK Explanation of vote

Putting all this into the context of the UK Explanation of vote, the 'significance' paragraph might almost be paraphrased as a variation of Catch 22:

'The UK believes that protection should be based on significance rather than being 'blanket', but assessing significance is impossible because there are so many wrecks in UK territorial waters'

The Issue of Designation and Licensing

As has already been shown, the numbers are not as large as implied, but there are also other things to note concerning the UK position on designation and licensing. The Government view was that:

'The procedures for the protection of underwater archaeology adopted in the Annex are those which are already followed by the United Kingdom with regard to the designation of wreck sites within its territorial sea and internal waters'

'... the text obliges signatory states to extend the same very high standards of protection to all underwater archaeology over 100 years old'

In the UK, application of the Rules is achieved by designating individual wrecks and requiring that investigations on those sites are subject to licence. There is no general licensing requirement for the investigation of archaeological material. Outside designated areas, the investigation of archaeological material is an unregulated 'freedom' constrained only by land ownership.

This is very different to most other states, where all activities directed at archaeological material are subject to licence, irrespective of where they occur and of any designation.

The UK tradition of regulating activity directed at archaeological material can be characterised as 'monument-based' because licensing is triggered by a designated monument. This contrasts with the more common 'event-based' regulation of other countries where licensing is triggered by the activity, irrespective of the presence of a monument (designated or otherwise).

It is because designation is assumed to be intrinsic to licensing in UK Government eyes that the Convention was seen as introducing an unwelcome obligation. The actual obligation is set out in Article 7(2) of the Convention:

7(2) ... States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea

For most states, Article 7(2) is little more than a codification of the existing practice of event-based licensing, asking only that reference be made to the Annex. For the monument-based UK, however, it was understood to require the introduction of mass designation. So whilst it is true that Article 7(2) creates an obligation to require application of the Rules in territorial waters, it does not create an

obligation to introduce statutory protection by designating all sites. Mechanisms other than designation, such as event-based licensing, will satisfy the Convention equally well⁴.

'It is estimated that there are probably 10,000 wreck sites on the seabed under the United Kingdom's territorial sea ...'

'... and it would neither be possible nor desirable to extend legal protection to all of them'

As already indicated, the best available evidence for the number of known wrecks on the seabed subject to the Convention is less than 1,000 rather than 10,000. Even if we were to anticipate WWI wrecks starting to fall within the definition of underwater cultural heritage over the next 4-8 years, the numbers – about 2,800 – are not insurmountable⁵.

The main point is that the number of wrecks is relevant only if a monument-based approach is taken to protection. If adopting the event-based approach that underpins the Convention, then the number of wrecks is irrelevant. All that matters is the number of *'activities directed at underwater cultural heritage'* as defined by the Convention. While there are no definitive figures, it seems likely that the number of licensable activities each year is very low, especially if the activities already subject to licensing through the Protection of Wrecks Act 1973 are set aside. The number of currently unlicensed *'activities'* might only amount to a few tens of investigations each year.

The reason that the number is so low is because, in my view, the Convention only requires licensing of a very narrow range of activities:

*1(6) Activities directed at underwater cultural heritage' means activities having underwater cultural heritage as their primary object **and** which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage (Added emphasis)*

In the first instance, *'activities directed at UCH'* are only those activities which have UCH as their primary object. Second, the relevant activities only include those *'which may disturb or otherwise damage'*. As indicated in bold, these clauses are linked by an *'and'*, which means that both clauses have to be satisfied in order for activities to count as *'activities directed at UCH'*. Activities directed at UCH but which do not risk damaging or disturbing the site need not be subject to the Rules of the Annex. To my mind, this means that within territorial waters, only intrusive investigations directed at UCH need be licensed under the Convention.

To reiterate, the Convention does not require legal protection by designating all wrecks. The view that the Convention would require a major programme of designation was invented by the UK Government; its problem was not with what the Convention said, but with what it thought the Convention said. This is an important part of why the UK thought there was a need to prioritise:

'The United Kingdom believes that it is better to focus its efforts and resources on protecting the most important and unique examples of underwater cultural heritage'

⁴ Note: Article 10(1) provides that *'No authorisation shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article'*. This article does not create an obligation to establish an authorisation system; it only requires that, where authorisation is required, it must be in conformity.

⁵ I recognise, of course, that some undated sites are likely to belong to these periods and could swell their numbers; I also recognise that there is potential for new wrecks to be found in UK waters. But decisions should be evidence-based, and this is what the current evidence indicates.

This phrase presents no problem; I agree with its sentiments and the policy background on significance. But as I have said, I do not believe that the Convention requires sites to be designated irrespective of significance. 'Protecting' and 'designating' are not synonymous; the Convention refers to 'protection,' not to 'designation'. The Convention does not preclude significance-based management of sites.

Enforcement

Taking the assumptions about the number of wrecks and the supposed requirements for designation/licensing together led to a further UK Government concern, that:

'It would simply be impossible to enforce the application of the rules in the Annex to every one of the thousands of wreck sites'

The point made here concerns the perceived burden of enforcement, but again, the number of wrecks is irrelevant. The question relates only to the number of damaging 'activities directed at UCH', which as noted above, probably amount to only a few tens per annum.

Even if the number of wrecks were to be relevant, the supposed impossibility of enforcing the application of the rules in the Annex ought to be considered in comparison with other heritage designations that involve day-to-day heritage management:

Table 3: Number of known wrecks over 100 years old and other heritage designations in England (Source: English Heritage, Heritage Counts 2010: England, p. 25)	
Wrecks over 100 years old	620
Scheduled Monuments	19,724
Listed Buildings	374,319

The 19,724 Scheduled Monuments in England alone amount to twice the number of known wrecks as stated in 2001 when the Convention was being discussed, and twenty times the number of known wrecks UK wide that would be subject to the requirements of the Convention. A wide range of works to Scheduled Monuments can only take place with the authority of a licence, known as Scheduled Monument Consent (SMC). Relative to the practicalities of enforcing SMC, I suspect that enforcing application of the Convention might be rather straightforward. Likewise, Listed Building Consent is required for a wide range of works that would physically alter the 374,319 Listed Buildings in England.

The issue is not therefore a question of what is possible; it is a choice about how we manage our heritage on land and sea.

A Way Forward?

We are entering a new era as far as the management of marine archaeology in the UK is concerned. In 2001, the land use planning-based system that had so radically altered archaeology on land had no parallel offshore. This situation is now changing. The Marine and Coastal Access Act became law in 2009. It introduces several very important elements into the management of UK waters, including archaeology. For the purposes of this discussion, the key elements are:

- Introduction of an explicit Marine Policy Statement

- Introduction of regional marine planning which will set out local policies for sea-use, and
- A comprehensive approach to licensing of marine activities.

One passage of the draft Marine Policy Statement is especially relevant. Drawing on a point widely established for land archaeology since the late 1980s, the MPS explicitly recognises that protection and designation are not synonymous.

'Many heritage assets with archaeological interest in [coastal and offshore] areas are not currently designated as scheduled monuments or protected wreck sites but are demonstrably of equivalent significance. The absence of designation for such assets does not necessarily indicate lower significance and the marine plan authority should consider them subject to the same policy principles as designated heritage assets based on information and advice from the relevant regulator advisors'

UK Marine Policy Statement, March 2011

This is an explicit recognition that sites may be significant even if they are not designated, and the same policy principles are expected to apply. Consequently, the planning system provides a mechanism for protecting significant non-designated sites.

In a note relating to the design of the new marine planning system, direct reference is made to the Annex of the Convention.

'Although the UK is not a signatory to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, we would look to marine planners to take account of the principles set out in its Annex.'

Consultation on a Marine Planning System for England, DEFRA, July 2010, Note 41

In effect, even though the UK is not a signatory, marine planners are expected to take account of the principles of the Annex.

Finally, the Marine and Coastal Access Act 2009 introduces a clear and comprehensive system that seems likely to entail licensing of intrusive archaeological activities by virtue of their impact on the environment of the seabed:

65 Requirement for licence

(1) No person may—

- (a) carry on a licensable marine activity, or*
- (b) cause or permit any other person to carry on such an activity, except in accordance with a marine licence granted by the appropriate licensing authority.*

(2) Subsection (1) is subject to any provision made by or under sections 74 to 77 (exemptions).

66 Licensable marine activities

(1) For the purposes of this Part, it is a licensable marine activity to do any of the following—

- 8. To use a vehicle, vessel, aircraft, marine structure or floating container to remove any substance or object from the sea bed within the UK marine licensing area.*

9. To carry out any form of dredging within the UK marine licensing area (whether or not involving the removal of any material from the sea or sea bed).

Thus a comprehensive event-based licensing system has now been introduced, albeit to meet the general requirements of sustainable marine management and environmental protection, rather than as a system for licensing marine archaeological activities. My reading of these provisions – notwithstanding some proposed exemptions – is that '*activities directed at UCH*' that are likely to cause damage or disturbance now fall within the scope of marine licencing. As indicated by Note 41 quoted above, in licensing activities directed at UCH, and making planning decisions, the Marine Management Organisation will need to apply marine plan policies that take account of the principles of the Annex.

Summary

The main points to note about the character and significance of wrecks in UK waters in relation to the UK Government's position on the UNESCO UCH Convention are that:

- There are about 950 wrecks known to be older than 100 years in UK territorial waters.
- By November 2018 this number will have increased to about 2,800 as WWI losses become eligible.
- Methods for assigning significance to wreck sites are increasingly well developed, and can be applied to large numbers of wrecks.
- The Convention does not preclude shipwrecks from being protected or managed in such a way that effort and resources are targeted on the most significant.
- As UK Government policy makes clear, sites can be significant without being designated; and the protection of significant sites can be managed through means other than designation, such as marine planning.
- The Convention does not require blanket designation in territorial waters.
- The Convention only requires licensing of (potentially) intrusive activities that are directed at UCH as their primary object. These seem likely to be very small in number each year.
- The Marine and Coastal Access Act 2009 has introduced licensing provisions that already exceed the requirements of the Convention. Marine planners are already expected to take account of the Rules of the Annex.
- Activities directed at UCH but which are non-intrusive, and activities that do not have UCH as their primary object, do not need to be subject to licensing.
- With a licensing system for intrusive activities already in existence, and probably low numbers of activities requiring a licence, there is no reason to think that enforcement will be impossible.

Conclusion

The rationale for the UK not signing the Convention may have been valid in 2001, but it has been overtaken by changing circumstances. The concerns raised about 'significance' need no longer prevent the UK from obtaining the benefits to managing UCH further offshore that accession to the Convention will afford.

Why the UK Should Reconsider the UNESCO Convention 2001 – Sarah Dromgoole¹

The following is the text of the paper delivered at the seminar, with the addition of one or two extra points or comments responding to statements made by members of the audience, as well as a few basic supporting references. It should be noted that this paper is not intended as a detailed technical analysis of the UK's reservations with respect to the Convention.

Introduction

This paper provides a brief overview of the following: what the Convention does; why it is necessary; the reasons why the Convention is regarded as controversial; and the reasons why the UK should now reconsider its position.

First of all, a few points by way of introduction. The *Convention on the Protection of the Underwater Cultural Heritage* was adopted by UNESCO in 2001 after thirteen years of preparatory work by UNESCO and the International Law Association (which initiated the process of drafting a convention in 1988). The fact the process took thirteen years from start to finish demonstrates the complex and sensitive nature of some of the issues involved. Under UNESCO's treaty-making procedures, where possible, conventions are adopted by consensus. However, in this case, despite the best efforts of UNESCO and the government experts involved in the negotiations, consensus could not be reached on the final text of the Convention and it had to be adopted by vote. A very substantial majority of the States that participated in the negotiations voted in favour, but a significant minority either abstained from voting or voted against.² Within this minority were a number of major maritime States, including the UK, which all held similar reservations.

Compared with some other international treaties in the heritage field, the 2001 Convention is quite a long and legally complex instrument. Because it relates specifically to activities at sea, it had to deal with aspects of maritime law and, in particular, the international law of the sea, which is a highly technical – and also politically charged – area of international law. Unlike some other international instruments in the heritage field, the implications of ratification of the 2001 Convention require careful deliberation by government ministries other than culture, including defence and foreign affairs. For this reason, among others, it is inevitable that it takes a substantial amount of time for States – even those that do not have any particular reservations about its terms – to take the political decision to ratify. The Convention therefore took rather longer than some other treaties in the heritage field to gain the ratifications it required to come into force. Nonetheless, it did so in January 2009, three months after receiving its twentieth ratification, and it has now been ratified by some thirty-five States.

What does the Convention do?

The primary purpose of the Convention is to provide legal protection for UCH in international waters, in other words beyond the 12 mile territorial limit and, in the main, the Convention is designed to provide for protection in respect of activities 'directed at' UCH. These are activities that have UCH as their

¹ Professor of Maritime Law University of Nottingham (Email: sarah.dromgoole@nottingham.ac.uk)

² The Convention was adopted at the 31st Session of the UNESCO General Conference on 6 November 2001 by eighty-seven votes in favour, four against, and fifteen abstentions.

primary object, in other words, where there is an intention to physically disturb the UCH.³ The Convention does not prohibit such deliberate interference, but instead is designed to ensure that all such interference is regulated in accordance with internationally accepted archaeological standards. Those standards are enshrined in Rules in the Annex to the Convention, which form an integral part of the Convention.⁴

The Convention adopts a broad definition of UCH, which essentially includes all traces of human existence that have been underwater for at least 100 years.⁵ It therefore covers all forms of UCH, although treasure hunting and souvenir-collecting from shipwrecks are the core threats that the initiative is designed to address.

The Convention incorporates a number of principles, perhaps the core of which are:

- Preservation *in situ* shall be considered as the first option,⁶ in other words a precautionary approach should be taken and interference should be permitted only where justified for scientific or protective purposes.
- In circumstances where recovery of UCH is permitted, the recovered material shall be deposited, conserved and managed in a manner that ensures its long-term preservation.⁷
- The application of salvage law is strictly limited.⁸
- UCH shall not be commercially exploited.⁹
- Responsible non-intrusive access is encouraged.¹⁰ (Among other things, it should be noted that the Convention does not require the licensing of diving on a 'look but don't touch' basis.)
- Proper respect must be given to human remains¹¹ and activities directed at UCH shall avoid the unnecessary disturbance of human remains or 'venerated' sites.¹²

Although the primary focus of the Convention is on regulating activities in international waters, in order to ensure that the same standards were applied to all maritime waters there is provision in Article 7 in respect of waters under coastal State sovereignty, including the territorial sea and internal waters. Article 7 requires that States Parties to the Convention apply the Rules in the Annex to activities directed at UCH in these waters.

Although the Convention focuses on regulating activities directed at UCH and its general scheme is set up with such activities in mind, it does include some provision designed to protect UCH from harm

³ Art. 1(6). cf. Activities '*incidentally affecting*' UCH, as defined in Art. 1(7). For a discussion of the distinction between these two forms of activities, see O'Keefe, P *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art and Law, 2002), pp. 45-46.

⁴ Art. 33.

⁵ Art. 1(a).

⁶ Art. 2(5). See also Rule 1.

⁷ Art. 2(6). See also Rule 33.

⁸ See Art. 4.

⁹ Art. 2(7). See also Rule 2.

¹⁰ Art. 2(10).

¹¹ Art. 2(9).

¹² Rule 5. Despite the absence of specific reference to war-graves in the Convention, references to human remains and venerated sites encompass gravesites of all kinds.

caused by other types of human activity and by natural causes. Of particular note is Article 5, which makes some specific provision in respect of activities 'incidentally affecting' UCH.¹³

Why is the Convention necessary?

A general legal framework governing activities in the oceans is enshrined in the Law of the Sea Convention 1982 (LOSC), which carefully balances the rights of coastal States and Flag States in this regard. The LOSC makes some minor provision in respect of the protection of UCH¹⁴. However, although it imposes a duty on States to protect UCH in all sea areas and to co-operate for this purpose,¹⁵ it provides practical assistance in this regard only in respect of the area from 12 to 24 nautical miles which States can claim as a contiguous zone.¹⁶ Beyond 24 nautical miles, the LOSC provides no practical assistance to States to enable them to fulfil the duty it imposed on them. In particular, it provides coastal States with no direct jurisdiction over UCH on the continental shelf and in the EEZ beyond 24 nautical miles. Furthermore, it provides no means to regulate activities directed at UCH that take place in the Area, that is, the deep seabed beyond the limits of national jurisdiction.¹⁷

The LOSC was negotiated in the 1970s when the international community was only just becoming aware of the archaeological and cultural potential of the oceans. In the intervening decades, a great deal has changed. In particular, the significance of UCH is far more widely appreciated and understood than it was in the 1970s and also there have been advances in technological capabilities that could not have been envisaged in the 1970s. As we know, it is now possible to undertake systematic search and location operations over thousands of square miles of seabed and to then undertake deepwater recovery using robotic technology. Furthermore, divers now have equipment allowing them to access UCH at considerable depths.

From a jurisdictional point of view, the core of the UNESCO Convention is the control mechanisms it establishes for the continental shelf and EEZ in Articles 9 and 10. These articles do not provide for a direct extension of coastal State jurisdiction over UCH in these areas, but instead establish a rather complex scheme that relies in large measure on co-operation between the coastal State and the Flag State of any vessel involved, and/or the State or States of any key nationals involved, potentially along with some assistance from other States within the geographical region. The scheme set out for the continental shelf and the EEZ is echoed in respect of the Area.¹⁸ Both schemes rely on the co-operation of States Parties and also on widespread adherence to the Convention so that there are plenty of States Parties to co-operate.

The idea behind the UNESCO Convention is that it plugs the jurisdictional gaps left by the LOSC by giving States the means whereby, acting together – 'co-operatively' – they can regulate activities

¹³ Art. 5 provides: 'Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.' For the definition of activities 'incidentally affecting' UCH, see Art. 1(7).

¹⁴ LOSC, Arts. 303 and 149.

¹⁵ LOSC, Art. 303(1).

¹⁶ LOSC, Art. 303(2).

¹⁷ LOSC, Art. 1(1). Although Art. 149 of the LOSC relates to UCH in the Area, it provides no practical means for achieving the objective it sets out, which is 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 ...'.

¹⁸ See Arts. 11 and 12.

directed at UCH in international waters in order to ensure that those activities are conducted in accordance with internationally accepted standards.

Why is the Convention controversial?

In 2001, when the UNESCO Convention was adopted, the UK and a number of other major maritime States, namely the United States, the Netherlands, France, Germany, Russia and Norway, while expressing support for its general principles and objectives, and the annexed Rules, also expressed serious reservations or objections to certain of its provisions.¹⁹ Although small in number, the failure of the Convention to gain the support of these States is extremely significant. This is because it is these States whose nationals and flag vessels have the resources and technological capability to undertake deep water search and recovery operations. Given the nature of the regulatory mechanisms in the Convention, which rely in large measure on the jurisdiction that States have over their own flag vessels and nationals, the support of these States is vital if the Convention is to be really effective in controlling activities directed at UCH.

For these States, there were two particular problems with the Convention that are of a technical nature. One related to its relationship with the LOSC and, in particular, the question of whether or not its provisions were compliant with that Convention. The second related to its treatment of sunken warships and other State vessels and aircraft.

For the UK, there was also a third area of concern and that was the absence of a significance criterion in the definition of UCH adopted by the Convention.

Why should the UK government now reconsider its position?

Given the concerns about the Convention that the UK government, among others, expressed in 2001, why should it reconsider the matter now? It is nearly ten years since the Convention was adopted. In 2001, with just one exception,²⁰ the major maritime States were unified in their lack of support for it. At that stage there was a great deal of skepticism, particularly among law of the sea specialists, about whether the Convention would ever come into force; or, if it did, whether it would gain support from States regarded as significant from a maritime point of view – especially those with substantial military and merchant fleets. However, slowly but surely, the Convention does appear to be gaining momentum and, indeed, has been garnering support from some rather surprising quarters (see below).

