

THE JOINT NAUTICAL ARCHAEOLOGY POLICY COMMITTEE

THE UNESCO CONVENTION FOR THE PROTECTION OF
THE UNDERWATER CULTURAL HERITAGE
PROCEEDINGS OF THE BURLINGTON HOUSE SEMINAR OCTOBER 2005

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Cover Photograph: The wreck of the schooner *Daniel Lyon*, Lake Michigan, Wisconsin, USA
(Courtesy of Tamara Thomsen – winner of the 2005 NAS photographic competition amateur
category)

Foreword

Robert Yorke *Chairman, Joint Nautical Archaeology Policy Committee*

Our underwater cultural heritage in international waters is at risk. Historic wrecks lying outside the UK's territorial limit of 12 nautical miles have no form of protection from salvors and treasure hunters. These 'time capsules' of our past contain vital historic information often better preserved than on archaeological land sites.

Technological advances in underwater geophysics, mapping techniques and deep water excavation using remote operated vehicles, means that historic wrecks previously protected by the depth of water above them can now be found and their contents salvaged for profit rather than information.

The 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage provides the only available international framework within which the UK Government can start to protect this and other countries' non-renewable cultural heritage. The UK Government has already accepted the Annex to this Convention as the example of best practice for underwater archaeology. We now ask the Government to ratify the Convention itself.

I am particularly grateful to Dr Sarah Dromgoole of Leicester University for organising the programme, and to all the other speakers for their contributions on the day and to this publication. On behalf of the JNAPC I would also like to thank The Society of Antiquaries, The Nautical Archaeology Society, English Heritage, Historic Scotland and the Environment and Heritage Service Northern Ireland, for their financial and other support towards the Seminar and this publication.

Introduction

On 28 October 2005 a gathering of over one hundred delegates from UK Government departments, national heritage agencies and key voluntary bodies met in the rooms of The Society of Antiquaries at Burlington House, London to discuss ways of raising awareness of the UNESCO Convention for the Protection of the Underwater Cultural Heritage. The seminar was convened by representatives of the Joint Nautical Archaeology Policy Committee, the Society of Antiquaries of London, the Nautical Archaeology Society, the Council for British Archaeology and the UNESCO UK Committee.

The Convention sets rigorous standards for the protection and management of underwater cultural heritage in the vast expanses of the sea that lie beyond territorial limits. Expert speakers from around the world gave an international perspective to the seminar. The papers printed in this volume can also be accessed through the Society of Antiquaries website at <http://www.sal.org.uk/>.

The Convention will only come into force when it has been ratified by 20 countries. By mid 2006 seven states had ratified: Panama (2003), Bulgaria (2003), Croatia (2004), Spain (2005), Libyan Arab Jamahiriya (2005), Nigeria (2005) and Lithuania (2006), with Portugal and Mexico in the process of doing so. The UK Government has so far declined to ratify it.

The seminar concluded with the agreement of the *Burlington House Declaration* (see p 41) which was endorsed by the organisations that convened the meeting and by other bodies, including ICOMOS-UK, ICON, and the IFA Maritime Affairs Group. The Declaration calls upon the UK Government to re-evaluate its position regarding the 2001 Convention and enter into discussions at the earliest opportunity with its heritage agencies, relevant non-governmental organisations and other interested parties with a view to taking the Convention forward. It was presented to the UK Government immediately after the meeting.

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

Current Status and Future Prospects for the 2001 Convention: the UNESCO Perspective

Guido Carducci¹

The 2001 UNESCO Convention for the Protection of the Underwater Cultural Heritage is the first multilateral treaty specific to the protection of underwater cultural heritage; as such it already deserves consideration.

The Convention takes further the idea of protection of '*objects of an archaeological and historical nature*' codified under Articles 149 and 303, 1 of the United Nations Convention on the Law of the Sea (1982, 'UNCLOS') and establishes a rather sophisticated and complete set of provisions, both of general application (Articles 1 through 6 and 13 through 33) and of geographically conditioned application (Articles 7 through 12).

The Convention embodies, nearly two decades later, the 'other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature' which are not to be prejudiced by Article 303 (especially Par.3). (See Art.303, Par.4).

The Convention focuses on underwater cultural heritage and does not aim at impacting on, nor on amending, existing international law rules and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.

The Convention represents a compromise text, as any multilateral treaty, between various views and perspectives. However, the Annex of the Convention was a unanimously adopted text. Its technical rather than legal (and/or political) nature helped in achieving such a result (remarkable in a genuinely multilateral negotiation).

¹ Chief of the International Standards Section, UNESCO

UNESCO Convention on the Protection of the Underwater Cultural Heritage: An Analysis of the United Kingdom's Standpoint

Michael V. Williams¹

Introduction

The presentation of this paper should be prefaced by a caution that I do not speak upon behalf of Her Majesty's Government², nor have I had access to any departmental records or officials in compiling this analysis. My analysis is based purely upon material that is in the public domain, my attendance at a series of consultation meetings, which HMG held with interested parties during the process of formulating the United Kingdom's policy towards the draft 2001 Convention and informal discussions I have had with civil servants. Consequently, the views stated herein must be taken as personal and not necessarily an accurate reflection of those of HMG³.

The process of this policy formulation by the United Kingdom⁴ was partly transparent, in that a series of consultation meetings were held by HMG with interested parties, principally persons or organisations from the archaeological, historical and maritime legal communities, the salvage⁵, seabed development and fishing industries and maritime recreational interests. Officials represented HMG from the Departments of Transport, Defence, Culture, Media & Sports and the Foreign & Commonwealth Office⁶. These meetings confirmed that a relatively strong and certainly vocal opposition to the draft Convention existed within these communities, even within the archaeological community⁷. This schism between interested parties may explain why the UK delegation to the UNESCO meetings was not accompanied by representatives from Non Government Organisations⁸, as some delegations were. However, it is also true to say that such inclusivity in decision making is not a characteristic of UK governance, so the non-participation of NGO's was in no way abnormal. It should also be noted that the UK delegation was perceived from within and outside the UK to lack specialised knowledge. The UK civil service is predominantly 'generalist', with civil servants frequently moving to different sections within their departments and often from department to department⁹. Consequently, and perhaps alarmingly, the DFT, MOD and even the DCMS representatives lacked any archaeological background or qualifications. Nor did archaeological advisors accompany them. It is believed that the only specialist advice available to hand was legal, given by FCO lawyers.

UK's Concerns

The anecdotal impression formed by many delegations was that the UK's attitude to the draft Convention was negative in the main. This attitude may be, to some unquantifiable degree, a reflection of the UK's consultation process, which had certainly revealed quite deep-seated opposition in some quarters. By February 2000 the UK's primary concerns had crystallised around

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² Hereafter 'HMG'

³ Nevertheless, I believe them to be a broadly accurate statement of the UK's position in relation to the 2001 Convention.

⁴ Hereafter 'the UK'

⁵ Particularly from what has been termed the 'archaeological salvage' industry that, although smaller in size than that of the USA, has several active participants.

⁶ Hereafter DFT, MOD, DCMS & FCO respectively.

⁷ This included some professional archaeologists but opposition, based on a fear of exclusion, was especially strong amongst avocational archaeologists and the sport diving community.

⁸ Hereafter NGO's

⁹ Typically, in the author's experience from 1992 to-date, civil servants in the relevant section of DCMS will arrive without any experience of regulating underwater culture heritage or understanding of the legal framework and will only remain in post for 2 to 3 years, sometimes less.

three issues, that of the possibility of 'creeping coastal State jurisdiction', which would upset the jurisdictional balance achieved in the *United Nations Convention on the Law of the Sea (1982)*¹⁰, the dilution of the principle of Sovereign Immunity, as it applied to warships and other State vessels and the draft Convention's 'blanket' application to all underwater cultural heritage irrespective of archaeological or historical significance¹¹. In respect of the first two of these issues the UK was insistent that the draft Convention should be in 'full conformity' with UNCLOS¹².

Creeping Coastal State Jurisdiction

Following the discussions at UNESCO in April 1999 the UK had become concerned that some delegations were in favour of altering the jurisdictional framework established by UNCLOS by introducing new elements of coastal State jurisdiction. The UK regarded this jurisdictional framework as sacrosanct.