As far as the problematic areas are concerned, Antony Firth has covered the question of significance (in a very interesting paper above), so these remarks are confined to the LOSC and warship issues.

(i) Compliance with the LOSC

I appreciate as much as anyone does the status of the LOSC and the sensitivities surrounding the question of any upset to the fine balance it achieves between the respective rights of coastal and Flag States.

¹⁹ Statements explaining the vote of these States (with the exception of Germany) are republished in Garaballo, R and Scovazzi, T (eds.), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Maritinus Nijhoff, 2003), Documents section 8, p. 239 *et seq.*

²⁰ Spain, see further below.

There are a number of aspects of the UNESCO Convention's provision in Articles 9 and 10 in respect of the EEZ and the continental shelf that have caused concern in respect of their potential impact on this fine balance. In particular, there are a number of 'constructive ambiguities' in these articles, in other words ambiguities that have been deliberately left in the text to allow for more than one interpretation. This was done to try to achieve consensus on the most contentious issues. However, what it means is that several provisions are open to interpretations that would run counter to the LOSC.²¹ Nonetheless, all States Parties to the LOSC (and that means a substantial majority of all States) are bound by an important provision of the LOSC (Article 311(3)) which makes it absolutely clear that, in making subsequent treaties, they must not interfere with the basic principles of the LOSC.²² Therefore, States Parties to the LOSC, in essence, are bound not to interpret the provisions of the UNESCO Convention in a way that runs counter to the careful jurisdictional balance created by the LOSC in relation to the continental shelf and EEZ.

The UK is best placed to remind other States Parties to the LOSC of their commitment in this regard by working from within the UNESCO Convention's regime, rather than from outside. In that way it can have most influence on the interpretations taken and, in effect, can reinforce the sea-walls of the LOSC before there is any chance that they start to be breached.

(ii) Sunken warships

Along with a number of other maritime States, the UK has concerns in respect of the provision that the UNESCO Convention makes for sunken warships in the territorial sea,²³ and on the continental shelf and in the EEZ,²⁴ of other States. In essence, the problem is that it does not provide in unqualified terms that (a) in the territorial sea, the Flag State *shall* be informed of discoveries, and (b) on the continental shelf and in the EEZ, that the agreement of the Flag State must be obtained *in all cases* prior to the authorisation of activities directed at UCH. However, in so far as this represents the position under general international law, that position must be maintained under the UNESCO Convention. This is because Article 3 of the UNESCO Convention provides that 'nothing in the UNESCO Convention shall prejudice the rights, jurisdiction and duties of States under international law ...'. Therefore, the rights of the UK with respect to its sunken warships can be no less under the Convention than they are in any event under general international law. Furthermore, it should be borne in mind that – in considering the position of sunken British warships under the Convention – the whole of the Convention needs to be taken into account, not just the provisions that refer specifically to warships. The Convention ensures that activities directed at warships (as is the case with any other

²¹ For some discussion of these articles and their ambiguous aspects, see O'Keefe, P *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (Institute of Art and Law, 2002), p. 80 *et seq.* See also Blumberg, R 'International Protection of Underwater Cultural Heritage', in Nordquist, M et al. (eds.), *Recent Developments in the Law of the Sea and China* (Martinus Nijhoff, 2006), pp. 491-511, esp. text of fn 21 on pp. 504-506.

²² LOSC, Art. 311(3) provides: 'Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, **provided** that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and **provided** further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.' (Emphasis added.)

²³ Art. 7(3).

²⁴ Art. 10(7).

UCH) will be subject to regulation and that interference will be permitted only where absolutely justified; in other circumstances, the principle of preservation *in situ* will prevail.²⁵ Moreover, Article 2, which sets out the objectives and general principles of the Convention, provides categorically that States Parties *shall* co-operate in the protection of UCH. It can therefore be argued that the authorisation of activities directed at a sunken warship in contravention of the wishes of a Flag State Party (in any maritime zone) would be a breach of this overarching principle of co-operation. Therefore, taking the Convention as a whole, it would appear to shore up, rather than undermine, the position of the UK and other major maritime States with respect to their sunken warships.²⁶ Indeed, I would go so far as to argue that it represents an improvement on the position under general international law, which is far from clear.²⁷

As Mariano Aznar-Gomez explains in his paper below, during the negotiation of the UNESCO Convention Spain originally had the same concerns as the UK regarding the status of its sunken warships. However, its concerns were sufficiently allayed during the negotiating process that it felt able to vote in favour of the Convention and to become one of the first States to deposit its instrument of ratification. As Michel L'Hour makes clear in his paper, France is also now poised to ratify the Convention. This is highly significant from the point of view of the UK because France was one of the maritime States that, like the UK, abstained from voting in favour of the Convention in light of its reservations on the questions of compliance with the LOSC and the treatment of sunken warships.

I think the positions of Spain and France show that the technical objections are not in themselves reasons to reject the Convention. As is the case when any State decides whether or not to ratify a particular Convention, ultimately the decision is made on the basis of a weighing up of the pros and cons of ratification: do the benefits to be gained outweigh any aspects that they dislike, such that it is in the best interests of the country to ratify? For Spain and France it seems that a tipping point in this balance was reached in part because of concerns about unregulated salvage in their offshore waters. The question is whether there is enough, at least at this stage, to tip the balance for the UK? To my mind, here in the UK we now need to move the debate forward from focusing on the technical reservations we may have to a more general 'cost-benefit' analysis of the Convention in the round.

Concluding remarks

The following are just a few specific reasons why it is now time that the UK reconsiders the position it took nearly ten years ago:

²⁵ As was pointed out at the seminar, twentieth century maritime war-graves will soon fall within the scope of the Convention. Under the conventional regime, activities directed at UCH can be undertaken only where authorised by competent authorities, in accordance with the principles of the Convention. The following principles in particular, taken together, would appear to provide a sound and appropriate basis for the management of major gravesites including war-graves: preservation *in situ* must be considered as the first option (Art. 2(5) and Rule 1); activities may only be authorised for the purpose of making a significant contribution to protection or knowledge or enhancement of UCH (Rule 1); activities *must avoid the unnecessary disturbance* of venerated sites and human remains (Rule 5; also Art. 2(9)); public access to *in situ* UCH shall be promoted *except where such access is incompatible with protection and management* (Rule 7).

²⁶ A further salient point to be noted is that the Convention makes no attempt to interfere with ownership rights in UCH and these will continue to be governed, as they are now, by the applicable national law.

²⁷ For an excellent article that addresses some of these issues, see Aznar-Gomez, M, 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', *International Journal of Marine and Coastal Law* (Vol. 25 No. 2, June 2010, pp. 209-236).

- The UNESCO Convention provides a much-needed framework to regulate activities directed at UCH on the continental shelf and in the EEZ. Application of the Rules in the Annex to the Convention as a matter of government policy is all well and good, but it cannot achieve the same outcome. The Rules cannot be applied to activities that the UK has no means of regulating.
- The UNESCO Convention has come into force and looks set to gain significant global support in the longer term. The UK should place itself in a position whereby it can influence the development of State practice under the Convention. As a State Party to the Convention, together with France and Spain (and there will be other like-minded States Parties too), it could work from within. This would help to ensure that the Convention is interpreted in a way consistent with the LOSC and that it becomes standard State practice to seek the consent of the Flag State *in all cases* prior to the issuing of authorisations for activities directed at sunken warships. (The Convention is now entering its implementation stage and it is important that influence is exerted during the early formative period.)
- There are few other options. The possibility that the US might spearhead an attempt at creating an alternative regime, which has been raised in the past, has receded in light of the departure of key personnel from the US State Department.
- Finally, the UK has a rich and varied heritage inshore, offshore and around the globe, which it needs to be active in protecting. The UK was regarded as a pioneer in 1973 when it first introduced legislation to protect UCH in the territorial sea, but since then its international reputation in this field has gradually been eroded over the years. It is now time to restore it, and it can do this by engaging actively and positively with the UNESCO initiative.

Objectives, benefits to States Parties, and implementation of the UNESCO Convention on Underwater Cultural Heritage (2001) – Ulrike Guérin¹

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) is a specialized agency of the United Nations. Among others, it works to improve the protection of all kinds of cultural heritage on a global level. Its Convention on the Protection of the Underwater Cultural Heritage seeks to improve legal and operational protection of submerged heritage. It is an international treaty, open to ratification by States and certain territories, responding to the increasing looting and destruction of such heritage.

The Convention sets out basic principles for the protection of underwater cultural heritage; it also provides a detailed State co-operation system and widely recognized scientific rules for the treatment and research of submerged sites. It does not regulate ownership issues nor does it change maritime zones.

The Convention has been drafted with the objective to obtain comprehensive protection for underwater cultural heritage wherever it is located and to harmonize its protection with that of heritage on land.

The Subject of Protection

The Convention protects as 'underwater cultural heritage' all traces of human existence having a cultural, historical or archaeological character and which have been partially or totally under water, periodically or continuously, for at least 100 years. This includes a large variety of sites, like ancient shipwrecks, submerged structures and buildings, human remains or traces in submerged caves or sunken prehistoric landscapes and villages.

The fact that there is no 'significance' benchmark for a relic or site to be protected is due to the issue that significance is almost impossible to be defined by a legal instrument. Significance is a subjective criterion; its evaluation depends mostly on the person judging and the comparative values used. Significance can for instance be measured as archaeological and historical significance, research significance, aesthetic, social or spiritual significance, remembrance value, site visibility and experience value or even economical significance etc. The drafters of the Convention thus decided, as with the protection of land-based sites, that damage and destruction should be avoided for all sites and general protection granted.

The lack of a significance benchmark does however not mean that States Parties would have to excavate all existent submerged heritage. In situ preservation should be considered first and recovery should only be considered for valid scientific or public reasons. However, it is legal protection and the requirement of permission for intrusive actions that have to be ensured first. The Convention also recognizes that industrial activities might damage heritage incidentally and requests mitigation and balancing, but does not block such activities *per se*. Its regulations show therefore a strong and intended similarity to protection standards already applied to land-based heritage.

¹ UNESCO, Secretary of the Convention on the Protection of the Underwater Cultural Heritage (2001)

Advantages of ratification

Ratifying the 2001 Convention provides several advantages to a State. These are listed below and then expanded in more detail:

- It brings underwater heritage protection to the same level as the protection of land based sites and enables States Parties to adopt a common approach to preservation and ethical scientific management.
- It helps to protect underwater cultural heritage from pillaging and commercial exploitation and achieves legal and operational safeguarding wherever a site is located.
- States Parties benefit from co-operation with other States Parties in practical and legal terms.
- It provides a forum for underwater archaeology and gives the ratifying State a voice at international and intergovernmental level.
- It gives the right to prevent unauthorized interventions in cases of immediate danger in the EEZ and the Area, ensures the closure of ports to persons working in non-conformity with the Convention and gives a possibility of seizure for trafficked material.
- It provides effective professional guidelines on how to intervene in and research underwater cultural heritage sites.

A tool to protect heritage from pillaging and looting

While underwater cultural heritage is increasingly attracting the interest of the public and of archaeologists, it has also become the object of a focused search by commercial enterprises intending to exploit submerged archaeological sites to sell the retrieved artefacts for a minimum investment cost and maximum profit, often also profiting from stock exchange speculations. They do so by benefitting from a low level of legal protection and site monitoring, as well as from the lack of the awareness of the cultural value of the concerned sites. A minimum of 160 major shipwrecks containing up to 500,000 artefacts have been destroyed in this way in recent years and thousands of other sites have been severely damaged.

The UNESCO 2001 Convention represents the answer for the international community to this pillaging and commercial exploitation. It provides the 'largest museum of the world', which is constituted by the oceans' seabed, with guardians, an alarm system and legal safekeeping.

The Convention will ensure that this precious underwater heritage will be protected and conserved by its States Parties. It sets a legal framework for the related measures and establishes a system of reporting and consultations on activities directed at submerged sites. It permits States Parties to agree on a common strategy and protection standard, and to take a firm stand against the pillaging, commercial exploitation and destruction of sites. The Convention furthermore contains regulations on sanctions for pillaging and the prevention of the illicit trafficking of illegally recovered artefacts².

² See Art. 14 of the 2001 Convention: '*States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention*', as well as Articles 17 and 18 on sanctions and seizure.

Legal protection afforded to underwater cultural heritage wherever located

More effective protection by the 2001 Convention than afforded by the pre-existing law of the sea:

As the subject of the 2001 Convention is underwater cultural heritage, which is located in large parts of the oceans, the Convention touches on issues regarding the law of the sea. Primarily, this law of the sea is codified in the United Nation's Convention on the Law of the Sea³ (also called 1982 Convention, Montego Bay Convention or, as hereinafter, UNCLOS).

This existing law of the sea however does not yet sufficiently protect the underwater cultural heritage and leaves a need for a more specific international treaty⁴.

UNCLOS contains only two regulations referring specifically to underwater cultural heritage, Articles 149 and 303. Both were last minute introductions into its text and remained general in their formulations. Art. 149⁵ stipulates a very generalised protection of underwater heritage in the 'Area', i.e. *'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction'*. Art. 303⁶ sets a general obligation for States to protect their underwater cultural heritage - it gives them however only effective protective powers up to the limits of the Contiguous Zone, i.e. up to 24 miles from the coast⁷.

In the large space between the Area and the Contiguous Zone, i.e. the remaining Exclusive Economic Zone and on the Continental Shelf, underwater cultural heritage in fact remains unprotected by UNCLOS. Even worse, Article 303 paragraph 3 stipulates that *'Nothing in this article affects ... the law of salvage or other rules of admiralty...'*. While in many States with civil law tradition 'salvage' only relates to the efforts of saving a ship in danger and not to wrecks (particularly if these have lain under water for over one hundred years), some common law countries have developed a concept of salvage law that extends to commercial exploitation operations of submerged archaeological sites. The UNCLOS regime therefore leaves room within its formulation for the commercial destruction of underwater heritage

³ This Convention has currently 157 States Parties. It sets also in large parts the standards for the common law respected by most non-States Parties including the USA, Venezuela, Ecuador, Iran, Syria, and others (status March 2009).

⁴ 'For some of its aspects ... it can even be considered not only insufficient, but also counterproductive and corresponding to an invitation to the looting of the heritage in question.' Scovazzi, T in Wolfrum, R (ed.) 2008, *The Max Planck Encyclopaedia of Public International Law*

⁵ UNCLOS Article 149 Archaeological and historical objects: *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.*

⁶ UNCLOS Article 303 Archaeological and historical objects found at sea:

1. *States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.*

2. *In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.*

3. *Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.*

4. *This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.*

⁷ See Art. 303 para. 2

and in consequence it has been criticized as containing a 'legal vacuum' and as representing an 'invitation to looting'⁸.

This legal vacuum is filled by the 2001 Convention, for which UNCLOS leaves express room in its Article 303 paragraph 4. The 2001 Convention explicitly outlaws⁹ the intervention in and destruction of underwater cultural heritage sites for commercial exploitation stressing the need to protect and preserve such sites. Furthermore, the 2001 Convention covers all waters and maritime zones, greatly extending the legal protection of submerged sites.

Wider protection than possible through national legislation

The 2001 Convention offers considerable advantages in comparison to a purely domestic regulation of the protection of underwater cultural heritage.

National law only applies as far as a State has jurisdiction. While States have full jurisdiction in their Territorial Sea, this is much more limited in their Exclusive Economic Zone. The dispute is ongoing as to whether the protection of underwater cultural heritage falls under the UNCLOS term 'marine scientific research', for which States parties to UNCLOS have jurisdiction in that zone¹⁰. On the High Seas, States have, with some exceptions, only jurisdiction over their own nationals and vessels flying their flag.

The further away from the coast a submerged archaeological site is located, the more difficult it becomes therefore for a State to prohibit any intervention, which may be undertaken on the site by a vessel sailing under another State's flag.

Outside a State's Territorial Sea, co-operation with Flag States therefore becomes crucial – and is regulated in a practical and effective way in the UNESCO 2001 Convention. According to the Convention, States request reports from their nationals and vessels on discoveries of underwater heritage and planned activities, inform the other States Parties and then co-operate with each other in the taking of protection measures. No new jurisdictional rights are conferred to any State in that regard, but co-operation is regulated and fostered, also through the means of a Coordinating State, as foreseen by the Convention.

An answer to immediate danger to sites

The 2001 Convention in its Articles 10 paragraph 4¹¹ and 12 paragraph 3¹² contains regulations that permit the prevention of an immediate danger threatening a submerged archaeological site, including

⁸ See Fn 1.

⁹ As Mariano Aznar put it in a recent London meeting *'it leaves it formally possible, but makes it materially impossible'*.

¹⁰ Article 56 para. 1 (b) ii UNCLOS, this applies also to most other States as customary law.

¹¹ *'Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and/or issue any necessary authorisations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.'*

¹² *'All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.'*

in particular looting. Within the Exclusive Economic Zone and on the Continental Shelf the vicinity of the Coastal State has been taken into consideration, which will in general intervene in such cases in the function of a coordinating State. In the Area the right to take immediate protection measures to prevent pressing danger falls to all States.

Such a right to prevent an immediate danger to sites is of immense practical value. A State Party does not need to wait for the conclusion of consultations, which usually take some time, and therefore allow the completion of acts of pillaging, before taking preventive measures.

A possible fear that this right to adopt urgent measures in cases of immediate danger could in particular within the EEZ be an instance of the extension of a coastal State's sovereignty rights and represent 'creeping jurisdiction' is unfounded. The 2001 Convention expressly states in its Article 10 that in taking measures in cases of immediate danger, the coordinating State acts 'on behalf of the States Parties as a whole and not in its own interest' and that its 'actions do not constitute a basis for the assertion of any preferential or jurisdictional rights'.

The right to prevent immediate danger to a site is in effect indispensable if a reasonable and effective protection of submerged archaeological sites against looting is to be achieved, and this represents an added benefit of the 2001 Convention.

Protection at the same level as the protection of land based sites

Until now, underwater cultural heritage is in most cases much less protected than land based heritage. Many legislative efforts concentrate in fact only on heritage located within the land territory of a State. In some regions, underwater heritage is even defined as only 'sellable objects recovered from the seabed'.

This situation is due to the higher visibility of land-based heritage, its economic return through tourism and – until recently – its easier accessibility. While archaeology on land has some 200 years of history, underwater archaeology, and with it the scientific appreciation of underwater cultural heritage, has only really become possible since the 1940's.

The 2001 Convention harmonizes protection standards for underwater heritage, wherever it may be located, in the oceans, rivers, lakes or flooded caves.

It stipulates as a general rule that States should protect their underwater cultural heritage. Furthermore, it sets principles for States to respect in their interventions directed at underwater cultural heritage, such as the first consideration given to *in situ* preservation or the objection to commercial exploitation and dispersal of heritage.

In the long term these standards and principles will assure the preservation of underwater cultural heritage in a similar fashion to sites on land. The Convention represents therefore a logical and indispensable extension of the currently existing law for the protection of underwater cultural heritage.

Adoption of a common approach to heritage protection

Underwater cultural heritage in particular represents a common heritage of humankind, because shipping connected civilisations over the centuries. It is therefore also a duty and a responsibility for all States to ensure the protection of this common heritage and to share the knowledge it can provide.

The 2001 Convention allows States to adopt a common approach to the protection of underwater heritage according to mutually recognized standards.

Such a common approach also means the respect of certain basic ethical principles regarding the consideration to be given to submerged heritage, which is more extensive than the simple respect of legal obligations *inter partes*, among States Parties.

A ratification of the 2001 Convention means a firm statement regarding the value of underwater heritage and represents a measure directed not only at States and other entities, but also to the general public and society as a whole. It is a statement against commercial salvage operations as far as the influence of the States Parties reaches and the expression of a will to protect submerged archaeological sites in the framework of an international community.

This expression of the will to protect and offer defence to the fragile legacy of submerged archaeological sites helps to establish an international ethical standard. It discourages not only pillaging but also the trading in artefacts recovered in pillage operations and raises general awareness that archaeological sites, even if submerged, do not represent exploitable treasures, but a cultural inheritance.