*'The need for full conformity with UNCLOS is particularly important in respect of the ... jurisdiction of the coastal State ... [The introduction of] new elements of coastal State jurisdiction in respect of underwater cultural heritage located in the exclusive economic zone and on the continental shelf beyond 24 nautical miles from baselines ... [would not] be in full conformity with UNCLOS.'*¹³

Other countries, especially the G-77 group of developing countries, took the view that UNCLOS authorised the development of further measures to protect Underwater Cultural Heritage¹⁴. To that extent, they argued, UNCLOS approved of the principle of protection of UCH located beyond the territorial sea but left the exact mechanisms to be developed later and it was not intended that the jurisdictional framework set out in UNCLOS was intended to remain unchanged in perpetuity. Conversely, the UK takes the view that the most surprising aspect of UNCLOS was that it was successfully negotiated at all. It is regarded as an achievement of negotiation and compromise and that any attempt to re-open the issue of jurisdiction would lead competing interests to unravel the carefully woven compromise that is the jurisdictional framework of UNCLOS. For the UK it was an article of faith that the formulation of any convention on the protection of UCH had to be within the jurisdictional parameters set down in UNCLOS.

The UK, in common with other Western maritime countries¹⁵, interprets UNCLOS as giving a coastal State exclusive jurisdiction within its territorial sea¹⁶, with certain exceptions recognised by international law such as Sovereign Immune vessels, which are susceptible only to flag jurisdiction¹⁷. Within the Contiguous Zone¹⁸, a coastal State is taken to have only limited jurisdiction for the purposes of enforcing its fiscal, immigration, customs or sanitary laws¹⁹. This limited jurisdiction also applies to UCH in that in order to control traffic in objects of archaeological or historical interest the coastal State may presume that the removal of these objects would infringe these laws²⁰. Again, in the view of the UK, such extended jurisdiction would not apply to Sovereign Immune vessels nor to the wrecks thereof. Within an Exclusive Economic Zone²¹ or on the Continental Shelf, coastal States are taken to have no jurisdiction relating to wrecks²².

¹⁰ Hereafter UNCLOS

¹¹ See further 'Comments of the United Kingdom', forwarded to UNESCO on 28th February 2000.

¹² *ibid.*

¹³ *ibid.* paras 3 & 4

¹⁴ Hereafter 'UCH'.

¹⁵ This expression is used loosely, since this grouping often enjoys the support of Japan and Russia.

¹⁶ Up to 12 nautical miles from the coastal baseline.

¹⁷ This aspect is discussed further below.

¹⁸ Up to 24 nautical miles from the baseline.

¹⁹ Art. 33 UNCLOS.

²⁰ Art. 303(2) UNCLOS.

²¹ Up to 200 nautical miles from the baseline.

²² See further O'Keefe P.J. 'Shipwreck Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage' (2002) Institute of Art & Law; Leicester. pp 2-4, 17-21.

The UK acknowledged UNCLOS's jurisdictional vacuum relating to UCH located beyond 24 nautical miles from the coastal State baseline. For this reason the UK was supportive of attempts to frame an international convention that addressed this problem but the basic tenet of this support was that any solution arrived at had to respect and be in accordance with the jurisdiction framework established by UNCLOS²³. No extension of coastal State jurisdiction or sovereignty over UCH located beyond the 24 nautical mile limit could be contemplated. From the initial perspective of the UK the 2001 Convention infringed this delicate jurisdictional balance between the rights of coastal States and other States by conferring upon the former new jurisdictional powers and duties²⁴. These innovations are contained within Articles 9 and 10 of the 2001 Convention. Such an extension of coastal State jurisdiction was unacceptable to the UK, raising the prospect of a 'post-UNCLOS' series of developments, in which coastal States would acquire, by incremental innovations in international law, an enhanced jurisdiction beyond 24 nautical miles over diverse matters in excess of that contemplated by UNCLOS²⁵. The spectre of this 'slippery slope' is unappealing to those States, including the UK²⁶, which regard UNCLOS as the final settlement on the matter of coastal State jurisdiction. No doubt there is an economic and geo-political element to this stance, as the UK, along with these other States²⁷, is anxious to preserve unimpeded access to littoral waters, with no further fetters upon activity being imposed by enhanced coastal State jurisdiction 'post-UNCLOS'.

Sovereign Immunity of State vessels²⁸ and wrecks thereof

State owned vessels, used for non-commercial purposes, are entitled to certain immunities and privileges. This entitlement is commonly referred to as 'Sovereign Immunity'. State owned vessels that are used for commercial purposes or privately owned vessels do not enjoy this entitlement. Some confusion has often surrounded this issue, which unfortunately has tended to become embroiled with the related question of ownership of State vessels. As Dr. Forrest has pointed out, the two issues, while related, are quite separate²⁹.

A State will retain title to a sunken vessel it owns, wherever located, unless such title is transferred to a third party or expressly abandoned³⁰. This retention of title applies to the wrecks of all State owned vessels, irrespective of the purposes for which they were used. However, in the case of State owned vessels used for non-commercial purposes, while they are afloat and, from a UK perspective, even after they have sunk, they will also be entitled to the immunities and privileges that comprise Sovereign Immunity. The most common example of a State owned vessel, used for non-commercial purpose and consequently entitled to Sovereign immunity is that of a commissioned warship.

²³ The accompanying papers of Ole Varmer and Dr. Sarah Dromgoole examine, inter alia, how such protection could be achieved within the jurisdictional framework of UNCLOS. See also 'International Protection of Underwater Cultural Heritage' Blumberg, R.C. <http://www.state.gov/g/oes/rls/rm/51256.htm>

²⁴ A view apparently shared by the USA, Russia, Japan and Scandinavia. See further Blumberg *ibid*.

²⁵ This suspicion that some countries had jurisdictional ambitions extending beyond UCH was perhaps strengthened by the fact that this jurisdictional extension for UCH enjoyed the support of those developing countries, especially Latin American, that had previously advocated a 200 nm jurisdictional over many activities and resources.

²⁶ In this matter the Foreign & Commonwealth Office represents the UK.

²⁷ Especially the USA.

²⁸ 'State vessel' is used here to denote a vessel, aircraft or other craft either owned by a State and / or used by a State for non-commercial purposes.

²⁹ See further 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage' (2003) 34 *Ocean Development and International Law* 41.

³⁰ It would appear that a majority of commentators accept express, as opposed to implied, abandonment is required; see further *Simon v. Taylor* [1975] 2 Lloyd's Rep. 338 and Roach, J.A. 'Sunken warships and military aircraft' (1996) 20 *Marine Policy* 351; for a contrary view see Bederman, D.J. 'Rethinking the Legal Status of Sunken Warships' (2000) 31 *Ocean Development and International Law* 97.

Sovereign Immunity is a traditional legal concept. It originates in the principle that sovereigns and their property cannot be the subject of a legal suit. Unless this immunity is waived³¹, a Sovereign and his or her property are beyond the jurisdiction of the courts, either of their own country or those of another. The principle's application to State vessels stems from the fact that historically such vessels were the personal property of the Sovereign and thus were not subject to the jurisdiction of any other State, even within that other State's territorial waters. Today, with the demise of absolute monarchies around the world, the Executive of a State claims sovereign immunity for vessels owned or operated by the State that are used for non-commercial purposes. The principle finds recognition in customary and conventional international law and is part of the concomitancy of nations. Thus, foreign warships³² are not subject to the jurisdiction of a coastal State whose territorial waters they enter³³, nor are they subject to salvage assistance³⁴ without the express consent of their flag State³⁵.

The UK³⁶, along with other Western Maritime States³⁷, takes the view that the wrecks of State vessels remain entitled to Sovereign Immunity, even when the vessel in question lies in the territorial waters or the contiguous zone of another coastal State³⁸. The coastal State controls access to such wrecks³⁹ but without the consent of the flag State, cannot authorise interference or removal or investigation of such wrecks, except for legitimate operations not prohibited by international law e.g. the preservation of navigation or prevention of environmental damage⁴⁰. Within the Exclusive Economic Zone or on the Continental Shelf the coastal State has no jurisdiction over such wrecks, since this is the exclusive preserve of the flag State whose consent is required for any interference⁴¹.

Historically, the UK has been very protective of the Sovereign Immunity of its wrecks, wherever located, and has intervened to assert Sovereign Immunity over its State vessels upon a number of occasions dating from the 1920's through to the present day. These include HMSub L5, lost in USSR waters in 1919⁴², HMS Spartan, lost in Italian waters in 1944⁴³, the salvage of HMS Birkenhead, lost in South African waters in 1852⁴⁴, the excavation of HMS Pandora, a 18th century vessel lost in Australian waters, unauthorised recovery of artefacts from HMS Prince of Wales and HMS Repulse, lost in international waters in 1941⁴⁵, Corsair fighter aircraft lost in American waters

³¹ As it is partly in the United Kingdom by the Crown Proceedings Act 1947.

³² For the definition of which see UNCLOS Art. 29. Although warships are the most numerous of State vessels the principle will apply to any State owned or operated vessel e.g. police, customs or coastguard vessels.

³³ UNCLOS Art. 32, *Chung Chi Cleung v R* [1939] AC 160; *Pianka v R* [1979] AC 107.