As such, the 2001 Convention fulfils the function of setting an international ethical standard and is the expression of a common attitude and resolve.

The benefit of co-operation

Co-operation between States is the only way to assure the comprehensive protection of underwater cultural heritage. As explained above, the limits of State jurisdiction make it necessary for all States to work hand in hand for the protection of submerged archaeological sites.

In joining the 2001 Convention, States have the benefit of becoming part of a very practical and operational co-operation system.

They agree to prohibit their nationals and vessels from looting underwater cultural heritage, regardless of its location, requesting that they report finds and activities and informing other States of their undertakings. The interested States can then co-operate in the protection of these archaeological sites. The Flag State sets legal regulations for its nationals and vessels and other States help it – through a coordinating State – in implementing them as agreed between the concerned States and in accordance with the Convention.

This co-operation between States, regulated by the 2001 Convention, and the common effort to achieve a legal protection of underwater heritage sites should ensure that in future wrecks, ruins and other sites outside the Territorial Seas of States will also be protected. The enhancement of effective legal protection is however not the only benefit of improved co-operation. States also pledge to co-operate and assist one another in capacity-building, the operational protection and the management of underwater cultural heritage and to exchange, in so far as possible, information. Furthermore, they will provide the contact details of the responsible competent authority in their country to the other States Parties and facilitate interaction.

The co-operation available under the 2001 Convention, which is of a practical and applicable nature, will therefore be a considerable asset and of great value to States Parties.

The Convention provides practical guidelines on how to intervene and research underwater cultural heritage

The Annex of the Convention is in fact one of the most important professional guidelines available for underwater archaeologists today. The Annex of the 2001 Convention contains the detailed practical 'Rules concerning activities directed at underwater cultural heritage'. They include regulations concerning the design of projects intended as interventions; guidelines regarding the competence and qualifications required for persons undertaking activities; and methodologies on conservation and site management.

The 36 Rules of the Annex present a directly applicable operational guideline for underwater interventions. Over the years, they have become a reference document in the field of underwater excavations and archaeology, setting out regulations for the responsible management of such cultural heritage. They provide archaeologists and national authorities worldwide with reliable rules on how to work on underwater cultural heritage sites as well as issues to consider when doing so.

These Rules are one of the main reasons for the great support that the 2001 Convention has found amongst underwater archaeologists. They also represent a normative standard of considerable advantage for every State adhering to the Convention, and can guide national authorities in their day to day decisions.

Closure of ports and seizure

The Convention facilitates also the prevention of illicit trafficking of illegally looted material. This improves the operational protection considerably, as not all supervision can be done on the water or by satellite. Frontier and port controls will also ensure the safety of underwater heritage. The Convention's Article 14 regulates for instance that States Parties shall take measures to prevent the entry into their territory of and the dealing in illicitly exported or recovered underwater cultural heritage. According to Article 15 States Parties will furthermore prohibit the use of their territory and ports in support of damaging activities. Article 18 gives rights to seizure of trafficked material.

Regulations on wrecks of State vessels

The 2001 Convention protects also the wrecks of State vessels and aircraft, including warships, as cultural heritage against looting and destruction and thereby improves their situation considerably. They will be accorded protection, human remains will be respected and commercial exploitation is excluded.

With regard to sovereign immunity, or a State's rights concerning these wrecks, the Convention does expressly not modify existing international law, and in particular UNCLOS, thus preserving the status quo¹³.

If such a wreck is found outside territorial waters and it falls under the definition of underwater cultural heritage (i.e. has been fully or partially immersed in water for at least one hundred years), the

¹³ Article 2 para. 8 of the 2001 Convention regulates: '*Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.*'

Convention requires that the Flag State is asked for agreement before any interventions are undertaken¹⁴.

Within their archipelagic waters and territorial sea, States Parties seeking cooperation on the best methods of protecting State vessels and aircraft, should inform any Flag State Party to the Convention of the discovery of such identifiable State vessels or aircraft. That does not mean that any other rights of Flag States, such as the right to expect respect of a requirement for its authorisation¹⁵, is infringed. If such a right exists, it is not altered by the Convention.

Conclusion

In view of the issues explained above it is hoped that the UNESCO Convention on the Protection of the Underwater Cultural Heritage will, in years to come, attract a very large number of States Parties. If this becomes the case, it will ensure that underwater cultural heritage will soon be as well protected as heritage on land. Underwater heritage is a very precious and still relatively unexplored source of information on the development of human civilisations and it merits all the benefits the international community can bestow upon it by the application of this carefully drafted legal instrument. Of course, it must be stressed that joining the Convention alone does not suffice; the crucial task is the operational implementation entrusted to the States Parties.

¹⁴ Article 10 paragraph 7 regulates for the exclusive economic zone and the continental shelf: *'Subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the Flag State and the collaboration of the Coordinating State.'*

Article 12 paragraph 7 regulates for the Area: *'No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the Flag State.'*

¹⁵ It is contested if a wreck of a warship enjoys sovereign immunity. Some States confirm this in interpreting UNCLOS or as customary law (especially maritime powers), others do not, arguing that a wreck is not under the command of an officer any more and has no crew. Wrecks in territorial waters are especially problematic. Article 29 UNCLOS definition of warships: *For the purposes of this Convention, 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.*

Introduction

Spain ratified the *UNESCO Convention on the Protection of the Underwater Cultural Heritage*² ('UNESCO Convention' or 'the Convention' hereinafter) on 6 June 2005 and incorporated the Convention into its domestic legal order by its official publication on 5 March 2009.³ Unfortunately, there were no sound discussions in Spain about the legal consequences of ratification in the domestic realm such as how it will affect the practical protection of underwater cultural heritage (UCH). Only the legal assessment by the *Consejo de Estado* was done, but from a pure formalistic point of view. However, the impact of the ratification on Spain's international legal policy was deeply assessed, as well as the political message Spain wished to send to the rest of the negotiating States —particularly the Latin-American States, the European partners and the United States.

This brief paper tries to evaluate some of these questions and discussions in order to offer a general *tour d'horizon* on the current position of Spain towards the UNESCO Convention and its implementation, both in the domestic and the international realm.⁴ It will try (1) to show the general views of Spain during the negotiation of the Convention and beyond; (2) to evaluate the problems of implementation of the Convention in the Spanish domestic order and the measures already adopted; and (3) to assess generally the future application of the Convention and the interests embodied by Spain in that process.

The road to the Convention

Spain mainly viewed – and still views – the UNESCO Convention as:

- A mechanism of co-operation, solving gaps in current law of the sea through an information sharing and reporting system;
- A scientific effort, closing UCH to salvage and endorsing archaeological and technical protocols in its annexed rules;
- A 'neutral' legal instrument, particularly with regard to jurisdiction and ownership; and
- A point of departure for new scientific synergies and legal agreements with other States parties.

The Convention as a mechanism of co-operation

Spain realised that the legal regime for the UCH in current general international law of the sea was incomplete and ineffective. The *UN Convention of the Law of the Sea*⁵ ('UNCLOS' hereinafter), in its Articles 149 and 303 (with relation to Article 33), does not establish an appropriate legal regime

¹ Professor of Public International Law, Universitat Jaume I, Spain. Member of the Scientific Committee of the Spanish National Plan for the Protection of the Underwater Cultural Heritage and Delegate of Spain in the Convention's Working Group of States Parties on the Operational Guidelines. The views expressed in this contribution are solely those of the author and do not necessarily reflect the position of Spain. This paper was prepared within the framework of the R+D Project P11A2009-05, of the University Jaume I/Bancaja.

²The Convention entered into force on 2 January 2009 in accordance with its Article 27. Text of the Convention available at UNESCO, *Records of the General Conference, 31st Session*, vol. 1, Resolutions (2001), at 50.

³*Boletín Oficial del Estado* of 5 March 2009.

⁴As requested by the organisers of the Seminar, this paper will particularly focus on the parallelism and divergences between the legal positions of Spain and the United Kingdom. Being the written translation of the oral contribution that the author delivered in the Seminar of 12 November 2010, this paper conserves that oral style, avoiding footnotes unless necessary.

⁵10 December 1982, 1834 *UNTS* 3. Previous 1958 Geneva Conventions on the law of the sea did not include any reference to the protection of UCH.

for the protection of UCH. On the contrary, Article 149 seems a simple and very general declaration under which 'archaeological and historical objects' found in the Area⁶ 'shall be preserved or disposed for the benefit of mankind as a whole'. It does not clarify the extent of the 'disposal', or identify who must act on behalf of 'mankind as a whole', and it leaves the 'preferential rights' of the concerned and interested States without a clear legal meaning.

Even worse is the regime foreseen in Article 303 — applicable to all marine zones — beyond the general (and plausible) principle envisaged in its paragraph 1: 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.' Paragraph 2 establishes a legal fiction upon which the legal regime envisaged for the contiguous zone also applies to archaeological and historical objects.⁷ But paragraph 3, a typical *sans préjudice* clause, incorporates *private* maritime rules in the *public* system of protection drawn by UNCLOS, particularly the law of salvage rules. Finally, paragraph 4 simply establishes that all these provisos are 'without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.'

Against this highly problematic framework, the UNESCO Convention tries to promote the general principle of protection and co-operation through a system of information sharing, collaboration among interested States and the respect of coastal State sovereignty and rights over its marine zones and of Flag States rights over their sunken State vessels. Perhaps the system will be simplified in the near future: the practice of States parties and the Operational Guidelines of the Convention to be adopted in 2011 should provide guidance on how to ensure an efficient cooperative system among those States.

The Convention as a scientific effort

The annexed rules, which form an integral part of the Convention under its Article 33, incorporate to an international legal text the general archaeological principles adopted by the scientific community embodied in the International Council on Monuments and Sites (ICOMOS). These rules are, *mutatis mutandi*, the rules adopted in 1996 in the *Charter of Sofia*.⁸ The diplomatic effort made by the States to subordinate them to a scientific protocol implies a deliberate policy to avoid the intrusion of non-scientific actors in the protection of UCH. This erodes the position of treasure-hunter companies, including those that try to convince the scientific community that they follow and respect those archaeological protocols.

A legal answer is given in Article 4 of the Convention, which excludes almost totally the application of the law of salvage and the law of finds to UCH. This article, drafted in the negative tense, reads as follows:

⁶ That is, 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Art. 1.1(1) UNCLOS).

⁷ Paragraph 2 of Article 303 UNCLOS establishes that 'In order to control traffic in such objects, the coastal State may, in applying article 33 [referred to the 24 nm contiguous zone], presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.' In the case of Spain, Article 40(1) of the Law 16/1985, of 25 June 1985, on the Spanish Historic Heritage, says that 'movable or immovable property of a historical nature that can be studied using archaeological methodology forms part of the Spanish Historical Heritage, whether or not it has been extracted and whether it is to be found on the surface or under ground, in territorial seas or on the continental shelf. Geological and paleontological elements relating to the history of man and his origins and background also form part of this heritage.' Therefore, under Spanish domestic law, not protested by other States, Spanish general legislation on the protection of UCH extends to the 200 nm continental shelf of Spain. See my comment on 'Spain', in Dromgoole, S (ed.), *The Protection of the Underwater Cultural Heritage. National Perspectives in Light of the UNESCO Convention 2001* (Leiden, Martinus Nijhoff, 2006), pp 271 ff.

⁸ See the text of this *Charter* at http://www.international.icomos.org/charters/underwater_e.htm.

'Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

*(a) is authorized by the competent authorities, **and***

*(b) is in full conformity with this Convention, **and***

(c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.' (emphasis added)

Being cumulative (not alternative) conditions, it is hardly conceivable that a salvage operator (not to say a treasure-hunter company) could successfully claim that its activities are in full conformity with the principles of the Convention. These notably include: preservation for the benefit of humanity; *in situ* preservation; deposit, conservation and management ensuring long-term preservation of UCH, not commercial exploitation (Article 2, paragraphs 2, 5, 6 and 7, respectively); integrity and non-dispersal of recovered objects; and preferential use of non-destructive techniques and survey methods in of recovery of objects (Rules 2 and 4, respectively).

In the new Law on Spanish Cultural Heritage, currently being drafted, there is a proposal to delete altogether the application of the law of salvage and the law of finds to UCH in Spanish waters.⁹ Actually, another draft law still in Parliament —the General Law of Maritime Navigation¹⁰— has already received several amendments by the Ministry of Culture accordingly.

The Convention as a 'neutral' legal instrument

Contrary to what was implied by the UK Government (among others), Spain considers that the Convention does not affect sovereign rights over marine zones or sunken States vessels. After a long technical assessment of its legal terms, and keeping in mind the history and the *procés verbaux* of the Convention, Spain concluded that Articles 2(8) and (11), 3, 7(3), 10(2) and (7) and 12(7) draw a legal canvas that respects both jurisdiction and legal titles on sunken State vessels enshrined in international law (including UNCLOS). These were two of the main British (and US) concerns.¹¹

The main rule is Article 3 of the Convention, under which

'Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.'

Article 3 plainly subordinates the UNESCO Convention to international law and UNCLOS —and this caused bitter discussions during the negotiating of the Convention.¹² Under this *chapeaux* must be understood the rest of the provisos. Hence, it clarifies Article 10(2) that says:

'A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or

⁹ Which is currently applied very strictly and under severe conditions.

¹⁰ See its initial draft at http://www.congreso.es/public_oficiales/L9/CONG/BOCG/A/A_014-01.PDF#page=1.

¹¹ On this, see Aznar-Gómez, M, 'Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage', 25 *The International Journal of Marine and Coastal Law* 209 (2009); and Varmer, O, Gray, J and Alberg, D, 'United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage', 5 *Journal of Maritime Archaeology* 129 (2010)

¹² On the negotiating process see Garabello, R, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo* (Milan, 2004).

jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea'

In my opinion, this proviso read in connection with Article 3, should dissipate the fears about 'creeping jurisdiction'. And the same could be said with regard to the other concern about the legal regime of sunken State vessels and the respective rights of flag and coastal State — also bitterly discussed in Paris. Under Article 7(3),

'Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the Flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.'

This proviso was seen by some Flag States as a lack of legal protection (even a reversion of title) in respect of their States vessels sunk in the territorial sea of a third State. But Article 7(3) — like the rest of the Convention— does not talk about title or property. It simply balances the sovereignty rights of the coastal State over its territorial sea with the general privilege of immunity expressly respected in Article 2(8), the text of which states that:

'Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.'

The meaning of this article, read in connection with paragraph 7 of both Articles 10 and 12 (which prohibit any activity directed at State vessels without the agreement of the Flag State), explain Spain's acquiescence with this regime. These provisions ensure that the Convention does not affect Spain's legal title to all its sunken State vessels, irrespective of the place where they sank and the time elapsed since their loss.

The Convention as a point of departure

Finally, Spain sees the Convention as a first step to complete an array of scientific and cooperative agreements to protect UCH. In this sense, Spanish scientific institutions and cultural agencies (both central and regional) have concluded several Memoranda of Understanding (MoU) to carry out scientific projects with other institutions abroad. This began even before the negotiation and entry into force of the Convention. Examples include the Institute of Nautical Archaeology (INA) working on the *Bajo de la Campana* wrecks or the timber study of the Phoenician wreck in Mazarrón and with the French *Centre national de la recherche scientifique* (CNRS) on several wrecks of the Trafalgar battle. Other collaborations include work with the Mexican *Instituto Nacional de Antropología e Historia* (INAH); the *Aurora Trust* Foundation; several museums' networks (for example, MEDMUS); *Parques Nacionales* in Dominican Republic; and with inter-regional European Union (EU) projects like *ArcheoMed*.

Spain is particularly eager to conclude bilateral, regional or particular international agreements with other countries, whether or not they are parties to the Convention, where Spanish UCH is located. In 2010, the Spanish Ministry of Culture signed a MoU with some US agencies, notably the National Oceanic and Atmospheric Administration (NOAA), to encourage co-operation in management, research, protection, conservation and preservation of UCH resources and sites. On the other hand, some informal conversations have taken place between Spain and Mexico, Japan,

Chile and the Philippines with regard the status of several Spanish sunken vessels in their respective territorial waters.

These kinds of approach to international collaboration follow Article 6 of the Convention.¹³

The implementation of the Convention

With regard to the implementation of the Convention, the main problems derive from:

- the absence of a previous sound discussion about the impact of the Convention upon the domestic legal order;
- the quasi-federal structure of the Spanish administration; and
- the lack of clear rules, efficient institutions and sufficient funds to manage the protection of UCH in Spain and abroad.

To some extent, the *National Plan for the Protection of Underwater Cultural Heritage* tries to solve some of these questions and their consequences.

The problems

As already stated, and contrary to what happened in some other States — such as the United Kingdom — there were no discussions about the legal and political opportunity to ratify the Convention. No discussions at all took place among the members of the Cortes Generales (Parliament); nor were any official debates held with the scientific or academic community to assess the impact of the Convention upon all the activities regulated by the Spanish domestic law. Among all the obligations included in the Convention, studies of doctrine have barely covered the most important one, included in Article 5, which tries to reduce the main negative impact on UCH: the activities (legal and legitimate) incidentally affecting UCH.¹⁴

Article 5 imposes an obligation on the behaviour of States parties that affects other domestic law since they must include, when necessary, new controls and preventive measures to apply to their laws and regulations on activities such as fishing, coastal urbanism, marine research, exploitation of non-living marine resources (from oil and gas to wind or wave energy), navigation, etc. These are human activities whose impact on fragile archaeological areas must be mitigated; and this may imply the amendment of domestic laws and regulations not completely foreseen by those who decided to ratify the Convention in 2005.

¹³ Article 6, on 'Bilateral, regional or other multilateral agreements', says:

'1. States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.'

2. The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.'

3. This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.'

¹⁴ The wording of this Article is as follows: *'Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.'*

And this problem worsens since Spain, a regional State formally,¹⁵ is a quasi-federal State where constitutional competences are exercised (i) by the central government exclusively; (ii) by the regional governments exclusively; or (iii) shared by central and regional governments. With regard to the management and protection of UCH, it is not completely clear, legally speaking, whether it is central or regional government that has competency over Spain's declared marine zones: the regional competencies must be exerted territorially and, formally speaking, those marine zones do not form part of the 'territory' of the regions but of the State. But under Spanish law, there has also been a general transfer of competencies from the central State to the regions. Thus the latter are competent *ratione materiae* but doubts arise with regard to their competence *ratione loci*.

That being said, the central Government had in fact decided from 1988 onwards to leave in the hands of the regions the entire management of the UCH.¹⁶ The legal basis for this *fait accompli* is not entirely clear, but nonetheless it is the point of departure for organising the legal protection of UCH in Spain. As a consequence, several regions — particularly Andalusia, Catalonia and the Valencia Community — have established their own regional centres for underwater archaeology. Along with the *National Museum of Underwater Archaeology* (ARQUA), these form the State network of centres. Furthermore, each region has enacted its own standards regarding the management and protection of UCH in the waters adjacent to its coast.¹⁷ However, most of them share common patterns with the central one, establishing a more or less common regime all over Spain.

It must be also affirmed that the system has generally functioned properly. The declaration (or prospect of declaration) of numerous 'archaeological preserved zones' along the coast of Andalusia and some other regions, as a preventive tool, has clarified the legal status and threshold of protection of several threatened areas, including the Trafalgar Battle zone, the Rande fleet zone, some natural marine zones and access routes to Spanish historical ports like Cádiz and Cartagena.

Notwithstanding such initiatives, some problems of co-ordination have arisen — the *Odyssey affair* and its aftermath being the epitome. Both central government and the regions decided to implement a new effort to protect UCH.

The solutions

On April 2007, *Odyssey* disclosed the looting of the *Nuestra Señora de las Mercedes* and filed an *in rem* action in the US courts. Since then, Spain decided to develop a twofold strategy: on the one hand to litigate before any foreign court or administration defending Spain's legal interest over its UCH; and on the other, to 'rethink' the general approach to the protection of this heritage.