³⁴ International Convention on Salvage 1989 Article 4, replicating Article 14 International Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea (Brussels 1910); this Article was subsequently amended to remove this immunity by Article 1 of a Protocol to the 1910 Convention, signed at Brussels on 27th May 1967. The original position was then restored by the 1989 Convention.

³⁵ i.e. the State whose flag they fly.

³⁶ For this purpose the UK is represented by the FCO and, if the vessel was military, the MOD.

³⁷ e.g. USA (see further Roach op.cit); Japan (see Roach op.cit); Spain (see *Sea Hunt Inc. V. Unidentified Shipwrecked Vessel or Vessels* 22 F. Supp. 2d. 521, 526.); United Kingdom (see Williams, M.V. 'Protecting Maritime Military Remains: A New Regime for the United Kingdom' International Maritime Law (2001) 8(9).); Germany also claims sovereign immunity for the wrecks of its naval vessels (Williams ibid.).

³⁸ Not all jurists accept that a wreck of a sovereign immune vessel retains this entitlement; see further Roach op.cit.;

³⁹ It appears customary for coastal States to afford access and consent for operations by flag States upon request.

⁴⁰ Roach op.cit.

⁴¹ O'Keefe op.cit. pp.2-4.

⁴² See further Evans, A.S. 'Beneath the Waves: A History of HM Submarine Losses 1904-1971' (1986) William Kimber: London pp. 134-139.

⁴³ 158 U.N.T.S. 432 (1952).

⁴⁴ U.K.T.S. No. 3 (1990) Cmnd. 906; 60 Brit. Y.B. Int'L671 (1990).

⁴⁵ In 2000 the HMG sought the assistance of Malaysian and Singaporean authorities in restraining interference with the wrecks by their nationals or others operating off their flagged diving vessels.

in the 1940's⁴⁶ and the Royal Naval vessels lost in international waters at the Battle of Jutland in 1916⁴⁷.

In executing this policy of asserting the sovereign immunity of wrecks of its State vessels the UK is very sympathetic of and supportive to genuine historical and archaeological research. Provided that there are sound educational and research objectives underpinning the proposed interference and appropriate undertakings are given in respect of 'best practice' in terms of methodology, consent will normally be given by HMG. Where the recovery occurs in littoral waters and the coastal State can provide suitable curatorial facilities the UK rarely asserts its right to material recovered, preferring to maintain the geographical connection between the wrecking and the preservation and display of the material. In each instance however, an acknowledgment of the requirement for the consent of the UK as the flag State is expected, as is close liaison over the methodology utilised and especially the accordance of due respect to human remains, irrespective of the passage of time since the sinking. While mindful of its historical and archaeological heritage, the MOD does not regard itself as being 'in the heritage business' and provided that UK sovereignty is acknowledged and appropriate assurances provided, the UK is normally content for coastal States to access pre 20th century wrecks of UK State vessels. However, the effluxion of time is not irrelevant. In respect of 20th century wrecks the question of access and disturbance is considerably more sensitive, since the loss may well be within 'living memory'⁴⁸.

Given this perhaps rather formal, but nevertheless *de facto* benign, policy towards the application of Sovereign Immunity an observer could be given for expressing surprise at the UK's statement that:

*' [T]he differences between flag States and jurisdictional claims of coastal States have not been resolved. The United Kingdom considers that the current text erodes the fundamental principle of customary international law, codified in UNCLOS ... of Sovereign Immunity. The text purports to alter the fine balance between ... the rights of coastal and flag States, carefully negotiated in UNCLOS, in a way unacceptable to the United Kingdom.'*⁴⁹.

No further amplification of the UK's position has been publicly provided but it would seem that the reasons for the UK's rejection of the 2001 Convention in respect of its provisions relating to sovereign immune wrecks are twofold. The first reason lies in the contemporary sensitivity surrounding 20th century war losses and the second in geo-political reality.

As recently as 2000 the MOD was mired in controversy over its policy of protecting wrecks that are were the last known resting place of service personnel. Since 1986 the Protection of Military Remains Act had provided a mechanism for protecting such wrecks, both in UK territorial waters and waters outside the 12 nautical mile limit of other coastal States. The controversy centred around several well published acts of interference with such wrecks from 20th century conflicts, both in UK territorial waters and in international waters, and the fact that no wrecks had been designated for protection under the Act⁵⁰. Following an extensive consultation exercise⁵¹ the MOD

⁴⁶ In 2004 HMG sought the assistance of the American authorities to prevent the proposed recovery and restoration of these aircraft.

⁴⁷ In 2005 HMG sought the assistance of Denmark in restraining interference by Danish nationals or others operating off Danish flagged vessels with wrecks of Royal Naval vessels sunk in this battle.

⁴⁸ This is especially true of World War 2 casualties, where the next of kin of deceased service personnel may still be alive.

⁴⁹ 'UNESCO Convention of Underwater Cultural Heritage: Explanation of Vote' United Kingdom Foreign & Commonwealth Office: 2001.

⁵⁰ See further Williams M. 'War Graves' and Salvage: Murky Waters?' International Maritime Law 7(5) pp. 151-158.

designated what it termed a 'first tranche' of wrecks and publicly sought the assistance of some coastal States in preventing interference by their nationals with wrecks situated in their territorial waters or just outside them. Further designations are understood by the author to be imminent and the matter remains one of considerable sensitivity for the MOD. The prospect of a coastal State authorising interference with a wreck in its Exclusive Economic Zone or on its Continental Shelf under Article 10 of the 2001 Convention, without the consent of the UK as the flag State, would undoubtedly be totally unacceptable to HMG. The exclusive jurisdiction of the flag State over sovereign immune wrecks in the Exclusive Economic Zone or on the Continental Shelf was, in the UK's view, codified by UNCLOS and from a UK perspective the 2001 Convention seems to represent an unacceptable departure from this principle.

However, in the opinion of the author, the UK's objection does not solely lie with sunken State vessels. There is a suspicion that the UK's concern over Sovereign Immunity also lies with State vessels that are presently afloat⁵². The principle of Sovereign Immunity gives coastal States no jurisdiction over another State's vessels and UNCLOS did nothing to erode this principle. Although the 2001 Convention is only concerned with UCH and not vessels which are currently operational, nevertheless the UK may well be concerned that its provisions give coastal States a degree of jurisdiction over wrecks which the UK regards as entitled to sovereign immunity. To that extent, especially in relation to the Exclusive Economic Zone and the Continental Shelf, one might regard the 2001 Convention as providing, for the first time, a qualification to the principle of Sovereign Immunity. Once a qualification to the principle is accepted, it is possible that over a period of time that further qualifications could be sought. Eventually, one could envisage a situation where a formerly absolute principle is indeed 'eroded' and heavily qualified.

While the UK can no longer be considered a global maritime power, it has every intention of remaining a global maritime force⁵³. Its proposed multi-billion investment in two new fleet aircraft carriers, attendant escort vessels and the accompanying joint development with the USA of a new strike aircraft to equip the carriers have been explained in terms of a determination to retain a naval capacity to support interventions by the UK land and air forces globally⁵⁴. Any erosion of the principle of Sovereign Immunity, with its accompanying right of freedom of passage for warships, could impede this ambition. While advocates of the 2001 Convention can point to the 'saving clause' in Article 2(8), which states that '*... 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.*', one suspects the political reality is that the UK sees the extension of coastal State powers and duties over wrecks in the Exclusive Economic Zone and the Continental Shelf as an initial erosion of a formerly absolute principle of international law. Whether this analysis is indeed correct or not, it is beyond dispute that the UK's concerns over the principle of Sovereign Immunity have not been assuaged by Article 2(8).

Lack of Significance

The definition of UCH in the 2001 Convention is undeniably wide, encompassing as it does '*...all traces of human existence having a cultural, historical or archaeological character...*'⁵⁵. This comprehensive approach, which has been termed 'blanket protection'⁵⁶, is in stark contrast to that of the UK. In domestic law the UK has been highly selective in protecting UCH. There is no

⁵¹ 'Military Maritime Graves and The Protection of Military Remains Act 1986: A Consultation Document'[February 2001] Ministry of Defence, Whitehall, London.

⁵² A view shared with the author by some American officials; see also Blumberg op.cit. .

⁵³ 'Admirals sink Navy to float Versatile Maritime Force' The Times 29/10/05.

⁵⁴ *ibid.*

⁵⁵ Article 1.

⁵⁶ See further 'Comments of the United Kingdom' para. 8 op.cit.

protection for submerged historic landscapes, amphibious vehicles or aircraft⁵⁷ as elements of the UCH. Wrecks of vessels or their cargo can be protected but out of the approximately 10,000 known wrecks in UK territorial waters only 57 have been designated as being of archaeological, historical or artistic interest⁵⁸. The concept of significance is thus central to the UK's approach⁵⁹ and a very restrictive interpretation has been taken in assessing this significance⁶⁰.

In its consideration of the 2001 Convention the UK interpreted the Convention as requiring it to protect all UCH to the same degree irrespective of significance. The UK went on record as stating '*Introduction of criteria to measure significance would enable States to prioritise protection [of UCH] within available resources*'⁶¹. This interpretation was reiterated by the UK in its explanation as to why it was unable to support the Convention.

*'... The text obliges [States] to extend ... very high standards of protection to all [UCH]... It is estimated there are ... about 10,000 wrecks [in UK jurisdiction] ... The UK believes it is better to focus its efforts and resources on ... the most important & unique examples...'*⁶².

This interpretation is arguably too stringent. While it is true that the application of the 2001 Convention is not dependant upon significance, i.e. it applies to all marine heritage assets that come within the definition of UCH in Article 1, the Convention is principally concerned only with activities directed at the UCH⁶³; furthermore, it is not prescriptive in that it is for each State to determine how preservation of the UCH within its jurisdiction is to be achieved⁶⁴. The measures to be taken for this preservation are to be '*appropriate*'⁶⁵ and '*... the best practicable means at [the State's] disposal and in accordance with [the State's] capabilities.*'⁶⁶. Clearly, a State's obligations under the 2001 Convention are not absolute but proportional to its capabilities and appropriate to the circumstances. In determining this appropriateness, the significance of the particular UCH in question would be a material consideration, as would be the level of resources the State decided it could afford to deploy on the preservation of UCH. The UK has considerable experience in the execution of regulatory regimes that require in their decision making process an assessment of the significance of intangible values. No better example is the decision making process in the development control regime under Town and Country Planning legislation, where the merits of proposed development have to be balanced against the potential loss of the intangible 'amenity' of the area. Such decisions inevitably require account to be taken of subjective values, such as significance. Additionally, it is for each State to determine what level of resources it is capable of committing to preservation of the UCH and consequently the best practicable means at its disposal. Ratification of the 2001 Convention does not require that an infinite level of resources be made available for the preservation of all UCH.

⁵⁷ Wrecks of all military, but not civil, aircraft of any nationality are protected from disturbance by the Protection of Military Remains Act 1986 but that legislation is purely passive and confers no powers of management.

⁵⁸ Under s.1 Protection of Wrecks Act 1973.

⁵⁹ The non-statutory criteria adopted under the Protection of Wrecks Act 1973 are the period of the wreck, rarity, historical documentation, group value, survival / condition, fragility / vulnerability, diversity, and potential of the site. See further Advisory Committee on Historic Wreck Sites, Report for years 1999 and 2000 Department for Culture, Media and Sport March 2002 Annex E pp.40-41.

⁶⁰ e.g. designation has been rejected both for HMS Venerable, part of the Channel Fleet blockading France and flagship at the Battle of Camperdown, lost in 1804 and the tea clipper Gossamer, lost in 1868, the first composite vessel to be built by Alexander Stephens, a pioneer of this method construction, and the first composite hull to be insured at Lloyd's. The hull has unique constructional features.

⁶¹ See further 'Comments of the United Kingdom' para. 8 op.cit.

⁶² 'UNESCO Convention of Underwater Cultural Heritage: Explanation of Vote' op.cit.

⁶³ As opposed to activities that *indirectly* affect UCH, e.g. trawling or seabed development.

⁶⁴ The only prescription relates to how activities directed at the UCH are to be conducted under the rules in the Annex to the Convention, which the UK has pledged to abide by in any event.

⁶⁵ Article 2(4).

⁶⁶ *ibid.*

However, the question as to whether the lack of significance is an insurmountable bar to the UK signing the Convention now appears to have been rendered somewhat academic by the actions of DCMS itself. In September 2000 the UK ratified the *European Convention on the Protection of the Archaeological Heritage (revised)*⁶⁷. In Article 1 the Valetta Convention defines the archaeological heritage to which it relates as '*... remains and objects and other traces of mankind from past epochs shall be considered to be elements of the archaeological heritage...*'⁶⁸ provided three specified criteria are met.

These criteria are:

- 'that the preservation and study of the remains, objects or trace help to retrace the history of mankind and its relation to the natural environment;*
- 'that the main sources of information are discovery, excavation or other methods of research;*
- 'that the location is in the jurisdiction of the Parties [to the Convention]'*.⁶⁹

Article 1 also states that the archaeological heritage 'includes', inter alia, '*...structures, constructions, developed sites, moveable objects, monuments of other kinds as well as their context, whether on land or underwater.*'⁷⁰

Since the archaeological heritage 'includes' these things it is not a definitive listing and therefore any remains or trace of mankind from a past epoch may comprise archaeological heritage⁷¹. This 'definition' is startlingly wide and lacks any concept of significance whatsoever. While there are differences between the 2001 Convention and the Valetta Convention, not least that the latter may arguably be restricted to a State's territorial waters and is principally concerned with the impact of development on the archaeological heritage, the scope of the marine heritage assets to which they relate is indistinguishable. Moreover, both Conventions provide for:

- authorisation of excavations & other archaeological activities
- supervision of excavations & other archaeological activities only to be undertaken by qualified persons
- prevention of illicit excavation or removal of archaeological heritage
- conservation & maintenance of archaeological heritage, preferably in situ
- appropriate storage of recovered material
- collection & dissemination of information
- prevention of illicit circulation of archaeological heritage.

Given that the UK obviously did not regard the lack of significance in the Valetta Convention to be an insurmountable bar to ratification, it would seem both inconsistent and illogical for the UK to continue to advance the omission of the concept of significance from the 2001 Convention as a reason for non-ratification by the UK.

Conclusion

Many in the international marine archaeological community have expressed to the author disappointment, dismay and even bewilderment that the UK has declared its intention not to sign the 2001 Convention. This reaction is all the stronger it seems because the UK at one point in time

⁶⁷ ETS no. 143. Hereafter 'the Valetta Convention'.

⁶⁸ para. 2.

⁶⁹ Ibid.

⁷⁰ para. 3 ibid.

⁷¹The Oxford Dictionary defines *epoch* as, inter alia, '*... a period of history...*'. Could the last epoch be said to be 1945 or, for example, the cultural revolution of the 1960's or 1990 with the end of the 'Cold War' in Europe and the start of a new European age? The ambiguous nature of the term raises awkward questions.

could legitimately claim to be at the forefront of the conservation of UCH. The Protection of Wrecks Act 1973, while not unique in concept, was innovatory in Northern Europe. The Nautical Archaeology Society's⁷² Training Scheme became the international 'gold standard' for field training of marine archaeologists and set new parameters for inclusiveness in terms of public participation in marine archaeology. As such, the scheme continues to be adopted by many countries around the globe.

While this reaction is perhaps understandable, it would be wrong to blame it upon simple indifference to the conservation of UCH by the UK. The UK has signed the Valetta Convention, which in many respects is almost co-extensive with the 2001 Convention. Moreover, HMG has recently undertaken an extensive public consultation exercise in respect of the effectiveness of the existing legal and administrative structures surrounding the conservation of UCH⁷³. Following this consultation working groups have been set up, with representation from interested parties and it is anticipated that new heritage legislation, partly relating to the marine historic environment, will be enacted within two to three years. Clearly, the importance of conserving the UCH is not lost on HMG.

The response of the UK to the 2001 Convention, while disappointing to many in the international marine archaeological community, was a studied reaction. To dismiss it as philistine is to ignore the fact that the UK's objections are based upon very real misgivings over the future development of the law of the sea and geo-political realities. One cannot also ignore the fact that these concerns are shared by other 'western maritime powers', who are also unlikely to sign up to the 2001 Convention in the foreseeable future. Balanced against genuinely held concerns over national security and international political stability, the issue cannot be assessed solely in terms of heritage.

Whether these concerns could have been successfully addressed in time, as alleged by the UK⁷⁴, is debatable. What is disappointing is that apart from issuing a short explanation of its vote, the UK has ceased to discuss, yet alone explore, with interested parties the possibility of it modifying its stance in the future. The explanation of the UK vote simply stated the UK's objections in outline and did not clarify in any depth the reasoning underlying these objections. This has left many in both the international and UK's legal and archaeological communities uncertain as to the exact basis upon which these objections were founded⁷⁵. This in turn has seriously hindered the development of a constructive analysis of the UK's stance. The fact that the UK felt able to sign up to the Valetta Convention, despite a lack of significance in its provisions, has been an added source of confusion. What would be most useful at this moment in time would be the holding of a series of consultation meetings by HMG, in a similar manner and with the same constituencies as those held previously. In these meetings a more detailed explanation of the UK's stance could be provided, which would enable a constructive debate to be developed as to how these objections could be addressed. Additionally, the interim proposals advanced by Dr. Dromgoole could be considered, with a view to the UK adopting them and moving partly towards a position comparable to that under the 2001 Convention.