As a result of the first decision, Spain filed a counterclaim with the full support of the US Government. Although the legal battle still pends at the time of writing this paper, on 22nd December 2009 the first decision given was completely favourable to the Spanish case. The discussion is now before the appeal court, and a final decision is expected during 2011.

¹⁵ Under Article 137 of Spanish Constitution of 1978, 'The State is organised territorially into municipalities, provinces and the Self-governing Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests.'

¹⁶ The central government, under Article 149(1)(28) of the Constitution, only conserves the exclusive competence on the 'Protection of Spain's cultural and artistic heritage and national monuments against exportation and spoliation; museums, libraries, and archives belonging to the State, without prejudice to their management by the Self-governing Communities.'

¹⁷ Which also poses another curious legal problem since there does not exist an official delimitation between adjacent or opposite 'regional waters', keeping in mind that, if competent, the regions must protect and manage all the UCH located on 'their' continental shelf, that is, up to 200 nm.

Spain has also moved forward with regard to some States in which threats to Spanish UCH have been disclosed. In all these cases, Spain has clarified and exposed its foreign legal policy, particularly with regard to the legal status of sunken State vessels. In the same way, Spain has clearly recognised the legal title of non-abandoned sunken foreign State vessels located in Spanish waters — like the British *HMS Sussex* or the French *Fougueaux*.

Along with these 'legal fights', as previously discussed, Spain decided to revisit its general framework on UCH from different perspectives: technical, legal, political and educative, among others. On 10 October 2007, following a proposal by the Ministry of Culture, the Council of Cultural Heritage (*Instituto del Patrimonio Cultural de España*) endorsed the project for a National Plan which was finally adopted by the Council of Ministers on 30 November 2007 as the *National Plan for the Protection of Underwater Cultural Heritage*. One of the by-products of the National Plan was the drafting of its *Green Book*, adopted in May 2009,¹⁸ which tries to rethink the national efforts to protect the UCH more effectively. Since then, different measures have been adopted, including:

- Several cooperative and coordination agreements have been concluded between the central government and the regional governments
- Some other agreements have been signed (or are close to signature) between the Ministry of Culture and the Ministries of Defence, Home Affairs and Foreign Affairs
- Several legislative decisions have been taken with regard to adapting some laws to reflect the UNESCO Convention, and a new law on cultural heritage has been initiated
- A Scientific Commission of the National Plan has been set up and projects coming from different regions have already been evaluated and included in the Plan
- A new curriculum for a university masters degree in underwater archaeology within the European Higher Education Area (EHEA) is under discussion at the time of writing
- A proposal to the Ministry of Science to include the protection of UCH among the priority list of research and development projects is under evaluation
- Some educational projects are under evaluation, trying to foster the dissemination among citizens of the need to protect UCH.

The Convention and beyond

The UNESCO Convention, the *Odyssey affair* and some other questions have changed the vision in Spain about the UCH. For the first time in its recent history, Spain has definitely decided to adopt a proactive policy toward UCH. Unfortunately, the economic implications of the financial crisis has affected individual decisions. However, a consolidated budget has been approved for the coming years.

As already explained, Spain is now implementing the Convention, but at the same time it is also trying to go beyond the Convention in different ways:

- At the legal level, Spain is trying (a) to confirm its legal policy with regard to its sunken State vessels, irrespective of their actual location, and (b) to clarify the 'constructive ambiguities' in the Convention through an active role when drafting its *Operational Guidelines*;
- At the political level, Spain is trying to negotiate and conclude, when necessary, bilateral or regional agreements (or MoUs) with some other States to confirm the legal policy above and to move beyond the current status of protection of common UCH; and

¹⁸ An English version of the *Green Book* is at <http://en.www.mcu.es/patrimonio/MC/LibroVerde/Capitulos.html>.

- At the social level, Spain is (a) trying to 'mobilise' public opinion against the destruction and looting of UCH, and (b) rethinking the educational model to implement new measures with regard to the training and formation of specialists in the protection, conservation and dissemination of UCH and how its public value is determined (*mise en valeur*).

These are hard and difficult tasks. Spain — like any other State with a true interest in the protection of UCH, such as the United Kingdom — faces new challenges and the somewhat demagogic uses of UCH by treasure hunters and other persons and entities around the world. A common effort of States, scientific institutions and NGOs to defend UCH is needed. The UNESCO Convention is a first step that could be improved if and when necessary.

Portugal's position having ratified the UNESCO Convention on the Protection of Underwater Cultural Heritage – Francisco J. S. Alves¹

Abstract

Portugal was the second country in Western Europe to ratify the 2001 UNESCO Convention, a pivotal step that occurred on September 21, 2006. In 2000, the Portuguese delegation presented a statement in the UNESCO meeting for the draft Convention, the substance of which emphasizes the principles of protection and co-operation concerning the underwater cultural heritage rather than the issue of its possession. Since 2008, the discovery of a 16th century Portuguese shipwreck near Oranjemund, Namibia, confirmed that the referred statement opened a premonitory strategic window for the conciliation of interests of States in what concerns such examples of *common heritage*. Another recent case raises a similar situation in which treasure hunters plundered a 16th century Portuguese shipwreck in Madagascar waters, part of the pillage being seized by French Navy. Finally, I present here some comments about the UK position concerning the 2001 UNESCO Convention.

Introduction

In 1997, at a crossroads in the international management of underwater cultural heritage (UCH), Portugal succeeded in revoking a legal framework created for treasure hunting that had been published four years earlier². Coinciding with this legislative change, several late-medieval shipwrecks and shipyard remains were discovered in Portuguese waters and intertidal areas³. These two factors contributed to raise public awareness of UCH management in Portugal, just as UNESCO launched negotiations on the draft Convention on the Protection of the Underwater Cultural Heritage. Invigorated by its recent national activities related to UCH management, Portugal became an active protagonist in the draft Convention negotiations. Adopted in 2001 at UNESCO's 31st General Conference, the Convention entered into force in January 2009. Portugal ratified the Convention in 2006, but it had already adopted most of its basic principles almost a decade before.

During the meeting about the draft Convention in 2000, the author drafted and presented a statement on behalf of the Portuguese delegation which was adopted (after revision) by a working group that included other representatives from the Ministries of Culture, Foreign Affairs and Defence (Navy), including specialists on the Law of the Sea. In 2008, at the Sixth World Archaeological Congress in Dublin, this statement was first presented publicly as a contribution to a possible strategic vision to bypass the conflict of interests between *Flag States* and *coastal States*, and to distinguish between *rights* and *duties*. These are pivotal issues in the drive for actual UCH protection.

Portugal's State Declaration (Lisbon, 2000)

'1. Notwithstanding the fact that UNCLOS does not contain any specific mention regarding the sovereign immunity of sunken war ships and State ships, Portugal considers that this consecrated principle – according to which the Flag State has sovereign rights over the said remains – shall be universally respected wherever they are located.'

¹ Head of Nautical and Underwater Archaeological Branch, IGESPAR, Ministry of Culture, Portugal

² Décret-loi n° 164 du 27 juin 1997 (Portugal/Portugal) in Prott, L V and Srong, I (eds.), 1999, *Background Materials on the Protection of the Underwater Cultural Heritage/Documents de Base sur la Protection du Patrimoine Culturel Subaquatique* : 56-62. UNESCO - NAS, Paris.

³ Alves, F (ed.), 2001, *Proceedings of the International Symposium on Archaeology of Medieval and Modern Ships of Iberian-Atlantic Tradition - Hull Remains, Manuscripts and Ethnographic Sources: A Comparative Approach (Lisbon, September 7-9, 1998)*, Trabalhos de Arqueologia, 18. IPA, Lisbon.

Naturally, this respect shall be extended to the principles stated in the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage (Sofia 1996), which have inspired the Annex of the current UNESCO Convention project.

2. Also, Portugal – notwithstanding the fact that it will strongly respect this principle in what concerns other state's ships or warships, located in areas under its maritime jurisdiction – will not claim this principle from other States, although the vast majority of its historical heritage is spread worldwide, on the seabed of all continents.

As a matter of fact, Portugal, does not consider the compliance with this ethical and cultural principle fundamental for the safeguard of its interests; nor is this the most important or the most urgent issue on scientific, political or cultural points of view in the frame of this draft Convention.

Portugal considers on the contrary that its best contribution to the protection and valorisation of its nautical heritage located in the sea bottom of all continents is not to claim for itself this historic and cultural heritage – that historically and culturally it shares with the countries that have jurisdiction over those areas – because its basic claim and affirmation in any relationship with those countries is just based upon the principles and the ethics underlined in the project of this draft Convention. Therefore, Portugal claims, above all, that those remains must be protected, researched, studied and valorised in the exclusive behalf of Science, Culture and Mankind (which by inference requires the primordial respect of the interests of the site, flag or countries' cultural origin), in accordance with the 1996 ICOMOS Sofia Charter principles, that inspired the annex of the present UNESCO Draft Convention. By 'site country' we mean the country in which sea or seabed those remains are located; by 'flag country' we mean the country whose nationality is historically and archaeologically identified; and by 'cultural origin' if such identification is based on strong archaeological presumption, declares, as a starting point, its entire availability to co-operate with any country in whose sea bottom [under their jurisdiction] lie the remains of a common historical and cultural heritage.

3. Such are the principles that inspire Portugal's behaviour in this domain and that explain its position in the frame of the present draft Convention. Principles that are expressed by the fact that the archaeology, protection and valorisation of underwater cultural heritage have begun in Portugal concerning French and Spanish ship remains, such as the cases of the Océan and the San Pedro de Alcantara, wrecked in the Portuguese territorial sea in 1759 and 1786; and by the fact that Portugal has always co-operated unselfishly when the remains of Portuguese ships lying in other countries territorial sea were studied under archaeological good practices (that is, according to the principles that were later adopted by the Sofia Charter), as has happened in the case of the Santíssimo Sacramento galleon (1666), in Brazil, or the case of the Santo de António de Tana (1697), in Kenya.

4. Portugal considers, independently of the said questioning, that the universality principle must inspire the application of the instrument that constitutes the present draft Convention. This means that, fundamentally the Convention must contemplate all underwater cultural heritage, whatever be its nature (sites with nautical remains or others, or, if these are ships, whatever its 'class' may be – state, men of war, 'civilian', etc.).

5. Portugal welcomes, in the context of the present draft Convention, all definitions capable of mitigating any divergences or promoting consensus around core issues. In that manner, Portugal proposes that article no 2 of the present draft Convention be written to apply universally, expressively stating only the ethical and methodological

assumptions of contemporaneous archaeology (expressed in the Sofia Charter) and those requiring a necessary and desirable co-operation between countries; leaving as a side issue – regulated by bi or multilateral co-operation agreements – all questions pertaining only to the authorities directly involved, such as the issue regarding sovereign immunity over war and State shipwrecks, with presumable or recognized archaeological importance.

Cases illustrating the application of the spirit of Portugal's Declaration

The 16th century Portuguese shipwreck of Oranjemund, Namibia

At the time we presented Portugal's State Declaration to the meeting of governmental experts at UNESCO, we could not imagine that the underlying philosophy of this text would very soon be adopted and applied by Portugal and some other country. But this is precisely what happened as a result of the discovery, on April 1 2008, of the remains of a 16th century Portuguese ship wrecked on the extreme southern coast of Namibia, close to the diamond-mining town of Oranjemund.

This discovery has led to a productive bi-lateral cooperative effort based on the assumption that the shipwreck remains are part of the common heritage of Portugal and Namibia, and that Portugal, with regard to those remains, claims for their *protection*, not for their *possession*. In 2008 and 2009, Portuguese representatives have participated in stakeholders' meetings, invited by the Namibian Government. That first year a Portuguese archaeological team led by the author participated in the final rescue excavation of the site, with the exclusive responsibility for the excavation, recording and dismantling of the ship hull remains still preserved in structural articulation. Moreover, in 2009, the same Portuguese team participated in a recording and training mission centred on the archaeography of the individual wooden parts recovered⁴; such participation demonstrated how successful this kind of approach to bi-lateral relations between States can be, when clearly and exclusively based on scientific and cooperative management reasons.

The day when other *Flag States* follow this example, is the day when coastal States will understand that it is better to *co-operate* with Flag States than to *negotiate* with treasure hunters. Since the discovery of this shipwreck, Namibia has understood this challenge and the advantageous opportunity it offers. Namibia is now preparing for the ratification of the UNESCO Convention. Maybe the co-operation with Portugal has contributed to this decision.

The 16th century Portuguese shipwreck of Banc de l'Etoile, Madagascar

The seizure by the French Navy of an important part of the loot from of a 16th Century Portuguese shipwreck in Madagascan waters recovered by treasure hunters, was already known informally, but recently, this has been the object of a formal communication between French and Portuguese authorities. France has informed Portugal that Madagascan authorities claim the seized heritage, and has asked what the Portuguese position is about that, while also stressing that they would be willing to satisfy the referred request.

I was recently asked to offer my advice about this issue. In an extensive memo, I have expressed my agreement to both expectations, for the same reasons set out in the 2000 Portuguese Statement and in reference to the Oranjemund shipwreck. Recalling the story of the judgment of Solomon, the meaning of the concept of *mutual heritage* is to seek a desirable balance between *rights* and *duties*, but with a new argument, a new consideration. The most

⁴ Alves, F., 2009, O navio português do século XVI de Oranjemund, Namíbia – Relatório das missões de 2008 e 2009. *Trabalhos da DANS*, 45. DANS-IGESPAR, Lisboa. On line in www.igespar.pt – 'Publicações'.

important consideration is to transfer the nexus of this problem from the issue of *possession* to the principles of *protection and co-operation*. This must now be considered the main challenge for the UCH globally. I wrote then:

'Will not the existence of focal memory connections of Portugal all over the world be incomparably important, evoking a presence that would remain visibly inscribed in their cultural matrices? Will this not simultaneously be the wisest and most successful way to put Portugal on the map?'

The wider application of this view can be clarified by substituting 'Flag States' for 'Portugal' and 'Coastal States' cultural matrices' for 'their cultural matrices'.

Comments about the UK position vis-à-vis the UNESCO Convention

As explained in other papers, the basic reason why the UK has not ratified the 2001 UNESCO Convention reflects two main issues: one concerns the Sovereign Immunity principle, and the second the legal protection system proposed.

Concerning the first, I quote: *'The United Kingdom considers that the current text [of the UNESCO Convention] erodes the fundamental principles of customary international law, codified in UNCLOS, of Sovereign Immunity which is retained by a State's warships and vessels and aircraft used for non commercial service until expressly abandoned by that State'.*

As seen from a Portuguese perspective, I reply that the UNESCO Convention supposes a compromise, as in any kind of human affair when the players have opposed interests. Consensus in those situations means concessions from both sides to reach the best possible solution to them. In that sense, *'should be'* instead of *'shall be'* in the controversial redaction of article 7.3 may from one perspective be seen as an unpleasant solution for Flag States – and remember that the art of politics is often not in the choice between the 'good' and the 'bad', but between the 'unpleasant' and the 'irremediable'.

But that *'unpleasant solution'* is in fact highly mitigated by the strong redaction of articles 2.8 and 3. Like article 7.3 referred to above, these constitute an example of what Carsten Lund had the insight to refer to as the *'constructive ambiguities'* of the Convention. Also, if we remember that international jurisprudence respects the core principle of Sovereign Immunity, those *'constructive ambiguities'* do not in fact represent an objective prejudice to a Flag State, but on the contrary, the means to maintain such immunity.

Finally, let us remember an argument frequently under-evaluated in this context, that like the judgment of Solomon, the UNESCO Convention represents a *nec plus ultra* paradigm in the practical challenge of protecting UCH worldwide.

Furthermore, in statistical terms the Flag States who will benefit most from the Convention will definitely be those who lost ships all over the world due to the historical and diachronic spread of their naval power.

Concerning the UK's second reason for not ratifying, I quote:

'It is estimated that there are probably about 10,000 wrecks sites on the seabed under the United Kingdom's territorial sea and it would neither be possible nor desirable to extend legal protection to all of them'.

I reply that as the *'in situ* preservation' principle supposes and the most skilled practices on UCH management demonstrate, nobody thinks that the application of *'the same very high standards of protection'* to all kind of UCH around the UK and all over the world, means literally the same kind of management system to different kinds of sites.

What the Convention actively refutes is the notion of first and second class categories of UCH, the first one for archaeologists and knowledge; the second for salvors and treasure hunters, for profit, and/or just for spectacle or the media, outside any archaeological principles and rules. This means that all kinds of UCH must be managed under the same *principles*, not under the same *priorities*. In fact, this corresponds to a top management tool – the ‘blanket protection’ principle⁵.

This basic UCH management principle in effect guarantees a basis for considering the desirability of safeguarding any remains, often with unsuspected high scientific potential, which might otherwise be threatened by salvors and treasure hunters. This principle also has another important value: to save tax payers’ money (from the management resources), because any kind of litigation due to UCH restrictive dark areas (for example concerning significance, ownership, shared responsibilities, etc.) always suppose morose, ruinous and uncertain developments. In this sense, ‘*blanket protection*’ principle acts like a shield that reinforces legally, pragmatically, but also politically and ethically the legitimacy of a Flag State to invoke the Sovereign Immunity principle when shipwrecks with their flag are exploited against the Convention principles (for example, Spain *versus* Odyssey, or the case studies of the *Juno* and *Galga*). In addition, it also facilitates proportional compromises in the context of a developer’s activities incidentally affecting the UCH, with clear benefits for mitigation archaeology.

Consequently, in the present century, Coastal and Flag States are effectively ‘condemned’ to reach a higher level of awareness, to discover or invent a new strategic option on UCH management. Returning to the judgment of Solomon dilemma, both sides of the argument, the Coastal State and the Flag State, may finally come to recognize the notion of *common/shared heritage protection*: a solution simply based on shifting the emphasis from the notion of *exclusive possession*, to the notion of *mutual co-operation*.

Aware of its limited resources and present difficulties (also dramatically reflected in UCH management), the Portuguese experience, crowned by the ratification of the UNESCO Convention in 2006, deserves to be stressed. We think Portugal can contribute to the new strategic option required by the international UCH momentum. But this is done with all due modesty because practical experience shows that this match is still very far off being won, as exemplified at the time of writing by Mozambique renewing its contract with the treasure hunting organisation Arqueonautas S.A.

⁵ Henderson, G 2001 ‘Significance assessment or blanket protection’, *The International Journal of Nautical Archaeology*, **30.1**: 3-4.

Introduction

The following paper is based on a short presentation given to the seminar on 'Protection of Underwater Cultural Heritage in International Waters adjacent to the United Kingdom' held in the Society of Antiquaries in London in November 2010. Some of the main legal issues relating to ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (the 'Convention') have been dealt with in detail recently (Kirwan 2010) and are only summarized here. The relevant articles of the Convention are not referred to in detail; again, reference may be had to cited material and the general literature on the Convention (e.g. O'Keefe 2002). The focus is on issues relating to the theme of the seminar, i.e. historic wrecks in international waters. The term 'international waters' is taken to mean waters lying beyond the territorial seas, i.e. including the contiguous zone, the exclusive economic zone and the waters of the Continental Shelf.² An outline is given of the practical ongoing work taking place to protect historic wrecks in such waters through the preparation of inventories and liaising with bodies responsible for the regulation of marine development.

One of the authors (Kirwan) participated in the Irish delegation to the meetings of governmental experts held by UNESCO to discuss the Convention in draft form and the other (Moore) manages the National Monuments Service's Underwater Archaeology Unit. Information and comments are drawn from this experience. The paper is not, however, a formal statement of Ireland's position on the various issues arising and the views expressed are those of the authors only.