⁷² The Nautical Archaeology Society is a UK registered charity whose objects include, inter alia, the advancement of the study and practice of nautical archaeology.

⁷³ 'Protecting our Marine Historic Environment: Making the System Work Better' (March 2004) Dept. of Culture, Media and Sport.

⁷⁴ 'UNESCO Convention of Underwater Cultural Heritage: Explanation of Vote'

⁷⁵ The author included.

The Irish Experience

Nessa O'Connor¹

Introduction

During the past couple of decades in particular, Ireland has taken an increasingly pro-active approach to the protection of its extensive and varied underwater cultural heritage - maritime, inland and intertidal. There are more than 10,000 recorded wrecks in Irish waters and several thousand protected sites associated with our lakes and rivers. Although we have yet to ratify the UNESCO Convention of 2001, Ireland participated in the various meetings of experts during the drafting of the instrument and voted in favour of it. In doing so, I suspect that we found it easier to support than many other jurisdictions in that we already have quite a stringent legal framework for underwater heritage protection.

The expert meetings in Paris were attended by a legal policy advisor from our then Department of Arts, Heritage, Gaeltacht and the Islands and by a representative from the Department of Foreign Affairs. The National Museum of Ireland was also consulted before and after these meetings and I recall that we were more concerned by any risk that there might be of losing the advantage of domestic statute law than by the severity of the provisions of the Convention. It still appears that there will be relatively little need for legislative change in order to accommodate the Convention in Ireland. The delays in ratifying the Convention appear to be administrative and personnel related rather than policy based. My colleagues and I who are involved from an archaeological point of view very much welcome today's seminar as one means to reawaken interest in the Convention in the necessary quarters and after today we would hope to be in a better informed position to help promote ratification.

In this paper, I will initially and briefly outline the relevant administrative structures in Ireland as well as the background in terms of case law and statutes. I have in any case written in more detail on this background in my chapter on 'Ireland' in S. Dromgoole (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (Kluwer Law International, 1999). A revised and updated edition of the chapter will appear in S. Dromgoole (ed.), *Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff, forthcoming 2006).

I will then make an equally brief assessment of Ireland's position in respect of some of the key provisions of the Convention and our priorities for underwater archaeology.

Regrettably from the point of view of this seminar, some of our more interesting case law is still current and *sub iudice* and I am therefore constrained in what I can say at this point in relation to at least two interesting cases.

Administrative Structures

Responsibility for underwater archaeology in Ireland rests largely on a day to day basis with the Department of the Environment, Heritage and Local Government and specifically with the Underwater Archaeological Unit of the National Monuments Service which was formerly known as Dúchas. My colleague Fionnbarr Moore who heads the Unit is here at the seminar today. The National Museum of Ireland also has an involvement in underwater archaeology to a significant degree. The Department deals with licensing for survey, excavation and remote sensing underwater. It is also involved in ongoing survey and recording and the production of sites and monuments records of underwater sites. It deals with a large volume of referrals (more than a

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thousand) each year concerning developmental impact in underwater context from the Department of Marine, Communications and Natural Resources and it also deals with applications for licences under the National Monuments Acts (1930 to 2004).

However, the National Monuments Acts have provided for a 2 strand protective system for archaeology since the principal Act was enacted in 1930, with the National Museum of Ireland 's statutory protection for archaeological objects providing the second protective arm or strand. As a result, the National Museum of Ireland (NMI) has an ongoing involvement with underwater archaeological sites and their protection in close association with our Underwater Unit colleagues in particular.

The Director of NMI is a consultee in the issue of excavation licences and we receive all related methodologies and paperwork for both dry land and aquatic applications.

The Underwater Unit is currently staffed by three full time archaeologists who also hold commercial diving qualifications as well as some seasonal staff and additional diving archaeologists for specific projects.

Legal Background – Case Law

There are a number of key cases.

O'Callaghan v the Commissioners of Public Works (1985)

Respecting the lands at Drumanagh, Co Dublin, the site of a major Iron Age coastal promontory fort, the plaintiff claimed that the placing of a Preservation Order on his lands amounted to an unjust attack on his constitutionally protected property rights.

The Supreme Court found against the plaintiff. I quote from the decision:

'It cannot be doubted that the common good requires that national monuments which are the prized relics of the past should require to be preserved as part of the history of our people. Clearly where damage to such monument is the probable result of unrestricted interference, by the owners or other persons, a conflict arises between the exigencies of the common good and the exercise of property rights. The legislation is not arbitrary or selective. It applies to all national monuments wherever situated and whoever owns them.....the exercise of property rights..... ought to be regulated by the principles of social justice'.

Early judicial statement of the 'common good' principle regarding regulation of private ownership rights versus the public right to preservation of national cultural heritage, relied upon extensively in subsequent case law and its ethos is reflected in the *Webb v Ireland* decision of 1988, the Barr, J., High Court Judgement in *Re la Lavia* and indeed the very recent High Court Judgement in the *Lusitania*, *Bemis v Minister for Arts, Heritage Gaeltacht and the Islands and the Attorney General*

Webb v Ireland

The case concerned the Derrynaflan chalice and hoard. The Supreme Court decision led to State ownership of archaeological objects, which finds legislative expression in the State ownership provisions of the National Monuments Amendment Act 1994

The case of la Lavia

This case concerning a Spanish Armada wreck resulted in the establishment of State ownership of archaeological objects from the sea and clarification of the relationship between heritage law and

Admiralty/merchant shipping law. In this regard I quote from Barr, J., in his High Court decision in the case:

'It seems to me that there are four fundamental features of an ancient maritime archaeological find in this jurisdiction. First, antiquity; secondly, State ownership; thirdly, lack of commercial market value in practical terms and finally, probable impossibility of tracing the successors in title of the owners and/or indemnifiers at the time of loss... and further on, I have no doubt that the wrecks of the Juliana; la Lavia and Santa Maria de la Vison passed out of the realms of commercial maritime law and into archaeological law long before they were found at Streedagh in 1985'

Legal Background – Statute Law

Legal Definitions

The legal definitions of 'wreck' and 'archaeological object' are as follows:

- *Wreck* means a vessel or part of a vessel lying wrecked on, in or under the seabed or on or in land covered by water and any objects contained in or on the vessel and any objects that were formerly contained in or on the vessel and are lying on, in or under the seabed or on or in land covered by water.
- *Archaeological object* means any chattel whether in a manufactured, partly manufactured or unmanufactured state which by reason of the archaeological interest attaching thereto or of its association with any Irish historical event or person has a value substantially greater than its intrinsic (including artistic) value and the said expression includes ancient human, animal or plant remains.

The broadly based definition of archaeological object can encompass later material, up to and including, the twentieth century as there is no age limitation on the definition.

Cumulatively, the two definitions appear to be all-embracing. However, my colleague Fionnbarr Moore has pointed out to me that some underwater archaeological sites or areas could fail to be captured by either of these definitions, such as fish traps, fording points, votive sites and the like. This is something that will need to be addressed in the revision of the legislation.

In this respect the definitions in Article 1 of the Convention appear to be more comprehensive in covering '*sites, structures, buildings, artefacts and human remains together with their archaeological and natural context*'

Provision is made for reporting to the Minister for the Environment, Heritage and Local Government (sites) and the Director of the National Museum of Ireland (objects) in Section 18 of the National Monuments (Amendment) Act 1994

The 100-year rule for automatic underwater site protection and licensing has created some problems for other jurisdictions.

We do not see any difficulty with the extension of control to every wreck of 100 years and more as we already vigorously enforce the statutory regulations in respect of all wreck. We continue to do so also in respect of archaeological objects from wreck of less than 100 years where the need for protection and/or enforcement of export regulation may arise.

Underwater Heritage Orders

Underwater Heritage Orders are used to protect sites of importance less than one hundred years old. So far only two orders have been made, one maritime and one inland. This rather sparing

approach is probably connected to a perceived need for additional monitoring of sites with Orders and the consequential resource implications.

Restriction on the use of detection devices and licensing

The National Monuments (Amendment) Act 1987 imposes a restriction on the unauthorised use of detection devices without an official licence, and this includes underwater magnetometers, side scan sonar etc.