Ireland's position on the Convention

Ireland supported the adoption of the Convention at the UNESCO General Conference in 2001. Concerns regarding possible conflict between the Convention and the maritime jurisdictions established under the United Nations Convention on the Law of the Sea ('UNCLOS'), or regarding the way in which the Convention deals with historic warships, were not, therefore, significant issues for Ireland. Concerning the former, support by Ireland for the coastal state having a role in protecting historic wrecks on the continental shelf was likely, given that Irish legislation had provided for this since 1987. As to the latter, maintenance of claimed rights over historic warships wrecked beyond its own territorial sea would not have been a particular concern for Ireland, given that it has no history as a major maritime power³. In so far as the issue was addressed by the Irish delegation during the UNESCO meetings, the view was taken that the provisions of the Convention provide an extra layer of legal protection for wrecked historic warships additional to any protection arising by reason of rights of sovereign immunity, where such apply.

For reasons which are summarized below, ratification by Ireland of the Convention will necessitate the enactment of new domestic legislation to address a number of issues not

¹ National Monuments Service, Department of the Environment, Heritage and Local Government, the Custom House, Dublin 1, Ireland.

² Terms for maritime zones are used with the meaning they have under the United Nations Convention on the Law of the Sea. For discussion of general legal issues in relation to these maritime zones in an Irish context reference may be had to Long 2007 and Symmons 2000.

³ Though this should not be taken to mean that there are not Irish vessels which may be considered of historic interest located far beyond the continental shelf of Ireland, in particular wrecks of Irish merchant vessels sunk during the Second World War. The *SS Irish Pine* was torpedoed and sunk south of Newfoundland in 1942 with the loss of all 33 crew. The *SS Irish Oak* was torpedoed and sunk in the mid-Atlantic in May 1943 (Brady 2009, 24).

covered in the existing National Monuments Acts, 1930 to 2004. The provisions of the Constitution of Ireland governing the relationship of international agreements to domestic law mean that this legislation will have to be in force prior to Ireland ratifying the Convention. Ratification would not of itself give effect to the Convention in Irish law and must therefore be preceded by the enactment of the domestic legislation to make sure Ireland avoids being unable to meet the international obligations taken through ratification (Kirwan 2010, 106). Government decisions in 2001 (Department of Arts, Heritage, Gaeltacht and the Islands 2002) and again in 2010 (Maxwell 2010) approved the drafting of new legislation which would include the necessary provisions to enable ratification to proceed. While this has not yet been enacted by the Oireachtas (Parliament), moving towards ratification of the Convention appears to be more a matter of prioritising the issue rather than any difficulty with the Convention. Following the enactment of the necessary legislation a further Government decision would be needed to allow the ratification process itself to be undertaken. Again, however, the indications are that this would be achievable.

The need for domestic legislation

In broad outline, since the enactment of the National Monuments (Amendment) Act, 1987 Ireland has had a wide scheme of legal protection for historic wrecks. There is automatic protection for wrecks 100 years or more old and historic wrecks of any date may be protected by designation. The level of protection applying is comprehensive; in summary any diving on or damage to a wreck to which the legislation applies, or interference with an underwater archaeological object can only be done under licence from the Minister for the Environment, Heritage and Local Government. Finds of wrecks one hundred or more years old and underwater archaeological objects must be reported to the relevant statutory bodies for protecting archaeological heritage. The general provisions of the National Monuments Acts, 1930 to 2004 also apply underwater, including regulation of archaeological excavation through a licensing system. Under the 1987 Act, the designation system for historic wrecks was not drafted to apply beyond the territorial seas. However, the National Monuments (Amendment) Act 1994 may be interpreted as extending it to Ireland's continental shelf, though the compatibility with UNCLOS of application of the legislation to the continental shelf has been doubted.⁴ Furthermore, the decision of the High Court in a case relating to three wrecks of the Spanish Armada at Streedagh, County Sligo (*King and Anor v The Owners and all other persons claiming an interest in the 'La Lavia', 'Juliana' and 'Santa Maria de La Vision'* [1999] 3 IR 413) has restricted the applicability of salvage law to wrecks.⁵

The clearest need for additional legislation to enable ratification is in respect of jurisdictional issues. With regard to the Area (i.e. the seabed beyond the limits of all national jurisdictions) and the continental shelf and exclusive economic zone of other States, Ireland needs to be in a position to exercise control over Irish nationals and vessels within the co-operation system established by the Convention for wrecks located in such zones. In regard to its own continental shelf (and leaving aside the question of compatibility with UNCLOS noted above), there may be a need for the existing law to be modified as it would apply to nationals and vessels of States Parties under the Convention. The main issue here would be to ensure that, in respect of historic wrecks on its continental shelf, Ireland could participate in the system of international co-operation envisaged by the Convention.

⁴ For fuller discussion both of the legislation and the issues noted see Kirwan 2010 (especially pp 105-106 and 107-109) and authorities cited there, in particular O'Connor, 1999 and 2006, Long 2007 pp 516-583 and (with particular reference to compatibility with UNCLOS) Symmons 2000 p 133.

⁵ See Kirwan 2010 for discussion of application of salvage law as it exists in Ireland to historic wrecks. See O'Connor 1999 and 2006 for discussion of the facts and findings of the case.

It may be noted that the necessary new legislative provision relates directly to the topic focused on, i.e. historic wrecks in international waters. This is also the case with regard to a possible, though less clear, issue that needs to be addressed in domestic legislation prior to ratification of the Convention. As noted, case law in Ireland has restricted the application of salvage law to historic wrecks. However, it can be argued that the extent of this restriction is not clear with respect to either wrecks of relatively recent date with identifiable owners, or (of particular relevance here) wrecks located beyond the territorial seas of Ireland.⁶ It may be advisable to clarify these issues in domestic legislation prior to ratification.

Ongoing work to protect underwater cultural heritage

Of course, the fact that ratification of the Convention cannot take place immediately does not mean that work on the protection of underwater cultural heritage cannot proceed. Both the National Monuments Service and the National Museum of Ireland have been involved actively in such work over many years, concerning both maritime and non-maritime waters. A detailed account of that work is not possible here. A key development was the establishment in 1997 of the Underwater Archaeology Unit (UAU) within the National Monuments Service. The approach of the UAU to the management and protection of the underwater cultural heritage covers several issues. These include dealing with applications for licences to dive on or interfere with wreck protected under the 1987 legislation; the compilation of a Shipwreck Inventory; advising on marine development proposals referred to it⁷; and non-disturbance survey and excavation (where necessary and appropriate) of newly discovered or vulnerable wreck and other underwater sites. Aspects of the work of the UAU of particular relevance to the theme of historic wrecks in international waters are discussed below, with reference also being made to some cases of work on wrecks that may be of international interest in Irish territorial waters⁸.

Before turning to this, it is worth noting that Ireland is party to the 1992 European Convention on the Protection of the Archaeological Heritage (Revised) (the Valletta Convention). This provides a basis for all policy on protection of archaeological heritage as has been set out in a national framework document (Department of Arts, Heritage, Gaeltacht and the Islands 1999). The legislation introduced in 1987 and subsequent non-legislative measures (e.g. establishment of UAU and the inventorying of historic wrecks) are in line with the recommended approaches set out in the Council of Europe's Parliamentary Assembly Recommendation 848 of 1978. Under Irish regulations implementing European Union legislation on environmental impact assessment, major marine development proposals are likely to be subject to assessment of impacts on underwater cultural heritage, including proposing measures to mitigate significant effects that cannot be avoided.

The Shipwreck Inventory of Ireland

A central aspect of the work of the UAU is the compilation of comprehensive dataset of underwater archaeological sites around the coast. This can be used as a management tool to ensure that archaeological heritage is considered in the course of planning marine development,

⁶ See Kirwan 2010 pp 113-114 for more detailed discussion. This also considers issues arising in relation to the provisions of the Merchant Shipping (Salvage and Wreck) Act, 1993 regarding disposal of unclaimed wreck. These provisions, based on the office of the Receiver of Wreck, do not apply to wreck to which the provisions of the National Monuments (Amendment) Act, 1987 dealing with historic wrecks apply. However, the 1987 Act clearly does not apply in the area of the continental shelf of Ireland. However, it should be noted that the relevant provisions of the 1993 Act do provide for involvement of the National Museum in deciding on how unclaimed wreck is disposed of so ensuring that the heritage importance of such material is taken into account.

⁷ For example applications for foreshore licences under the Foreshore Act, 1933, as amended

⁸ See Kelleher 2007 and Brady 2008 for more detailed descriptions of the work of the UAU.

as well as implementing the National Monuments Acts 1930 to 2004, including the 1987 Act as referred to above. The Inventory should be useful as a first step towards deciding which wrecks less than one hundred years old but of historic importance would be worth protecting by way of specific designation under the 1987 Act⁹. The Shipwreck Inventory of Ireland is the primary element of this dataset and comprises a database of all recorded wrecks up to and including 1945 in Irish territorial waters (both internal maritime waters and the territorial seas) and in areas of the continental shelf designated under the Continental Shelf Act, 1968¹⁰ and within Ireland's Exclusive Economic Zone. At present, the database contains approximately 12,000 wrecks, 25% having recorded positions, 60% of which are located outside the territorial sea.

The inventory is largely a desk-based study gleaned from a variety of documentary sources including United Kingdom Hydrographic Office wreck data, 18th and 19th century surveys and sea charts, Lloyd's List and Lloyd's Register, Parliamentary Papers, local and international journals, the Irish National Seabed Survey, fishermen's charts and divers' reports, to list only some. It is proposed to publish a series of volumes based on the Inventory. The first of these was published in 2008, covering the waters off the eastern counties of Louth, Meath, Dublin and Wicklow (Brady 2008). The inventory volume includes mapping of wreck distributions. The positions of precisely located wrecks are represented by a single point and associated wreck number. Wrecks with only general or vague locations are recorded as relative densities to illustrate areas of potential, expressed as a density surface. Specified shades (colours in the original maps) represent areas enclosed by isolines for which the Shipwreck Inventory has a high or low number of records and areas of greater or lesser density of wreck (Figure 1).

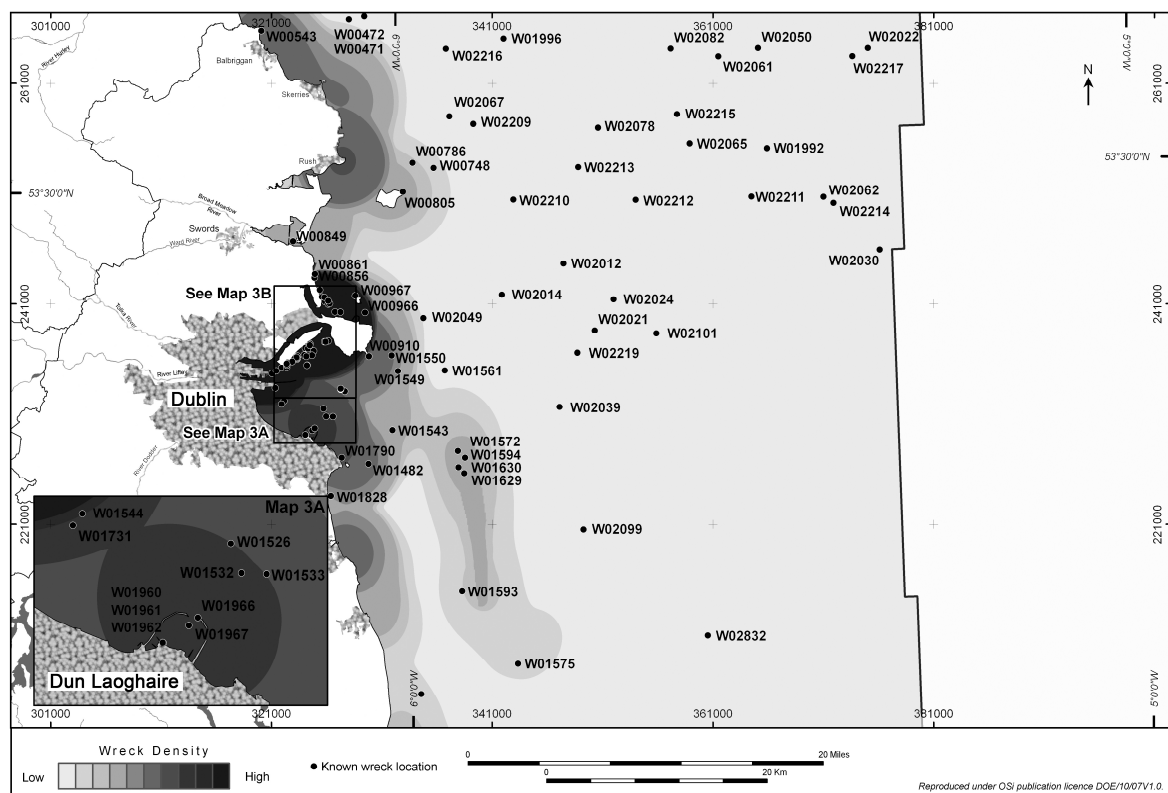


Figure 1: Shipwreck Inventory map showing recorded wrecks off Dublin (after Brady 2008)

⁹ Only one wreck less than 100 hundred years old has been so protected so far; the wreck of the *Lusitania* which is located inside Ireland's territorial sea. It sunk in 1915 after being torpedoed by a German U-boat. It was made subject to an Underwater Heritage Order under section 3 of the National Monuments (Amendment) Act, 1987 in 1995.

¹⁰ The legislation under which Ireland asserts its rights under international law to areas of continental shelf.

In addition to the regional mapping to appear in each inventory volume, the UAU is compiling as a 'work in progress' a single location map of all wreck sites up to and including 1945 for which there is a definite location. This covers the full area of the Shipwreck Inventory, i.e. including territorial waters and areas designated under the 1968 Act and the Exclusive Economic Zone. A version of this as it currently stands is reproduced in Figure 2, with reference to the continental shelf.

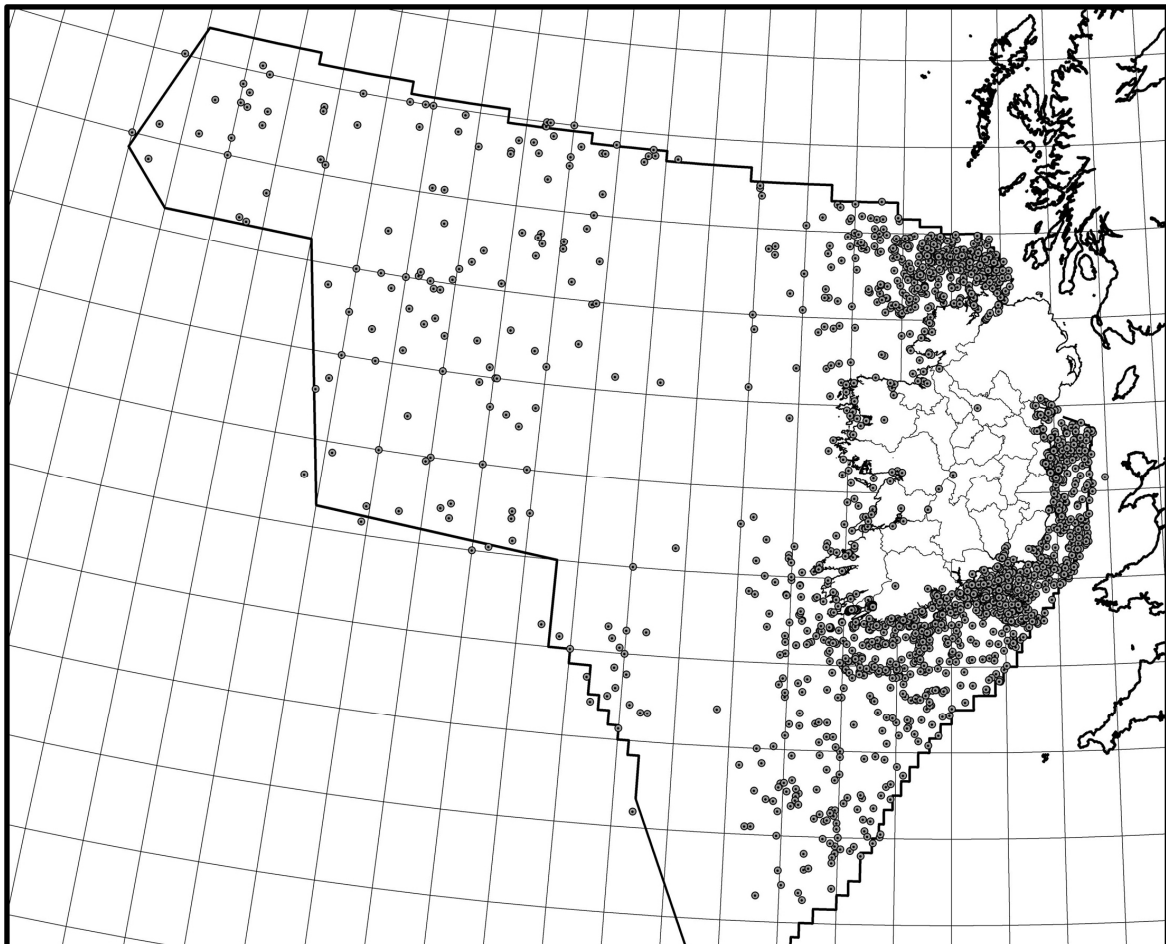


Figure 2: Overall distribution of wrecks in Irish Exclusive Economic Zone

As can be seen, there is still a significant gap off the west coast, which is being worked on currently. It is worth noting that more wrecks on the west coast of Ireland fall within Ireland's territorial sea than might be expected due to the practice, permitted under international law, of measuring the 12 mile limit from a straight base line cutting off certain bays.

Interest and significance of wrecks on Ireland's continental shelf

Many of the known wrecks on Ireland's continental shelf are from the First and Second World Wars. This means that, for the time being, they are outside the scope of both the National Monuments (Amendment) Act, 1987 (as far as it applies on the continental shelf) and the Convention, though in the case of wrecks from the First World War this exclusion will begin to end within a few years. The current exclusion should not, however, be taken as meaning that these wrecks lack interest and significance as underwater cultural heritage, taken in the broader sense than wrecks and objects to which the Convention applies. This will, perhaps, be most readily accepted with regard to wrecks associated with particular events of importance. An example is the wreck of the British liner the *Athenia*, lying some 250 miles west of Inishtrahull

Island, County Donegal, at a depth of 189 metres. Sunk by a German U-boat on 3rd September 1939, it was the first victim of submarine warfare during the Second World War.

The importance of less high profile wrecks has been emphasised recently with respect to wrecks of German U-Boats in the waters around Ireland (Brady 2009). In addition to those sunk in combat, there is a group off the north-west coast of Ireland (some within the territorial sea and others on the continental shelf) sunk after the war had ended. Following the end of hostilities, 154 U-boats were surrendered to Allied forces, 28 of which were distributed amongst the Allied forces. It was decided to dispose of the remaining vessels by sinking them 120 miles to the northwest of County Donegal in the Rockall Trough in an exercise known as Operation Deadlight. Between November 1945 and February 1946, 116 German U-boats were sunk. Less than half were sunk in the designated area while the remainder sank while being towed out to sea. This has resulted in some U-boats being located in areas now forming part of Ireland's territorial waters and with others being located in international waters (Brady 2009; Brady pers. com.). While not combat wrecks or war graves, they represent an important resource in terms of well preserved examples of U-boat technology.

The emphasis above on wrecks with recorded locations should not obscure the potential of Ireland's continental shelf to contain unknown wrecks of great interest. A dramatic illustration of this is the find of a Roman storage jar dredged up in 1934 by a Welsh trawler on the Porcupine Bank, 150 miles off the west coast of Ireland (Brady 2008, 23; Bateson 1973, 27, 30, 77; Ó Ríordáin 1945 to 1948, 65-66).

The protection of historic wrecks on Ireland's continental shelf beyond the territorial seas (12 mile limit)

As a reading of the Convention will show, its focus is on 'activities directed at underwater cultural heritage', in effect salvage and treasure hunting. It also requires States Parties to take steps to avoid or mitigate the impact of 'activities incidentally affecting underwater cultural heritage' (e.g. pipeline construction or petroleum exploration).