Merchant Shipping (Salvage and Wreck) Act 1993

This act provides for a relationship between the deposition of 'wreck' or archaeological objects with the Receivers of Wreck and the authority of the Director of the National Museum to claim un-owned wreck that is of historic or archaeological importance

The Revision and Consolidation of the National Monuments Acts

The updating of the National Monuments Acts is ongoing in the Department of Environment, Heritage and Local Government in consultation with the National Museum. There have been amendments in 1954, 1987, 1994 and 2000 since the enactment of the principal Act in 1930. This process of revision provides an opportunity to ensure that any minor changes necessary to accommodate the Convention can be made. Effective control of imports in the sense of illegally acquired underwater archaeological heritage would be one aspect that merits consideration.

In a published summary of the Review of the National Monuments Acts in April 2002, the then Minister Síle de Valera stated in a policy document:

'A number of Court Judgements have upheld the principle of State ownership of archaeological wrecks found in territorial waters and with no known owners. It is now proposed to give effect to this particular principle in the revised legislation. This legislation would also make provision for the requisite measures to allow Ireland to ratify the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, in addition to making provision for the regulation of Irish registered vessels and individuals engaged in interfering with underwater archaeological heritage outside the jurisdiction of the State. Finally, it would regulate the importation of archaeological material or objects recovered from underwater sites.'

Regarding the latter, it appears that both the Receivers of Wreck and Customs officials would have the authority to seize illegally acquired wreck or objects at point of entry. However, it is probably also advisable that such powers are extended to specific heritage protection legislation.

Export and alter regulations

The controls placed on the export of archaeological objects and the altering in any way of an archaeological object, can be very important additional protective mechanisms for the underwater heritage, especially where unlicensed raising of wreck or archaeological objects has occurred

Developmental legislation

Ancillary heritage protection is provided in other legislative provisions, such as the Harbours Act, the Foreshore Act and Dumping at Sea Act, which are also of assistance in the protection of underwater cultural heritage.

UNCLOS

Ireland ratified UNCLOS in 1996. Article 303(2) gives responsibility to States for control over the removal of archaeological artefacts from the contiguous zone. Ireland has yet to formally declare a contiguous zone but we have certainly sought to exercise control within the zone, especially in the face of developmental threat

Continental Shelf/Contiguous Zone – The Practical Issues

There has been some published comment upon Ireland's extension of its rights to place Underwater Heritage Orders under the terms of the National Monuments (Amendment) Act 1987 to the furthest extent of the Continental Shelf as per Section 2(1) of the Continental Shelf Act (1968) – for example in Clive Symmons *Ireland and the Law of the Sea* (second edition) Dublin 2000.

In practice however, the regulatory authorities are likely to feel that they have more than enough to contend with in protecting UCH in the territorial waters and contiguous zone. The experience so far has borne this out.

Symmons quotes the case of the *Carpathia*(1918) and the apparent reluctance of the then responsible, Minister Sile de Valera, to invoke the extra territorial powers of protection created in 1987. My understanding of this case is that the response was pragmatic and resource related as much as policy based and followed consultation with the office of the UK Receiver of Wreck in Southampton.

The *Carpathia* case was dealt with in emergency circumstances where salvors were physically present on the wreck at the time and there was a need to take immediate action. As I recall it, there was no time available to look at the legal position in detail or to take advice from Counsel. The main consideration was given to the level of importance of the wreck relative to the measures that would need to be taken to place an Order on it at a location distant from the Irish coast. The Department of the Environment and Heritage has always been slow to place Underwater Heritage Orders anyway (probably because of the implications for monitoring as they see it - but there are arguments for the placing of quite a few more). I think ultimately, they viewed it relative to other resourcing priorities and decided that it had to be down the list in circumstances where there was already a heavy work schedule for that year, including monitoring and other requirements for the wreck site of the *Lusitania* which is subject to an Underwater Heritage Order.

The Minister would have been advised by the Heritage authorities before she made her statement in the Dáil, which Clive quotes in his book - I think it is fairly clear that there was no detailed consideration of the legality aspect or jurisdiction in international law although she is likely to have been made aware of the legal provisions in general terms. So it was probably an influence to some extent but not, I think, the major factor. On a practical level, there were no procedures in place from any previous experience to provide, for instance, for the necessary survey work that would have been required for the placing of the Order. For underwater archaeology in Ireland, this wreck would not have been a high priority for protection given the costs and personnel that would have been needed. Perhaps if there had been a format for consultation and action between a number of adjacent States with set procedures in place, things might have worked out differently. We would advocate a co-operative approach in similar instances in the future.

With regard to gas pipelines and other infrastructure built across the contiguous zones and on the continental shelf, oil and gas contractors have generally speaking been requested to carry out geophysical survey in the contiguous zone and beyond. There is an element of grace-and-favour in this, though it is also fair to say that in many instances they have needed geophysical survey anyway from an engineering point of view so as to avoid obstacles. In most cases it does not therefore require very much more in the way of resources on their part.

Co-operative Approach

I think that we would very much favour a co-operative approach to the protection of underwater cultural heritage in the EEZ and on our continental shelf. Perhaps one useful model for, at least pan-European, co-operation might be the Guidelines for Administrative Co-operation between member states/competent authorities in relation to the Export of Cultural Goods (Reg. 3911/92). In Ireland a cross-departmental committee has been formed with lists of European contacts and procedures for action as appropriate.

Possible Development of Codes of Practice with Developmental Agencies

The Underwater Unit have had discussions with the Oil and Gas Industry as to the possibility of establishing a Code of practice for Underwater Archaeology as well as one with the Port Authorities in Ireland. This route has been taken with other categories of developers in Ireland with a degree of success. The initial model was the Code of Practice for archaeology negotiated between the then Minister for Arts, Heritage Gaeltacht and the Islands and the National Roads Authority in 1999. To put this in perspective, between 2500 and 3000 licensed excavations have taken place annually in Ireland in recent years of which perhaps 10 to 15% would be in aquatic environs of one kind or another.

Salvage Issue

The Irish delegation at the expert meetings contributed on this topic in terms of limiting scope of salvage vis-à-vis cultural heritage rather than excluding it completely. As things stand Irish legislation offers little comfort to the commercial salvor intent on exploiting UCH in Irish waters.

The Ownership Issue

Although ownership is not addressed per se in the Convention, it remains a pre-occupation in respect of relatively recent wreck and in terms of the tie up between heritage and salvage law in the Merchant Shipping (Salvage and Wreck) Act and in the High Court findings in *Re la Lavia*. Of necessity there is a need to distinguish between wreck immediately claimable by the State and that which falls within the remit of Merchant Shipping law for determination.

Some Other Case Studies

The Carpathia (1918) – a wreck outside of territorial waters that was involved in rescuing passengers from the *Titanic*.

Irish 12th century sword guard, from the Irish Sea raised in fisherman's nets off the Welsh coast, involvement on the part of the National Museum, British Museum and National Museum of Wales but acquired ultimately by the National Museum of Wales with the agreement of the other Museums.

The *Lusitania* – presently and for some considerable time, subject to ongoing litigation between the owner of the hull, appurtenances and apparel, and the Irish State.

The *Asgard (1905)* – intact vessel on dry land and now in the National Museum with Erskine Childers 'Riddle of the Sands' connection protected by virtue of its falling within the definition of archaeological object. It was under threat in the face of a rather mad cap idea to put it back afloat which would have involved large scale replacement of original material. Interestingly, the recent *Lusitania* judgement also confirmed that the *Lusitania* and all parts thereof is an 'archaeological object' as well as 'wreck' under the definitions in the National Monuments Acts.

International Responsibility in Export Licensing

Taking cognisance of the underwater cultural heritage of other jurisdictions we have used the export licensing requirement for archaeological objects under the terms of the *National Cultural Institutions Act (1997)* as a mechanism to enable us to extend assessment and possible protection to the patrimony of other countries especially where we become aware of proposed export for sale.

Heritage Protection Ireland

Heritage Ethos

As stated by Barr, J., in the Streedagh Armada case re. *la Lavia* and earlier in *Webb v Ireland* and in *O'Callaghan v the Commissioners of Public Works*, heritage for the benefit of all is the general ethos of these decisions and indeed the expectation and concern of a large section of the Irish public. Finlay, J., Chief Justice, stated for example in the Derrynaflan case judgement of *Webb v Ireland*:

'It would appear to me to be inconsistent with the framework of the society sought to be created and sought to be protected by the Constitution that such objects should become the exclusive property of those who by chance may find them...'

In his speech introducing the National Monuments (Amendment) Act 1994 to the Dáil, Michael D Higgins, the Minister for Arts, Culture and the Gaeltacht, said:

'we have put into legislative form a clear unequivocal statutory right to our heritage and clear provisions for action against those who would seek to diminish it'

Heritage Management Issues

There are both jurisdictional and international co-operative issues in this area but they all hinge upon resourcing. A considerable amount of investment has progressively been made by the State in underwater heritage protection in the course of the past decade. This has come at a time of increasing demand and increased pressure from infrastructural and private development on land and in territorial waters – in the latter instance including harbour works, dredging, aquaculture, dumping at sea and oil and gas pipe lines.