In regard to the latter, provisions of Irish law separate to the National Monuments Acts provide a good basis for action. This is because relevant legislation (e.g. that dealing with minerals and petroleum exploration or dumping at sea) applies, either under its own terms or under the terms of the Continental Shelf Act 1968, to designated areas of continental shelf. Without going into detailed discussion, the application of such legislation by any state to its continental shelf is permissible in the context of exercising its rights under international law over the natural resources of the continental shelf. This allows indirect protection of underwater cultural heritage on the continental shelf; licences and permits for exploration or exploitation of natural resources can be made subject to conditions for the protection of underwater cultural heritage. In regard to offshore oil and gas exploration, guidelines drawn up by the Petroleum Affairs Division of the Department of Communications, Marine and Natural Resources take account of impacts on the underwater cultural heritage. The UAU has a role in implementing these guidelines, and has recommended that such developments be subject to archaeological impact assessments that take account of the underwater cultural heritage. Ongoing work by the UAU mapping wrecks in both international waters and the territorial seas has meant that known wrecks can be avoided during the exploration and pipe laying phases of these projects. Information gleaned from the work of the National Seabed Survey has been particularly helpful in identifying wrecks that might be affected. The pipeline route for the Kinsale gas field off the south west coast was subject to detailed geophysical surveys that took account of the potential for underwater archaeology to exist, and appropriate archaeological monitoring programmes were also put in place.

However, such 'indirect protection' does not address actual or potential problems regarding salvage or treasure hunting directed at historic wrecks on the continental shelf beyond the territorial seas. Apart from full scale commercial salvage of wrecks, as outlined in the paper by Parham and Williams elsewhere in this volume, wrecks in deeper waters which until recently were inaccessible to scuba divers are now becoming accessible. While it is anticipated that the majority of those who dive on historic wrecks will act responsibly, even if the wrecks are not legally protected, there may be some who do not. Apart from possible legal issues arising in regard to the enforcement of the relevant provisions of National Monuments (Amendment) Act 1987 against non-Irish nationals operating on Ireland's continental shelf (Kirwan 2010, 109)¹¹, the practical difficulties in attempting to police such activities on the further reaches of the continental shelf are likely to be considerable. Persons intent on carrying out salvage or treasure hunting operations on the Irish continental shelf in respect of a historic wreck might never enter an Irish port, using instead the ports of other states. This also highlights a difficulty in such context of using Irish salvage law as set out in the Merchant Shipping (Salvage and Wreck) Act, 1993 to protect underwater cultural heritage. The duty to deliver wreck to the Receiver of Wreck only arises if the wreck is within the territory of Ireland (which is to be taken as ending at the outer limit of the territorial seas) or, if found outside it, is brought within it (see section 44 of the 1993 Act).

The authors would argue that the issues outlined above point clearly towards international co-operation as the best way forward. The Convention appears to address this in detail through its package of co-operation and shared responsibilities among interested states in respect of particular wrecks, the duties given to all States Parties to regulate the activities of their vessels, and to regulate the entry of underwater cultural heritage into their territory. One gap, though, is that the definition of underwater cultural heritage for the purposes of the Convention is restricted to material underwater for at least 100 years. From the discussion above, it can be seen that this leaves a gap in respect of a potentially significant number of wrecks of considerable historic interest which could become the target of in-appropriate salvage or treasure hunting even if only a few years short of the necessary 100 year age. Again, international co-operation may be the way forward, possibly including regional or bilateral agreements concluded as necessary. Such agreements are provided for in the Convention in Article 6 concerning underwater cultural heritage as defined in the Convention, but agreements to protect later wrecks do not appear excluded. Indeed, they could be seen as being in line with the general duty on all States Parties to UNCLOS to protect objects of an archaeological and historical nature found at sea and to co-operate for that purpose (Article 303 (1) of UNCLOS). However, the challenges in putting in place such agreements and the length of time needed could be substantial. One issue that would arise, and arises in any event concerning action by individual states, is deciding which wrecks less than 100 hundred years old merit the allocation of resources to achieve their protection. As suggested earlier, the compilation of inventories may be a first step towards this, allowing an overview of the nature of the resource and its extent.

While none of the above is, of course, an official policy position, the official response (by way of answer to a Parliamentary question to the responsible Minister¹²) to the reported discovery of

¹¹ No view on this should be read as being expressed in this paper. The declaration by Ireland of a contiguous zone may strengthen the degree to which the jurisdiction of Ireland over historic wrecks located within 24 miles from the outer limit of the territorial sea is accepted internationally in accordance with Article 303 (2) of UNCLOS, at least in regard to prevention of removal of material. Section 84 of the Sea-Fisheries and Maritime Jurisdiction Act, 2006 establishes an Irish contiguous zone.

¹² Dáil Éireann Debate Vol. 508 No. 5 Thursday 7th October 1999

the *Carpathia*¹³ in the late 1990's may be seen as favouring an approach to historic wreck protection on the continental shelf based on co-operation. On the other hand, the response in that case, involving reluctance to make an underwater heritage order and a desire to await the conclusion of the negotiations which led to the Convention, has been viewed as being as much 'pragmatic and resource related' as 'policy based'. However, the same author was also of the view that a co-operative approach was likely to be favoured in similar cases in the future (O'Connor 2006, 142-143).

Work of the UAU in respect of historic warships within Ireland's territorial waters (i.e. internal waters or territorial sea)

The general issue of historic warships wherever located (i.e. not just in international waters) and the relationship of the Convention to them gave rise to some discussion at the seminar. It was also touched on in the presentation as given, as it enables some aspects of the work of UAU to be illustrated. The presence of historic warships of major importance along the coast of Ireland was highlighted by the discovery of Spanish Armada wrecks in the 1960s and 1970s (Flanagan 1988; Martin 1975). Further discoveries and research have re-emphasised this. The UAU has a dive capacity and has undertaken a number of surveys and excavations at protected wreck sites over the last 12 years. Some of these dive projects have been undertaken in response to new discoveries made under archaeological conditions placed on marine development; others have been in response to reports of discoveries by recreational divers, or to inspect and gather evidence where wrecks have been illegally interfered with. Some have followed up old discoveries to assess the condition of these sites today. Relevant cases include the 1797 French Armada vessel, *La Surveillante* (Breen 2001), the Spanish Armada wreck, *La Trinidad Valencera*¹⁴ and a 17th century wreck on Duncannon Bar in Co. Waterford (possibly the English Parliamentary flag ship, *The Great Lewis*) (Kelleher 2004) are cases in point¹⁵.

Taking one example, the wreck of *La Surveillante* was discovered during a seabed survey in 1981 following the Whiddy Island oil terminal disaster, near Bantry in west County Cork in 1979. *La Surveillante* was part of a large fleet of 48 French ships that set sail from Brest on December 16th 1796 on course for a planned invasion of Ireland. The venture was a failure, mainly due to weather conditions. *La Surveillante*, which arrived on the north side of Whiddy Island on December 31st 1796, was taking on water to such an extent that she was dismantled, abandoned and scuttled over the next few days. As should be clear from the earlier outline of the legislation, the wreck is protected under the National Monuments (Amendment) Act, 1987, indeed its discovery may have been one of the factors leading to the enactment of the 1987 Act (probably along with the litigation relating to the Streedagh Armada wrecks as referred to above). Two of the 14 cannon on board and the ship's bell were recovered in the 1990's, but the policy of the Department of the Environment, Heritage and Local Government in regard to it (and other such wrecks) is based on preservation *in situ* with provision for well-researched scientific study under licence from the Minister, unless circumstances require recovery of material. The lower part of the hull of the ship is all that survives, but that section is in

¹³ The ship which came to the rescue of the *Titanic*. The *Carpathia* was torpedoed on 17th July 1918 and lies at a depth of 150 metres some 100 miles southwest of Baltimore, County Cork.

¹⁴ Clearly falling into the category of following up old discoveries (Flanagan 1988; Martin 1975 and 1979).

¹⁵ Another example of such work by the UAU is a possible 17th century slave ship in Dunworley Bay, Co. Cork (Kelleher 2010), though this is not a warship. Another historic wreck of international interest located in Ireland's territorial sea is that of the *Lusitania*, as referred to earlier. The work of the UAU over a period of years has included liaising with the recognised owner of the wreck and monitoring private dives carried out under licence granted by the Minister for Environment, Heritage and Local Government under the terms of the 1987 legislation.

remarkably good condition, surviving from stem to stern and containing a diagnostic range of artefacts of the period (Breen et al 2001).

The work of the UAU in recommending archaeological work in advance of marine development is also relevant. As part of the archaeological impact assessment for the Kinsale Gas pipeline (as referred to above) the National Seabed Survey data was analysed and a number of anomalies were investigated by Moore Marine Ltd in advance of the pipeline being laid. The need for an assessment was recommended by the UAU in 2009, and it was informed by data for the area in question contained in the Shipwreck Inventory archive. Two of these anomalies proved to be of archaeological significance, being the wrecks of two German U-boats, UC42 and the U58. The U58 sank in about 70 metres of water outside Cork Harbour while the UC42 went down just outside the harbour, off Roche's point, in 27 metres of water. UC42 was lost on September 10th 1917 when a mine she was carrying exploded, while the U58 was depth charged by a United States' destroyer on November 17th 1917 (the first submarine destroyed by the United States Navy in the First World War). The crew of the UC42 was lost while most of the U58 crew was saved. The UC42 is therefore a war grave. Because of this, and in keeping with the spirit of the UNESCO Convention, the Department of the Environment Heritage and Local Government officially notified the discovery to the German Embassy in Dublin. The Department has advised that it intends to monitor activity on the site with a view to protecting it under the 1987 Act should the need arise.

Conclusion

Pending enactment of the necessary legislation to enable Ireland to ratify the Convention, the work to protect the underwater archaeological heritage as outlined above will continue within inevitable resource constraints. The experience has been that the publication of the first volume of the Shipwreck Inventory has resulted in more queries from the general public looking for information on wrecks and increased reporting of wreck discoveries. This is very much to be welcomed, but if it leads to increased expectation of response from the UAU, it may place further demands on its resources. It is hoped that new legislation, in addition to addressing the Convention, will give a better legal base for key aspects of existing action to protect historic wrecks, namely co-operation with the Naval Service and Receivers of Wrecks. Much beneficial co-operation with these already takes place, but increased express powers for them to implement the legislation would assist. Encouraging co-operation between relevant public bodies, recreational divers¹⁶ and the state heritage services has been a key aspect of developing underwater archaeology in Ireland. Such co-operation will also be vital for the protection of underwater cultural heritage in waters beyond the limits of Ireland's territorial seas, and reference is made above to the importance of exercising state rights over the natural resources of the continental shelf in such a way as to protect underwater cultural heritage. However, unless one is of the view that commercial salvage or treasure hunting of historic wrecks beyond territorial seas or contiguous zones should, in practical terms, be left unregulated (and the authors are not of such view), co-operation at international level seems essential. The UNESCO Convention was the product of a long and difficult negotiating process; whatever criticisms are made, it is unlikely to be replaced or modified other than (possibly) in the longer term. It must surely be the basis on which international co-operation in this field moves forward though, as discussed, it leaves some gaps in regard to historic wrecks of later date.

¹⁶ For a fuller discussion of co-operation with recreational divers see O'Connor 1999, 98

Acknowledgements

The authors wish to thank Robert Yorke of the Joint Nautical Archaeology Policy Committee for the invitation to attend the seminar in London in November 2010 and for his patience in awaiting submission of this paper. They also wish to thank Karl Brady of the Underwater Archaeology Unit, National Monuments Service for preparing the Figures and providing a range of information used in preparing the paper.

References

- Bateson J.D. 1973 'Roman Material from Ireland: A Reconsideration', *Proceedings of the Royal Irish Academy* **73 C**, 21-97
- Brady K 2008 *Shipwreck Inventory of Ireland Louth, Meath, Dublin and Arklow*, Dublin
- Brady K 2009 'U-boat Losses off the Irish Coast', *Archaeology Ireland* **23(3)** Issue No. 89, 22-25
- Breen, C 2001 *Integrated Marine Investigations on the Historic Shipwreck La Surveillante*, Coleraine
- Department of Arts, Heritage, Gaeltacht and the Islands 1999 *Framework and Principles for the Protection of the Archaeological Heritage*, Dublin
- Department of Arts, Heritage, Gaeltacht and the Islands 2002 *Protecting our Heritage Review of the National Monuments Acts*, Dublin
- Flanagan L 1988 *Ireland's Armada Legacy*, Dublin
- Kelleher C 2004 'The Duncannon Wreck - A Seventeenth-century Ship in Waterford Harbour' *Archaeology Ireland Heritage Guide No. 26*, Bray
- Kelleher C 2007 'Quantification of the Underwater Archaeological Resource in Ireland as a Means to its Management and Protection' in Satchell, J and Palma, P (eds.) *Managing the Marine Cultural Heritage*, York, 5-16.
- Kelleher C 2010 'The Dunworley Bay Shipwreck: Seventeenth-Century Evidence for Piracy and Slavery in Ireland' in Horrell, C and Damour, M (eds.) *ACUA Underwater Archaeology Proceedings 2010*, 38-145
- Kirwan S 2010 'Ireland and the UNESCO Convention on the Protection of the Underwater Cultural Heritage' *Journal of Maritime Archaeology* **5(2)** December 2010, 105-115
- Long R 2007 *Marine Resource Law*, Dublin
- Martin C 1975 *Full Fathom Five*, London
- Martin C 1979 'La Trinidad Valencera: An Armada invasion transport lost off Donegal' *International Journal of Nautical Archaeology* **8(1)**, 13-38
- Maxwell N 2010 'New National Monuments Bill' *Archaeology Ireland* **24(2)** Issue No. 94, 4
- O'Connor N 1999 'Ireland' in Dromgoole S (ed.) *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague, 87-99
- O'Connor N 2006 'Ireland' in Dromgoole S (ed.) *The Protection of the Underwater Cultural Heritage: National Perspectives in the Light of the UNESCO Convention 2001*, Leiden, 127-144
- O'Keefe P J 2002 *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester
- Ó Ríordáin S P 1945 to 1948 'Roman Material from Ireland' *Proceedings of the Royal Irish Academy* **51C** 35-82
- Symmons C 2000 *Ireland and the Law of the Sea 2nd Edition*, Dublin

United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage – Ole Varmer¹

Disclaimer: these are personal views of Ole Varmer and do not necessarily reflect the views of NOAA, the Dept of Commerce or anyone in the US Government

The United States Government has been a leader in the protection of underwater cultural heritage (UCH). For example, in 1975, the US National Oceanic Atmospheric Administration (NOAA) designated the USS *Monitor* as its first National Marine Sanctuary some 17 miles off its coast. As such, the USG was an early leader, if not the first nation, to designate a marine protected area in the high seas in order to protect a historic shipwreck from looting and unwanted salvage.

Other evidence of this interest and support is found in its statutes, agreements and policies. The US Congress has enacted a number of statutes including the RMS Titanic Maritime Memorial Act of 1986, the Abandoned Shipwreck Act of 1987, and more recently the Sunken Military Craft Act of 2004. The Department of State has executed a number of agreements with other nations in order to protect certain UCH of common interest. These include agreements to protect RMS *Titanic* off the coast of Canada, *La Belle* off the coast of the US State of Texas, *CSS Alabama* off the coast of France, and the Japanese Type-A *Kohyoteki* midget submarines off the coast of the US State of Hawaii. The agreements with France and Japan implement the respective duty to co-operate in the protection of UCH and recognize not only the ownership and sovereign immunity of sunken warships but also recognize the jurisdiction and authority of coastal States over foreign sunken warships located within their territorial seas.

Around the time that negotiations on the UNESCO Convention were concluding in 2001, President William J Clinton issued a *Statement on the US Policy for the Protection of Sunken Warships*. This provided notice that the US maintains ownership of its sunken State craft wherever located unless expressly abandoned, in a manner directed by Congress; that the law of finds shall not apply; and that no salvage is authorized without the government's express permission. In 2004, the US Congress passed the Sunken Military Craft Act that codified this policy thereby protecting US sunken military craft wherever located and foreign vessels located within the US 24-nautical-mile Contiguous Zone. Copies of these agreements and policies are available on the website of the NOAA Office of General Counsel for International Law.²

The US Department of State and other federal agencies also support many of the principles and provisions of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, particularly the Rules in the Annex. Thus, while the USG still has a couple of issues preventing it from signing the 2001 UNESCO Convention, most of the relevant federal agencies have indicated that they comply with the Rules in the Annex or comparable rules or guidelines. For example, in response to letters from the President of the Society of Historical Archaeology (SHA), the following agencies have indicated that they follow the Rules in the Annex as a matter of practice and policy: NOAA; the Advisory Council on Historic Preservation (April 25, 2008); the Mineral Management Service (June 17, 2008); and the National Park Service (October 27, 2006). SHA has also been successful in getting a number of State offices and agencies to document their plans to comply with the Rules of the Annex or the ICOMOS Charter on which the Rules are primarily based.

Even judges sitting in Admiralty are recognizing the importance of international co-operation on the protection of UCH in accordance with the Rules or comparable guidelines, like the NOAA

¹ Attorney-Adviser, US National Oceanic Atmospheric Administration

² http://www.qc.noaa.gov/qcil_heritage2.html

Titanic Guidelines. For example, in the *Titanic* case, the court has issued orders prohibiting penetration of the hull portions and limited salvage to the area on the seabed between the hull portions where artifacts are scattered. The salvor, RMST Inc., has consistently said it complies with current standards of research, recovery, conservation and curation. In a number of decisions, the court has cited NOAA's *Titanic* Guidelines and the *Titanic* Agreement as reflecting the public interest in *Titanic* and has asked NOAA to help monitor the salvor's activities to ensure that they continue to comply with the Rules and guidelines. Thus although the *Titanic* Agreement is not yet in force and the NOAA Guidelines are only advisory, they have been cited by the court (RMS *Titanic* 2004) and may be enforced by the court in its discretion.

The court clearly does not have jurisdiction over other nations or their flagged vessels and nationals, however, it does have *in personam* jurisdiction over the salvors, RMS *Titanic* Incorporated. Thus, until the US Congress enacts legislation, the Judge is in the best position to protect and manage the wreck site from improper salvage under the law of salvage.

The court has recently granted RMST's request for an award of approximately \$110,000,000 for its salvage services. The court decided to wait until August 2011 to see either if some acceptable entity is willing to purchase the collection so that the proceeds may be used to satisfy the award; or, in the absence of any other means to do so, it should grant RMST's request to award the Collection of artifacts along with the Covenants and Conditions³. The Covenants and Conditions incorporate many of the provisions in the international Agreement on *Titanic* and professional archaeological standards. These include requirements that the collection of salvaged artifacts be conserved and curated as an intact collection – sale of individual artifacts at auction or otherwise is prohibited.

While the US has been a leader in protecting certain UCH and supports the Preamble, Annex Rules and most of the general principles, it has not yet signed the 2001 UNESCO Convention. This is because of concerns about the regime on the continental shelf and EEZ and an inconsistent application of the Flag State consent regime that applies to sunken warships in all of the maritime zones except the territorial sea. Nonetheless, the US has taken steps to protect UCH in a manner consistent with the framework of the LOSC and the 2001 UNESCO Convention Annex. In the US I have advised archaeologists to focus first on getting legislation protecting UCH that could be used to implement the 2001 UNESCO Convention in a manner consistent with the LOSC. This would include provisions providing authority to co-operate in the control of all salvage of UCH by US flagged vessels or nationals - activities that should be prohibited except to the extent they are authorized by appropriate authority consistent with Rules of the Annex. This would address concerns about unauthorized salvage and looting by US salvors in the seas of foreign nations, in the high seas as well as to the UCH on the US continental shelf/EEZ that is outside of protection of the regulations of sanctuaries, the Sunken Military Craft Act and the Abandoned Shipwreck Act.

³ See http://www.qc.noaa.gov/qcil_titanic-salvage.html for copies of the decision.

How has France overcome its original reservations and why do they no longer prevent it from ratifying the 2001 Convention?

France was concerned about a possible undermining of its State sovereignty over the wrecks of its warships and State vessels lost in the Territorial Waters of other States. However, since the adoption of the Convention the actual practice in the field has showed that in all cases the co-operation between the concerned States functioned very well and France's sovereign rights were respected.

After more in-depth legal consideration, France has furthermore concluded that the 2001 Convention does not in fact change the pre-existing legal status of State vessels in a negative way. The Convention does mean that France should be informed when one of its sunken vessels is found in Territorial Waters of another State. However, this does not hinder France's right to claim stronger rights from other existing laws, be it UNCLOS or customary law that in France's opinion may require its positive agreement before any intervention is undertaken. France will make this opinion clear, when ratifying the 2001 Convention by the means of an interpretative declaration.

What benefits France would derive from ratifying?

France wishes to protect effectively all sunken heritage from pillaging, destruction and treasure hunting, wherever this heritage may be located, including international waters. The 2001 Convention is the most effective international instrument to reach this goal. It wishes furthermore to engage in an amicable spirit in the co-operation with other States to commonly investigate and research this precious legacy, to foster and advance underwater archaeology and to meet in a common forum, like the Meeting of States Parties to the Convention or its Scientific Advisory Body in order to address global issues of underwater archaeology together.

It considers furthermore the ethical standards set by the Convention as those that should be the internationally recognized ones for the treatment and research of underwater cultural heritage, concerning in particular a protection harmonized with that granted to land-based heritage, non-commercialisation and the need for an archaeological overview of interventions.

What benefits might France receive if the UK were to ratify?

France and the UK are neighbours, especially where this concerns the waters of the Channel and the North Sea. In innumerable instances, their vessels sailed the same seaways. It is in both France's and the UK's common interest to make use of their respective jurisdictional rights, as foreseen by the Convention, in order to protect sunken heritage from undesired interventions and commercialisation. France furthermore expresses its sincere wish to join hands with the UK's scientific community to advance underwater archaeology and bring the sunken heritage closer to the heart of the public.

What administrative process must France adopt in order to ratify?

France is currently undertaking the Parliamentary process needed to ratify the Convention.

What is the current timetable for the French ratification?

France still hopes to ratify in 2011.

¹ Chef du Département, Département des Recherches Archéologiques Subaquatiques et Sous-Marine, (DRASSM), Marseille, France

First of all, I would like to thank the organizing bodies for *once again* organizing a seminar at the Society of Antiquaries at Burlington House, addressing issues related to the protection of underwater cultural heritage. The meeting was convened not just in a spirit of reflection, but with determined engagement to help the UK government get its bearings in these matters; to adjust its course so as not to make things worse in incident management, but to steer towards the acceptance of overall international standards; and to commit itself to the 2001 UNESCO Convention. Thank you also for inviting me to be part of that and *once again* to offer some views: not necessarily balanced opinions since I was asked to provide critical comments.

It is always a pleasure to be in your midst here in London. In a way, it is a somewhat dubious pleasure to be invited in October 2005 to a meeting with a well-defined purpose of inspiring the UK government to consider ratification of the international instrument of 2001, and then to be invited *once again*, 5 years and a month later, to a meeting with much the same purpose, motivations and expectations. Depending, I suppose, on one's personality and character, one could get quite depressed by such an identical invitation, but it shows after all that whatever the impact of the Burlington House Declaration of 2005, things have certainly not been moving at interstellar speed. Will there be another meeting in 5 years time, in ten years..... in endless repetition, until death separates us? Well, I do not think there is any reason for such fatalistic pessimism.

The period between 2005 and 2010 has certainly seen a couple of high-profile scandals involving the UK government in a deplorable manner and in a way that deserves much criticism and which, with careful steering, should have been avoided. At the same time, developments in a more positive direction have not stopped. For things to move along one needs a good scandal every now and again, coupled, on the other hand, with such determination and perseverance as JNAPC and its partners have displayed in today's seminar. All in all, while many of us present here today would like things to move much quicker, we are all equally aware of a few, mutually reinforcing developments. One is the gradual but persistent change in perceptions relating to the role of heritage in society. That gradual but persistent change calls for codification of those perceptions in protection, management, law and regulations, making it an urgent matter. But at the same time it is undeniable that this change has indeed been attended by gradual institutional and regulatory reform. This has happened over the last 30, 40, 50 years, including the five years that went by since the October 2005 seminar. Some such steps are unfortunate in hindsight, a fact that is always hard to admit, making correction an even slower process than the steps themselves. But correction does occur and so do steps that do not need any correction at all.

Looking at the UK and its foreign relations, as today once again I am asked to do from an outside perspective, some such steps do stand out. Very crucial in my mind has been the ratification of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. This was achieved by the UK, Switzerland, Denmark and Sweden just prior to our 2005 meeting, and by Norway, Germany, Belgium and The Netherlands since then. Traditionally none of these States – and certainly not the UK – had great concerns about trade in antiquities that resulted in imports, and thus cultural enrichment rather than depletion at home, whatever the results elsewhere. But this has changed. The loss of context for heritage objects from illegal excavations and solidarity with those who try to diminish destruction have become a serious political concern, not least by the simple act of ratification. Moreover, in this context the UK has implemented very lucid domestic legislation in the form of the Dealing in Cultural Objects (Offences) Act of 2003.

¹ Professor of Maritime Archaeology, University of Southern Denmark; President, ICOMOS-ICUCH

One can debate whether the resulting system of control and enforcement can be improved or should be supported by ratification of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, but that is not our subject of today. What is, however, is the fact that excavated objects from sites on land, whose pedigree cannot be indicated are considered 'tainted', and probably on the market illegally. Reputable art dealers and their customers do not really like that. They want to be nice people. Although nice people do tell lies, they try to avoid doing so all too conspicuously (Watson 2007). This inevitably results in fundamentally increased pressure on underwater sites to produce antiquities for the market, to the great advantage of dicey operators. Excavated material from underwater sites that appears on the market is not 'tainted' in the same way as similar material would be from a land site.

Would I therefore suggest that the ratification of the 1970 convention that put more pressure on the exploitation of the underwater cultural heritage as a marketable resource is a bad thing? No, not at all; on the contrary – but one cornerstone of the whole structure is still missing: the ratification of the 2001 Convention that would render unauthorized excavation in international waters as illegal, as 'tainted', as it is on land. That is why *once again* we are gathered today.

Another small step taken by the present UK government that I would like to comment on is the abolition of the Advisory Committee on Historic Wreck Sites. Many who are present today have perhaps commented this on negatively, but looking at it from the outside it can, on the contrary, be assessed as a positive step.

Why is – in my eyes – the abolition of such a committee a good thing? Well, its existence has given the UK government the reasonable impression – and the excuse – that it was in one way or another addressing the issue of Underwater Cultural Heritage, while in fact it was not. In practice it only managed – it only *could* manage – an anomalous handful of permits under the Protection of Wrecks Act 1973, an emergency act that was never meant to guide further thinking. It was devised to deal with a then unfortunate situation, but which in a perspective from abroad served equally unfortunate initiatives rather than guiding an all-encompassing approach. In The Netherlands it was often cited as legitimizing utterly unwanted approaches (Maarleveld 2006: 164-5; van Duivenvoorde 2006). The Protection of Wrecks Act guided thoughts on what underwater cultural heritage is and what it needs, on the wrong footing. Let us hope that the abolition of the Advisory Committee will pave the way for a more encompassing approach.

In a way it should. An agency such as English Heritage to which the Committee's English business now falls, cannot permit itself to come up with idiosyncratic solutions without looking at the wider issues. This includes the wider public function of heritage in society; the whole spectrum of heritage, including the make-up and texture of the submerged landscape, its different layers relating to Prehistory through Modern times; the cultural meaning of estuaries, roadsteads, sea routes and the sea, as well as the significance of individual sites within those contexts.

This tendency to move away from idiosyncratic incident management towards a more encompassing approach, of finding 'the right footing to act on' first and then acting, seems to be a more general trend. One would not think so immediately when listing the individual scandals that involve UK government institutions in relation to looting of underwater cultural heritage, but I think it is a trend all the same.

Our meeting in Burlington House in 2005 was simply named after the 2001 Convention. Two meetings held in Wolverhampton under the leadership of Mike Williams addressed the specific significance of the heritage issuing from the battles of World War I, notably the Battle of Jutland and the particular concerns of British divers, citizens and institutions regarding British warships overseas. However specific this significance is, or however legitimate these particular concerns are, it became very clear that they can only be addressed and met in their own local context, in tune with developing strategies for other heritage in the area concerned. Then the additional

arguments for protection, related to the war's emotional and political impact come into play, but not before, not as an isolated issue, not in defining what a monument is. Moreover, there must be reciprocity. The UK cannot expect other coastal States to do more in their adjacent waters for heritage with a British link than it is itself prepared to do for any heritage in waters adjacent to its own territorial sea (Maarleveld 2009; Maarleveld *in print*).

In that respect, today's seminar is telling. It finally addresses the protection of Underwater Cultural Heritage in the (international) waters adjacent to the U.K in general terms. As has been highlighted in other papers given at the seminar, there is very little scope for anything but an encompassing approach. The intensity of implementation is another matter. This was clearly indicated by Antony Firth. But any effort that does not address the whole picture, that does not address the impact on 267 sites that was needed to find a link with Admiral Sir John Balchin, but only addresses the impact on that particular site, is window dressing, self-defeating in the long run and thus a waste of effort and a waste of money.

The UK has – and this is particularly evident from the outside – a very good tradition of debating manifold aspects of heritage, of recognizing the public function of heritage and of addressing the rapport and harmonizing of local, regional, scientific and other interests. I have – on quite a few occasions – been very critical on the way the UK government dealt with and evidently conceived of maritime heritage and heritage offshore: dealing with one incident after another, often cloaked in secrecy and confidentiality, making it even worse in terms of heritage as a public interest. But on the other hand, I have always been a great admirer of the well thought through guidance under which archaeological professionals, consultants, operators and curators work – in short of UK archaeology in general. It has a great tradition. Why not simply extend this tradition to include all decisions relating to adjacent international waters?

To some extent, that is exactly what is beginning to happen. This is exemplified in the planning of development offshore, including assessment of impact and its mitigation, that we heard of today; in all the enthralling research that is financed as compensation for development loss through the Aggregate Levy Sustainability Fund; and in the approaches to understanding the Prehistoric landscapes of the continental shelf that reflect the early development of humankind. I could mention the European SPLASH-COS initiative in which British input is paramount (Fischer 2010; Flemming 2004; Gaffney, Fitch & Smith 2009). Antony Firth is certainly right: it is a pity that the UK has so much to offer but still has such an appalling reputation! Guidance developed for general purposes of heritage management and for the archaeological profession in general, now needs, however simply, to be made applicable to the heritage in adjacent waters.

Why does that not seem to work where shipwrecks are concerned? Such guidance should be applicable; it should be applied there as well. Certainly, the problem relates to an unfortunate succession of incidents and their management over the last 37 years, whose precedent should now perhaps be sidelined. A ship cannot do with more than one captain, whoever its owner or owners, whoever is a stakeholder or an interested partner, but every British institution wants to be the captain of this ship.

The Receiver of Wreck, the Ministry of Defence, the Department for Culture, Media and Sport, the Marine Management Organisation, the Crown Estate are all noble institutions, each with their own remit, each with their own qualities and objectives: defence for instance, or receiving wreck and settling the claims and private law issues surrounding individual items found. Despite laudable attempts to take good care of heritage issues and incidents that come up in the context of their tasks, that is not the same thing as embodying the UK's approach to heritage in a balanced way. It is not the same thing as being captain of this ship.

For protection of heritage, for its management, be this superficial or intensive, something else is needed: to warrant a balanced view and to warrant public interests for the benefit of all UK

citizens, for local or non-local stakeholder groups alike, and not least to warrant reciprocity through serving the interest of international stakeholders and international verifiable links as well. The ship, in other words, needs a 'curator' to take charge. There is nothing new in that. It is how the care for heritage on land, how terrestrial archaeology is organized in Britain as in other countries. But it seems to be next to new in the context of adjacent waters. Let us hope that the abolition of the Advisory Committee on Historic Wreck Sites leads to the unequivocal establishment of such a curator both for territorial and for adjacent waters, the one and non-exchangeable captain, the one and non-exchangeable competent authority according to the 2001 Convention.

From the outside perspective, it does not matter so much which authority that is, as long as it is competent in all matters relating to heritage and as long as taking the 'curator' role is what it is established for, rather than Defence, or receiving wreck.

I am perfectly aware – and have pointed this out previously (Maarleveld 2007) – that such an unequivocal choice of a curator for national and international waters is somewhat at odds with the tendency to decentralize, to put more responsibility at the regional and county (not to touch on devolution within the united union). But from a perspective of other countries, having one such central point is indispensable. So please, find a solution for that! Having a Ministry of Defence to define heritage issues on the sidelines is simply not an option. It just leads to ever more scandals. In addition, perhaps I could remind you of just how much aversion to the UK in the international community this awkward role pattern produced during the negotiations of the 2001 Convention, as I illustrated during the last Wolverhampton Conference (Maarleveld 2009).

One last issue I would like to raise concerns the professional community in the UK more than signing the Convention – however much that is needed. The professional community of archaeological practitioners in the UK is quite strong and well organised. Professional bodies such as the Institute for Archaeologists are essential to discuss the role of archaeologists and the type of services they can or should not offer. This has been quite crucial in periods of inconsistent or versatile government policies and organisational change. Agreed professional codes of practice are the result. Members sign up to those codes of practice. They vow to work in the best interest of archaeological heritage, its study and preservation, just like a member of the medical profession signs up to the Hippocratic Oath.

With regard to the present situation relating to underwater cultural heritage, especially in Britain, I think we should go an extra mile. We need to make it crystal clear that those who operate contrary to the central tenets of the profession – by promoting dispersal and sale of artefacts; by accepting archaeological material for their personal collection or as payment; or by helping to make such approaches acceptable and fashionable – are not part of the archaeological profession. They are not archaeologists, whatever their previous training in the subject, and should not to be regarded as such.

The assignments that authorities have been giving out to archaeological consultancy, in order to cover up or sincerely correct a *faux-pas*, represent a particularly interesting field of walking the fine line rather than walking the plank, and some such assignments perhaps simply need to be rejected.

References

Fischer, A 2010 'SPLASHCOS, a European network on Submerged Prehistory,' *The Maritime Archaeology Newsletter from Denmark* 25, 24-27

Flemming, N (ed.) *Submarine prehistoric archaeology of the North Sea*, York: Council for British Archaeology (CBA Research Report 141)

Gaffney, V, Fitch, S and Smith, D 2009 *Europe's Lost World: the Rediscovery of Doggerland*. York: Council for British Archaeology (CBA Research Report 160)

Maarleveld, T J 2006 'The Netherlands' in Dromgoole, S (ed.) *The Protection of the Underwater Cultural*

Heritage: National Perspectives in light of the UNESCO Convention 2001, Leiden and Boston: Martinus Nijhoff 161–188

Maarleveld, T J 2007 'Maritime management matters', Chapter 6 in Satchell, J and Palma, P (eds.) *Managing the Marine Cultural Heritage: Defining, Accessing And Managing the Resource*, York: Council for British Archaeology (CBA Research Report 153) 49-58

Maarleveld, T J 2009 'Shared heritage: Joint responsibilities in the management of British warship wrecks overseas.' International good practice or a few comments upon them' in Gallagher S (ed.) *Shared heritage: Joint responsibilities in the management of British warship wrecks overseas* English Heritage, Swindon UK 58–74

Maarleveld, T J *in print* 'The maritime paradox: does international heritage exist?', *The International Journal of Heritage Studies* **17** (2011)

van Duivenvoorde, W 2006 'Dutch Ministry of Finance Violates Agreement on Submerged Cultural Heritage' *INA Quarterly* **33(1)** 15–16

Watson, P 2007 'Looted Antiquities: Why Nice People Tell Lies' Keynote lecture for conference *Trade in Stolen Cultural Heritage: UNESCO's Cultural Conventions and the role of Denmark*. National Museum of Denmark, Friday 9 March 2007

Project Background

As an island nation located on the maritime approaches to northern Europe, and given its historic role as a major maritime and imperial power, the United Kingdom (UK) has a very varied and rich underwater cultural heritage (UCH).

This underwater cultural heritage comprises a range of elements, including Shipwrecks and related seabed debris, Aircraft wrecks and related seabed debris and submerged prehistoric land surfaces, sites and objects. This Project will focus on the shipwreck element of this wider underwater cultural heritage.

The UK has a wide range of shipwrecks of many nations within its territorial sea and adjacent international waters. Having been a major naval power since the late 16th century, and the world's largest such power from the early 18th century until well into the 20th century, supplemented by a merchant marine of equal scale, the UK also has historical ties to many shipwrecks in the territorial seas and adjacent waters of a considerable number of States elsewhere in the world.

Underwater cultural heritage in the UK's territorial sea can be afforded appropriate protection under domestic law, policy and practice. However, the threats posed by human activities of all sorts to UCH in international waters adjacent to the coast of the UK, and on UCH elsewhere in the world, both within other States' jurisdiction and in international waters, in which the UK has an interest, continue to grow. The discovery in the last few decades of wrecks such as RMS *Titanic* (1912) in 3,800m of water, and Royal Navy vessels like HMS *Hood* (1941) in 2,700m of water, HMS *Ark Royal* (1941) in 1,070m of water and HMS *Victory* (1744) in 90m of water, for example, shows that continuing developments in underwater technology mean that sites to which access was impossible until relatively recently are now accessible to those with the funds to pay for this technology. This level of human accessibility also applies to submerged prehistoric land surfaces, which are located on the geological continental shelf extending in some places far beyond the 12-mile limit.

The UNESCO *Convention on the Protection of the Underwater Cultural Heritage* (2001) offers a potential framework that could help the UK to address this problem.

Ten years have passed since the Convention was adopted at the 2001 UNESCO General Conference in Paris and the ratification process is gathering momentum. Sufficient ratifications were obtained by January 2009 for the Convention to enter into force, and support for the Convention continues to grow, including from States that originally held similar reservations as those expressed by the UK. (The UK abstained from the vote on the Convention at the 2001 UNESCO General Conference.)

Since then the UK Government has been challenged to change the position it adopted at the time. These calls were partially heeded in 2005 when the Government adopted as national policy, the Annex to the Convention, which sets out internationally accepted principles and best practice guidelines for UCH management.

Two notable meetings (28 October 2005 and 12 November 2010), hosted by the Society of Antiquaries of London at Burlington House and attended by a broad range of stakeholders, considered the UK's position on the Convention and called for its re-evaluation. In light of the information presented during the most recent seminar, which was sponsored by the Society, English Heritage, the UK National Commission for UNESCO and the Joint Nautical Archaeology Policy Committee, it was agreed that there is a case for the UK Government to review the position it has taken to date on the Convention.

The national heritage agencies of England, Scotland, Wales and Northern Ireland and the UK National Commission for UNESCO have given their support for a Project to review the Convention and to identify the implications of ratification for the UK. The results of this Project will be presented to the Department for Culture, Media and Sport, the Ministry of Defence, the Foreign and Commonwealth Office, the Department for Transport and the devolved administrations of Scotland, Wales and Northern Ireland. The results will also be made available to all interested parties on the Web.

¹ Emu Ltd

² Hampshire and Wight Trust for Maritime Archaeology

³ Bournemouth University

⁴ Wessex Archaeology

Project Aims and Objectives

The aim of this Project is to produce an objective evidential review of the impacts of the ratification of the Convention for the UK.

It will focus on establishing the degree to which the UK is already compliant with the Convention and what would be required for it to become fully compliant.

The Project will be a collaborative effort, bringing together experts with relevant specialisms, from a range of organisations. The Project will not make specific recommendations.