Comments on the Convention

Specific Points Section By Section

- Preamble – We have no difficulties with anything in the preamble and would fully support the principles therein.
- Art. 4 – Particularly welcome and in keeping with the Irish approach to salvage regulation.
- Art. 5 – Activities 'incidentally affecting underwater heritage' are being dealt with proactively on the basis of the 'polluter pays' principle and on the basis of government policy of preservation by record if not in-situ of archaeological remains affected by developmental impact. Developmental legislation with heritage mitigation provisions also assist (as quoted elsewhere in this paper).
- Art 6 – Bilateral, regional and multi-lateral agreements and a co-operative approach would seem to be the best means of protection where possible, especially beyond territorial waters.
- Art 7 – We have extensive and important archaeological remains in our internal waters which we seek to protect to the same degree as with maritime remains.
- Art 9 and Art 10 – see Continental Shelf references in this paper. There are a number of options here with regard to procedures when UCH is found on the continental shelf of a

coastal State. 9.1 appears to extend the right of States to provide protection to UCH on the Continental Shelf provided that reporting and consultation with relevant State parties also takes place. As predicted by Symmons (2000) there has been a move under the Convention as agreed, to extend the protective jurisdiction of States. In this context I would consider it unlikely that Ireland would take unilateral action on the further reaches of the Continental Shelf without consultation with relevant State parties and only in circumstances where either the extent of adversarial impact or importance of the given UCH merited it.

- Art 13 – in the interim, prior to ratification or as an additional protection, a memorandum of understanding or Code of Practice for Archaeology with the Naval Services might be considered.
- Art 14 – Regarding control of entry into the territory, dealing and possession: the possession of unreported (to NMI) archaeological objects is already an offence under the terms of the National Monuments (Amendment) Act 1994. We already have co-operative procedures in place under the *EU Cultural Goods Regulations Guidelines* between the National Museum, Revenue Commissioners and the Art and Antiques Unit of the National Bureau for Criminal Investigation, An Garda Síochána.
- Art 18.1 – Seizure and Disposition of Cultural Heritage: the above arrangements apply regarding Customs law and Criminal law but some amendment to the National Monuments Acts and/or National Cultural Institutions Act might also be considered.
- Arts 19 to 23 – regarding co-operation, information sharing, public awareness, training, establishment of competent authorities, and meetings of State Parties: we would be in full support of and actively encourage the procedures provided for in these sections.

The Annexes and the Role of the Rules in Setting of Standards

We are very comfortable with the rules annexed to the Convention and they are in keeping with the sort of 'best practice procedures' that we advocate in Ireland. Messrs Kirwan and Smyth of the Irish delegation at the expert meetings were involved in the drafting of the Rules and they closely reflect the approach of the Irish regulatory authorities to project design and resourcing for underwater research, survey and excavation. The rules mirror the type of regulation and policy articulated to salvors and others who have on occasion sought to exploit the UCH in Irish waters. We welcome this part of the Convention as a further means to promote high standards of practise

Conclusions

There are a few legislative issues that need to be addressed to assist Ireland in giving full effect to the Convention. However, with the assistance of the international co-operation provisions in the Convention, there should be few obstacles to the implementation of much of the ethos and many of the provisions in the interim

One of the strengths of the Convention is that it should support State parties involved in adversarial legal actions where Convention principles supporting State protective action can be invoked.

A perspective from across the Channel

Thijs J. Maarleveld¹

To start with I would like to commend the Joint Nautical Archaeology Policy Committee and its partners for organizing the seminar. It puts the problems addressed by the *2001 UNESCO Convention* firmly on the agenda in the United Kingdom. Let us hope that this will really help to solve a series of contentious issues that cause anger and quarrels within the heritage community and that compromise governments on a regular basis.

I was asked to enlighten you with a perspective from across the Channel. Evidently I will do this with some emphasis on the Netherlands, the little country where I have been working on underwater heritage issues over the past twenty-five years. The continent across the Channel, however, is much larger, extending as it does from the Netherlands up to Kamchatka and China. I can not possibly give a perspective for that whole continent, but neither will I go into the details of legal changes that we are going through in the Netherlands at this moment. It would distract from the essentials of today's discussion. Those of you who are interested in these details –and I presume there are quite a few – are better referred to the chapter I wrote for the book that one of the organizers of today's seminar, Sarah Dromgoole, is presently editing: 'The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the 2001 UNESCO Convention'. It will appear in 2006 (The Hague: Martinus Nijhoff). Instead of such details, I would rather like to underpin a few trends that we could help to strengthen or to curb.

First of all, let me dwell once more on that huge continent of Eurasia. Last week I attended the General Assembly of ICOMOS at its very eastern end, in Xi'An in China. Development in China, in Asia in general is really incredible, booming. Development affects and strengthens 'The Heritage Industry', to use Hewison's phrase. Monuments and their remakes are suddenly seen as an asset. Museums are being established as a tourist attraction. Also, in the eastern and southeastern Asian region the consciousness that Underwater Cultural Heritage is a resource that can be exploited for the heritage industry is growing. But so is the consciousness that it is self-defeating to exploit it through selling retrieved artifacts in western markets. There is strong pressure from the region itself to align policies. One of the ideas promoted for this purpose is to strive for a multi-state nomination as World Heritage of shipwreck sites defined by ceramic cargoes along the 'Maritime Silk-Road'. At present the realization of such a concept may be far off, but the very fact that such concepts are being discussed means quite a lot. It goes hand in hand with initiatives for interregional co-operation and awareness-raising in joint field schools and the like. Tenets like 'Vietnam is too poor a country to protect its UCH, so it should salvage it and make money on its sale' become less and less tenable by the promotion of such concepts and approaches.

What is the relevance of this for our discussion today? What is the relevance for Britain or for the Netherlands, for that matter? Well, both have strong antiquities markets, selling everything that originates from archaeological sites, especially if this is permitted or not explicitly made illegal by the State in which the archaeological site lies or in which the material is first landed. At present you may be aware of rumours of a huge consignment (200,000 pieces?) of tenth century ceramics being store housed in Indonesia. Allegedly it has been 'salvaged' off Java and includes material from the Arabic world and Egypt. It is to be shipped to Amsterdam for sale at auction. Amsterdam lies in the Netherlands and so, whether we like it or not, we are somewhat involved.

Can you imagine? Tenth century! What an important find it might be! But the context is that Asia is being depleted of its archaeological riches by the planned movements of goods. However, Asia is

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gradually realizing this and pressure is building up to exploit such riches differently! For today's discussion this is relevant in that in making undesirable excavations and undesirable appropriation illegal, Asia will compel the U.K., the Netherlands, Switzerland to live by the *1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. As David Gaimster reminded us in his address on behalf of the Society of Antiquaries of London, the U.K. and Switzerland have recently signed up to that convention and finally the Netherlands have also announced to prepare for becoming a partner.

Thus in order to take the *UNESCO Convention on the Protection of the Underwater Cultural Heritage* forward, my **first point** is that **we should also stress the 1970 Convention on illicit trade and transfer of ownership and the UNIDROIT Convention on the International Return of Stolen or Illegally Exported Cultural Objects of 1995 as complementary instruments**. In their implementation it is crucial that a register of stolen goods be made operational and that the Register should include an alerting section for excavated material that – because of the illegal nature of the excavation – has not been registered, but for which seizure would nevertheless be the wish of the State of origin or of the owner.

My second point today will bring me back to my home country, and not immediately to the auction house (although we may have to stop there again). When starting to write my contribution for the book I referred to earlier, I sat down in an extremely pessimistic mood. Till November 2001 quite a few of us had worked very hard on the *Convention*. Now we are 4 years on and what has happened? Nothing...? Will something happen soon? Unlikely? So, why bother? Well, of course I bother. I am even paid to do so. So I sat down and described all the changes, legal and otherwise, that archaeological heritage management in the Netherlands is presently going through. Much of this has to do with the implementation of the *European Convention on the Protection of the Archaeological Heritage [Revised]*, the so-called *Valletta Convention* that Mike Williams mentioned earlier in this seminar. During the process of writing my essay, I gradually realized that quite a few changes are being made that follow the guidance of the *2001 Convention*.

All 'activities incidentally affecting UCH' are now under obligations of Environmental Impact Statements and under obligations to take measures for mitigation of impact on cultural heritage. This applies to the Dutch territory, of course. But since 2002 this also applies integrally to the EEZ and Continental Shelf. A Contiguous Zone has been established, bringing all 'activities directed at UCH' under control in a much larger area than before. There is a relatively strong network in place for information and reporting of incidental finds by fisheries and the like. Control and enforcement of heritage legislation within the Dutch maritime zones is being catered for by the co-operatively organized Coastguard. There is a policy framework in place regarding Dutch historic ship finds and shipwreck sites outside of the Netherlands.