The objective of the Project is to address both the administrative and legal impacts of ratifying the Convention for the UK, and also a range of broader issues and considerations related to ratifying and implementing the Convention.

The Project has six work packages:

- A literature review of the history of the development of the Convention;
- An impact review of the Convention and its Annex;
- A consideration of the compatibility of the Convention with United Nations Convention on the Law of the Sea (UNCLOS);
- A consideration of the issues surrounding sovereign immune vessels; and
- A consideration of the issues surrounding wreck protection in the UK's territorial sea and adjacent international waters.
- The outcomes of these work packages will be presented and discussed in a final report.

Each of these work packages are discussed in detail below.

Project Elements and Method Statement

Literature Review and Timeline

This element of the Project will comprise a desk-based review of the history of the development and entry into force of the Convention. It will be undertaken to provide a full context for the UK's position up to, at and since the vote in 2001.

This review will be presented as a timeline that captures the key events and milestones regarding the Convention and the UK's position in relation to it.

Areas that will be considered as part of this review include:

- The background to the development and purpose of the UNESCO 2001 Convention, including a brief discussion of the key points in the salvage versus archaeology debate with respect to underwater cultural heritage;
- International and UK best practice with respect to UCH management. This will include a consideration of the basic principles of the Convention and the Annex, such as:
 - *In situ* preservation;
 - Refusing commercial recovery, and sale, of underwater cultural heritage;
 - Broad and active co-operation of States Parties in the management of underwater cultural heritage; and
 - The creation of international standards for underwater archaeology/cultural heritage management; and
- Current UK maritime research frameworks, such as the Scottish, English and Welsh *Maritime Research Frameworks* and the *North Sea Prehistory Research and Management Framework*, to provide a broad picture of the underwater cultural heritage of Great Britain and the current legal and policy regime in place to protect and manage it.

Impact Review and Issue Matrix

This element of the project will comprise a detailed, clause-by-clause desk-based review of the Articles of the Convention and the Rules of the Annex to assess the broad administrative, legal and other implications for the UK of ratifying the Convention. It will aim to identify:

- Whether the management of underwater cultural heritage in the UK is compliant with the Convention and, if not, what is required for such compliance;

- Any administrative changes that might be required until the UK has ratified the Convention or subsequent to ratification; and
- Whether or not there would be a need for legislative amendment to achieve compliance.

The impact review will be presented in the project report as a table or matrix which will set out the results against the following anticipated headings: *Clause; Application; Current UK provision; Administrative responsibility; Additional measures required; and Additional resources*. The detailed impact review will be attached as an appendix to the final report and may include relevant case studies.

An attempt will be made to develop a 'traffic-light' element to the table/matrix to provide a simple visualisation of where the UK currently stands in terms of compliance with each element of the Convention.

Wessex Archaeology will undertake the development of the basic table/matrix concept and accompanying text, which will flag issues, but not necessarily resolve them. Dr Simon Davidson (a Senior Archaeologist in their Coastal and Marine Section who did his doctorate on shipwreck management and is well acquainted with the Convention), will develop the table/matrix with input from Dr Antony Firth. Other members of the Project team and Advisory Group will contribute to this study.

As 'paid for' time this Project element will be timetabled and delivered early in the life of the Project. The table/matrix will form a framework to which administrative, legal and other, broader issues can be attached, and will also form an important tool for subsequent discussion, particularly in the final report.

Sovereign Immune Vessels

In its explanation of the vote in 2001, the UK Government expressed concern about the protection of sovereign immune vessels in the waters of other States and wrote:

'The discussions about warships and State vessels and aircraft used on non commercial service have proved contentious. There have been exhaustive attempts to reach consensus between the competing claims of the Sovereign Immunity enjoyed by Flag States on the one hand and jurisdictional claims of Coastal States on the other. Unfortunately the differences have not been resolved. The United Kingdom considers that the current text erodes the fundamental principles of customary international law, codified in UNCLOS, of Sovereign Immunity which is retained by a State's warships and vessels and aircraft used for non commercial service until expressly abandoned by that State.'

As a way to address some of the Government concern in this regard this element of the Project will comprise two work packages:

- A survey to be called *The Royal Navy Loss List*; and
- A review of the wider issues related to the question of 'sovereign immune vessels' as defined in the Convention.

The Royal Navy Loss List

This desk-based work will aim to ascertain the number and location of all Royal Navy vessels lost between 1688 and 1945, and will form part of the essential evidence-base for reviewing one of the UK Government's key objections to the Convention. It is also aimed at helping the MoD in considering their position with respect to the Convention.

The *Royal Navy Loss List* desk study will be undertaken by Jessica Berry of the Maritime Archaeology Sea Trust (MAST) through Bournemouth University and under the supervision of Dr David Parham. The desk study will draw data from a wide range of published sources⁵ and will also take into account and build on previous work in this broad area, particularly the *Our Marine Historic Environment: Enhancing the NMR* (funded by English Heritage) and *Potentially Polluting Wrecks* (funded by the Ministry of Defence) projects.

The primary output of this work package will be an Excel spreadsheet, possibly linked to Google Earth, listing all recorded Royal Navy losses.

Funding of £2,500 for this work package has been sourced by David Parham from the Maritime Archaeology Sea Trust.

⁵ A number of sources are available, including: Lyon, D 1993 *The Sailing Navy List 1688-1860*; Lyon, D and Winfield, R 2004 *The Sail and Steam Navy List 1815-1889*; Gossett, W P 1986 *Lost Ships of the Royal Navy 1794-1900*; HMSO 1988 *British Ships lost at Sea 1914-18 and 1939-45*; Lloyds of London 1989-1991 *Lloyds War Losses - The First and Second World Wars*; Lavery, B 1983 *The Ship of the Line Vol I*

Sovereign Immune Vessels

In the context of the global picture of the distribution of the Royal Navy wrecks this Project element will consider the question of 'sovereign immune vessels', as defined in the Convention, and the legal and practical implications of protecting such wrecks, particularly in the territorial seas and offshore waters of other States around the world.

The study will also review how States that have already ratified the Convention have addressed the issue of sovereign immune vessels and will include examples of UK warships in other Coastal State jurisdictions and their management (for example, HMS *Birkenhead* and HMS *Sybil* in South Africa and HMS *Swift* in Argentina) drawing on the substance of the 2008 *Shared Heritage* seminar which addressed this issue⁶.

This work package will provide a useful context for decisions in the UK about the future management of such wrecks, whether the Convention is ratified or not. Whereas the Convention only applies to wrecks over 100 years old, this Project will also include consideration of naval wrecks of World War I and World War II which also require positive management decisions regardless of ratification (see Dunkley, 2011). If the Convention were ratified these wrecks would fall under its jurisdiction in three and 28 years respectively.

Number and Significance of Wrecks

This element of the project will address the second key concern expressed by the UK Government in 2001 in relation to ratification, namely, the perceived requirement to protect all wreck sites in waters adjacent to the UK:

'The procedures for the protection of underwater archaeology adopted in the Annex are those which are already followed by the United Kingdom with regard to the designation of wreck sites within its territorial sea and internal waters. However, the text obliges signatory States to extend the same very high standards of protection to all underwater archaeology over 100 years old. It is estimated that there are probably about 10,000 wreck sites on the seabed under the United Kingdom's territorial sea and it would neither be possible nor desirable to extend legal protection to all of them. The United Kingdom believes that it is better to focus its efforts and resources on protecting the most important and unique examples of underwater cultural heritage. It would simply be impossible to enforce the application of the rules in the Annex to every one of the thousands of wreck sites'.

Since 2001 a considerable amount of work has been undertaken to establish the likely number of known historic wrecks in the UK's territorial sea⁷. In light of the Government concerns expressed above, this exercise will quantify the scale of UCH in both the UK's territorial sea and on its continental shelf, and will examine the range of potential management responses that might be required for this historical asset.

Compatibility with UNCLOS

Although the statement explaining the UK's vote did not say so in clear and explicit terms, the following sentence in that statement indicates that the UK, like many of the other major maritime States, may have had concerns about some of the jurisdictional mechanisms in the Convention and their compatibility with UNCLOS.

'The text purports to alter the fine balance between the equal, but conflicting, rights of Coastal and Flag States, carefully negotiated in UNCLOS, in a way that is unacceptable to the United Kingdom.'

It is undoubtedly the case that there are some so called 'constructive ambiguities' in the Convention, particularly in Articles 9 and 10, relating to the Exclusive Economic Zone and the continental shelf, which could lead to interpretations that are incompatible with UNCLOS.

This work package will identify these ambiguities and any other provisions which could be regarded as potentially altering the balance of rights enshrined in UNCLOS and will consider their full implications, as well as the extent to which they weigh on the 'cost' side of a 'cost/benefit' balance in relation to the Convention.

Final Report

A final report will draw together the issues raised and the results of the work packages described above to provide a balanced review of the impact for the UK of ratifying the Convention.

The final report will be made available in electronic format on the Web.

⁶ English Heritage 2008 *Shared Heritage: Joint Responsibilities in the Management of British Warship Wrecks Overseas* Proceedings of the seminar held at the University of Wolverhampton, 8 July 2008

⁷ Yorke R (ed) 2011 *Proceedings of the Protection of Underwater Cultural Heritage in International Waters adjacent to the UK Seminar*, Society of Antiquaries, Burlington House, 12 November 2010

Business Case: Relationship of this Project to Funding and Research Priorities

The proposed work is relevant to a number of national and international priorities:

Department for Culture, Media and Sport Business Plan 2011-2015

Within the Coalition Priorities identified in the Department for Culture, Media and Sport *Business Plan 2011-2015* a major responsibility is the protection of our nation's cultural heritage and the preservation of, *inter alia*, sites and monuments.

Through its review of the Convention this project will contribute to the future protection of the UK's underwater cultural heritage.

National Heritage Protection Plan

The English Heritage National Protection Plan (NHPP) was recently published (English Heritage 2011). In terms of broad, high level objectives, the NHPP states that by the end of the first plan period in 2015 the outcomes will include:

- A better understanding of those parts of the historic environment that are most threatened;
- Actions well underway to reduce that threat;
- A shared public understanding of the significance of the historic environment;
- A cross-sector programme of agreed projects carried out where possible and where appropriate in partnership with local communities.

In relation to the NHPP, this Project will address, in particular:

- The development of a better understanding of the threats to the marine historic environment; and
- Any potential, through the Convention, to reduce that threat.

United Kingdom Context

The proposed Project will be highly beneficial to the strategic and research priorities of the UK's heritage agencies, as well as wider priorities for managing the marine environment within the UK in terms of the Marine and Coastal Access Act 2009 and the Marine Policy Statement.

This Project will contribute to the Heritage Protection Draft Bill (DCMS 2007), which presents significant challenges and opportunities to the heritage sector by addressing the development of an improved system of marine heritage protection in England and Wales that can work effectively alongside national systems.

The Project will address the overall objective of a long-term and sustainable system for managing our marine environment in line with the Marine and Coastal Access Act 2009 (HM Government 2009), the Marine (Scotland) Act 2010 and the Northern Ireland Marine Bill.

International Context

Some of the UK's neighbours – France and Ireland – have stated their intention to ratify the Convention in the near future. The Netherlands and Belgium are also currently considering their positions with regard to the Convention.

This Project will consider the potential implications for the UK of a regional cluster of ratifications of the Convention where all States co-operate on managing UCH in international waters. This cluster could potentially cover an area extending from Gibraltar and the Western Approaches to the North Sea.

Interfaces

The results of a number of projects and initiatives, including those listed below, will be reviewed in carrying out this Project:

- On the Importance of Shipwrecks, English Heritage/ALSF, 2006
- Identifying Shipwrecks of Historic Importance lying within Deposits of Marine Aggregate, English Heritage/ALSF, 2007 and 2008
- Shared Heritage: Joint Responsibilities in the Management of British Warship Wrecks Overseas, English Heritage, 2008
- Refining Areas of Maritime Archaeological Potential for Shipwrecks – AMAP 1, English Heritage/ALSF, 2008
- Our Marine Historic Environment: Enhancing the NMR (Phase 1), English Heritage/ALSF, 2010

- UK Potentially Polluting Wrecks (Phases 3 and 4), MCA and MoD, 2010 and 2011
- Heritage at Risk;
- The Royal Commission on Ancient and Historical Monuments of Wales' Maritime Record Enhancement;
- The Strategy for Scotland's Marine Historic Environment; and
- The Department of the Environment: Northern Ireland's Maritime Record Enhancement.

The results of these projects will provide access for this Project to baseline data at key interfaces.

Resources and Programming

Project Team

A Project Team under the leadership of John Gribble (Principal Archaeologist: Emu Ltd, and member of the ICOMOS International Committee on the Underwater Cultural Heritage (ICUCH)) will manage the Project. Members may be appointed to the Project Team as appropriate but initial members are:

- Sarah Dromgoole, Professor of Maritime Law, University of Nottingham;
- Antony Firth, Head of Coastal and Marine, Wessex Archaeology;
- Tim Howard, Policy Manager, Institute for Archaeologists (IfA);
- David Parham, Senior Lecturer in Marine Archaeology, Bournemouth University;
- Michael Williams, Honorary Professor, Institute of Archaeology, University College London and Visiting Research Fellow, Plymouth Law School, University of Plymouth; and
- Ian Oxley, Head of Maritime, English Heritage.

The Project Team will draw upon the experience and expertise of the following Project Advisory Group and Observers:

Project Advisory Group

A Project Advisory Group has already been set up, to provide technical advice and additional input to the Project Team with regard to the content of the various work packages. This group currently includes the following individuals:

- David Blackman, Senior Research Fellow, University of Oxford;
- Stuart Bryan, Sub-Aqua Association;
- Gill Chitty, Head of Conservation, Council for British Archaeology;
- Sue Davies OBE, UK National Commission for UNESCO;
- Virginia Dellino-Musgrave, Hampshire and Wight Trust for Maritime Archaeology and IfA Council;
- Christopher Dobbs, UK representative on ICOMOS ICUCH;
- Tom Hassall, Chairman, Historic Wreck Panel, English Heritage;
- George Lambrick, Chair, Nautical Archaeology Society;
- John Lewis, General Secretary and CEO, Society of Antiquaries of London;
- Jane Maddocks, British Sub-Aqua Club;
- Suzanne Pleydell, PADI International; and
- Robert Yorke, Chairman, Joint Nautical Archaeology Policy Committee.

Observers

The following organisations have agreed to be Observers to the Project:

- Historic Scotland (Philip Robertson);
- Cadw (Sian Rees);
- Northern Ireland Environment Agency (Brian Williams);
- Receiver of Wreck (Alison Kentuck);
- National Record of the Historic Environment – Maritime Record (Martin Newman);
- RCAHM Scotland;
- RCAHM Wales; and
- All Party Parliamentary Archaeology Group (Lord Renfrew of Kaimsthorn, Chairman).

To canvas wider opinion through email correspondence as the Project develops, a Consultative Group will be set up which could include:

- A representative of the Salvage Association;
- A representative of the British Maritime Law Association;
- A representative of a commercial salvage company;
- Representatives of ICOMOS and ICUCH;
- International experts in the field of maritime and heritage law;
- Members and observers from JNAPC; and
- Members of The Archaeology Forum.

Products and Tasks

The outputs of this project will be:

- A Project report (in both hard copy and published on the Web);
- A Project database (Excel spreadsheet); and
- Project pages on the Web.

The principal project tasks and those responsible are:

Task	Responsible
Literature review and timeline	Project Team
Impact review and issue matrix	Wessex Archaeology (Simon Davidson and Antony Firth) Mike Williams
Sovereign immune vessels review: <ul style="list-style-type: none">• <i>Royal Navy Loss List</i>• Sovereign immune vessels	Bournemouth University (Jessica Berry and David Parham) Project Team
Number and Significance of Wrecks review	Project Team
Compatibility with UNCLOS	Mike Williams
Final Report	Project Team

Input to all tasks set out above will be sought from the members of the Project Team, Advisory Group and, as necessary, Project Observers. Overall project management will be John Gribble.

Project Duration

The likely duration of this Project is based on a balance between the need to complete the work as speedily as possible, the largely voluntary nature of contributions by the members of the Project Team, Project Advisory Group and Observer group, and the requirement to be as thorough as possible. It is therefore anticipated that the project will take 18 months from commencement to complete, with a likely delivery date of December 2012.

Project Budget

The nature of this project, and the terms under which the Project Team and Advisory Group members have agreed to be involved means that most of their time and input will be voluntary. However, to ensure that the Project moves ahead and meets its deadline for completion, the cost breakdown below includes a provision for

- a) some funding to cover a portion of Project Team and/or Advisory Group member's time for direct inputs into the Project work packages, and
- b) funds to reimburse Project Team and Advisory Group members, where necessary, for expenses related to attendance at project meetings.

The cost breakdown also includes a lump sum for the development by Wessex Archaeology of the impact review and issues table/matrix.

Funding of £2,500.00 has already been sourced and obtained by David Parham, Bournemouth University for the *Royal Navy Loss List* desk-study.

Item	Cost	Notes
Impact Review and Issues Table/Matrix	£2,500.00	Lump sum cost for Wessex Archaeology to develop the impact review and issues matrix
Project Team/Advisory Group Input	£6,000.00	To cover a portion of the Project Team's direct input into the Project work packages (cost based on a total 15 person days over the life of the project)
Third Party Data (eg. SeaZone or UKHO)	£1,000.00	To cover the cost of third party data for the Number and Significance of Wrecks review
Project Team Meetings	£2,000.00	To cover basic expenses (mainly travel) for team members to attend meetings
Project Advisory Group Meetings (4 x quarterly meetings)	£4,000.00	To cover basic expenses (mainly travel) for Advisory Group members to attend meetings, where necessary
Project Management	£4,000.00	To cover a portion of John Gribble's project management time (cost based on 10 person days over the life of the project)
Report production and publication	£1,000.00	Publication of final report
Total	£20,500.00	

References

- ABPMer and Maritime Archaeology Ltd 2010 *Potentially Polluting Shipwrecks in UK Waters (Phase 3)* unpublished Report for the Maritime and Coastguard Agency
- Bournemouth University 2007 *Identifying Shipwrecks of Historic Importance lying within Deposits of Marine Aggregate*, report produced for English Heritage and the ALSF
- Bournemouth University 2008 *Refining Areas of Maritime Archaeological Potential for Shipwrecks – AMAP 1*, report produced for English Heritage and the ALSF
- Dellino-Musgrave, V 2011 *Our Marine Historic Environment: Enhancing the NMR (Phase 1)* report produced for English Heritage and the ALSF
- Dunkley, M 2011 'Catastrophic burials: the study of human remains from sunken warships', *Conservation Bulletin*, Issue 66, English Heritage 20-22
- English Heritage 2008 *Shared Heritage: Joint Responsibilities in the Management of British Warship Wrecks Overseas* Proceedings of the seminar held at the University of Wolverhampton, 8 July 2008
- Gossett, W P 1986 *Lost Ships of the Royal Navy 1794 – 1900* Mansell Publishing, London
- HMSO 1988 *British Ships lost at Sea 1914-18 and 1939-45*
- Lavery, B 1983 *The Ship of the Line Volume I*, Conway Maritime Press
- Lloyds of London 1989 -1991 *Lloyds War Losses: The First and Second World Wars*
- Lyon, D 1993 *The Sailing Navy List 1688-1860* Conway Maritime Press
- Lyon, D and Winfield, R 2004 *The Sail and Steam Navy List 1815-1889* Chatham Publishing
- Maritime Archaeology Ltd and SeaZone 2011 *Potentially Polluting Wrecks Database (Phase 4)* Unpublished Report for the MoD Salvage and Marine Operations
- Wessex Archaeology 2006 *On the Importance of Shipwrecks* report produced for English Heritage and the ALSF
- Yorke, R (ed.) 2011 *Protection of Underwater Cultural Heritage in International Waters adjacent to the UK* Proceedings of the JNAPC 21st Anniversary Seminar Burlington House November 2010, Nautical Archaeology Society (this volume)