In short: although at present it does not seem to be a political priority, quite a bit is in place to make accession to the *2001 Convention* a relatively easy affair. However – and this is relevant for the U.K. as well – this could only be realized by informed management at central government level, coordinated by the Minister of Culture. Continued maritime heritage management is presently guaranteed. But this is not something that follows logically in a sphere where government is reassessing its role and decentralizing responsibilities by transferring cultural and planning responsibilities to local government.

So my **second point** is that to take the *Convention* forward **centralized, nation-wide coordination of maritime heritage management under the political responsibility of the Minister of Culture is essential**. The sea has no inhabitants and local government will not address the issues sufficiently. Central guidance is much needed.

Then my third point. It has to do with the concept of 'verifiable links' that the *2001 UNESCO Convention* addresses. The policy framework regarding Dutch shipwreck-material and Dutch shipwreck-sites abroad is in place. It is a compromise document, negotiated between several government departments. Nevertheless, it closely follows the principles of the *2001 Convention*. Its implementation is straightforward as long as apparent interests are clear. For instance when the State in whose waters a Dutch shipwreck occurs does not recognize a Dutch ownership claim. Or, alternatively, when that State has the claim transferred to itself by a bilateral agreement. The implementation is also straightforward in those cases where the apparent interests are limited.

As other situations abound, the framework has not been able to eliminate all contention. We still face problematic situations that are incident-driven. This will be the case as long as the *Convention* itself is not in place. At present the Netherlands and the U.K. are facing such an awkward situation, regarding Dutch wreck in English waters. In 2003 there have been demarches between the two countries to prevent such contentious situations by agreeing on a joint policy for Dutch shipwrecks in English waters and – of course – the other way round. In the meantime other priorities seem to have delayed the process that was started and presently we are therefore facing a situation nobody had foreseen. Under these circumstances my **third point** is that I would like **to stress Recommendation 2c of the Burlington House Declaration and advise that the U.K. and the Netherlands draw up some sort of bilateral Memorandum of Understanding.**

That brings me to my fourth and last point. Perhaps it is the most important one. In my practical experience in the Netherlands I have found it to be of utmost importance. For the British system it has, for some reason long been identified as a bridge too far. I do not think it is. The climate is changing and it seems that it needs to change in order to implement the *Valletta Convention* to which the U.K. government is committed. The point that I do want to stress has been mentioned by Robert Grenier. It was also referred to by Mike Williams. Incidentally, it also solves such awkward situations as I was referring to in relation to a Dutch wreck found in English waters. It is the following. English legislation does not have what one would call 'Blanket Protection'. I have always contended that the Netherlands does. In Dutch law there is an obligation to report new finds and there is also a prohibition to excavate without permit. But 'to excavate' is used in this context as a very technical term. Not all earth-moving is called 'excavation'. The administrative burden of the prohibition is therefore very limited. Technically, excavation is defined as 'all disturbing of context for the purpose of collecting antiquities or cultural-historical data. So, whereas activities that 'incidentally affect' cultural heritage (with whatever mechanical excavator) are covered by one set of rules, activities 'directed at' cultural heritage are covered by a blanket rule, regardless of prior assessment of the site it is directed at. The fact that someone wants to collect certain antiquities for their cultural-historical significance already defines their significance, or wouldn't that be true?

So as my **fourth point**, in my opinion **it is essential that the UK looks into something similar in the implementation of regulations that govern 'excavation', that is to say the disturbance of unknown, unregistered, non-assessed sites for their cultural-historical potential.** In view of the Valetta Convention the UK will need to do so.

In summary, I have addressed four points to take the *UNESCO Convention on the Protection of the Underwater Cultural Heritage* forward, stressing the importance of:

- The Conventions on illegal trade and the register of stolen goods, including alerts on suspect material from illegal excavations.
- A Competent Authority at central government level under the authority of the Minister of Culture. In other words: Maritime Management Matters (Recommendation 4 of the Burlington House Declaration).

- Bilateral agreements to prevent international tension and to solve contentious issues in which, until now, the treasure-hunter has always been the one to profit from un-clarities, playing off one State against the other.
- A limited but effective system of blanket protection that simply regulates reporting of finds and the conditions for excavation.

A Perspective from Across the Atlantic **Ole Varmer¹**

Introduction

We are all connected by the sea. In its bed lies our cultural heritage which has been gathering there since humans began to use the sea for food and transportation. Where ever ships travel, some inevitably sink because of natural disasters or human error. As ships became vehicles for trade, laws developed to provide a more predictable business environment, including awards for those who salvaged ships that were in marine peril and returned the cargo to the stream of commerce. As shipwrecks became objects of antiquity, the lure of fortune and fame resulted in the hunting and plundering of many treasure laden shipwrecks. In the absence of any international agreements or legislation regarding this underwater cultural heritage (UCH), many treasure hunters were successful in obtaining title to abandoned property under the common law of finds or as an award under the law of salvage. As a result, laws developed to protect UCH. Governments, as the owners or entities in control of the UCH, have also successfully used salvage law in court to prevent the unwanted salvage or to ensure that it is done in a proper manner. The recognition of government ownership or control by federal admiralty courts usually involves the recognition of government statutes concerning UCH.

This paper provides a brief overview of the United States (US) laws, policies and practices relevant to the protection and management of UCH in the context of some of the more important provisions of the United Nations Education Scientific Cultural Organization (UNESCO) Convention for the Protection of the Underwater Cultural Heritage (hereinafter 'UCH Convention').² At the UNESCO Meeting, the US, United Kingdom (UK) and other nations with significant maritime interests supported the primary purpose of the Convention to prevent looting and unwanted salvage as well as most of its archaeological and historic preservation provisions, including the Annexed Rules. There were, however, two major obstacles that prevented the US, UK and some other nations from supporting the Convention as a whole. First, there was the concern about the so-called 'creeping coastal State jurisdiction' over UCH on the continental shelf (CS) and Exclusive Economic Zone (EEZ) seaward of the 24 nm limit of the contiguous zone. The other matter of concern to the US, UK and other nations was the treatment of foreign sunken warships and other sunken State craft landward of the 12 nm limit of the territorial sea. In particular, they were concerned about the diluting the principle of sovereign immunity as it applies to all sovereign vessels and equipment. This paper will summarize how US law protects and manages UCH in all of the maritime zones in a manner consistent with the Law of the Sea Convention (LOSC) and the UNESCO UCH Convention, including in these two areas of concern. For example, it will summarize how the US treats foreign sunken State craft and protects UCH in the EEZ/CS in a manner consistent with international law. As such, the author suggests that this US approach to preventing looting and unwanted salvage suggests a way for other nations to move forward in protecting UCH from activities subject to their control and jurisdiction in manner consistent with the LOSC and the UNESCO UCH Convention without changing the international law regarding the principle of sovereign immunity or extending coastal State jurisdiction over UCH.

¹ US National Oceanic and Atmospheric Administration (NOAA). The views expressed in this chapter are the personal opinions of the author and do not represent the official positions of the US government, (NOAA), or the Department of Commerce. Special thanks to Jeanne Philbin.

² A more detailed account will appear in S. Dromgoole (ed.) *Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (Martinus Nijhoff, forthcoming 2006).

Overview of United States Law, Policy and Practice Governing the Protection of UCH

In the US a few laws specifically protect certain UCH. There are also a few laws that were enacted to protect terrestrial land-based heritage but which also apply to certain heritage located in the marine environment. The US has not yet passed legislation providing comprehensive protection to all UCH that may be subject to its control and jurisdiction. However, it has done more than most, if not all other nations, to protect certain UCH in the 12 nm territorial sea, 24 nm contiguous zone, 200 nm EEZ and in the high seas. Perhaps even more importantly, these laws do so a manner consistent with international law as reflected by the LOSC. They also protect UCH in a manner consistent with the archaeological and historic preservation principles in the UNESCO UCH Convention, particularly the Annexed Rules.

Under the UCH Convention, heritage that has been underwater for 100 years is to be protected and managed in accordance with historic preservation and archaeological standards and requirements. The US Archaeological Resource Protection Act (ARPA) has the same 100 year threshold for protecting such resources located on US public lands. US laws also protect UCH that are deemed historically significant. Under the US National Historic Preservation Act (NHPA), a 50 year rule of thumb has developed as a matter of practice and policy for determining historical significance. Accordingly, the US suggested that UNESCO adopt a 50 year rule for determining historical significance for the UCH that should be subject to the Annexed Rules and other provisions. However, the US subsequently agreed with the 100 year blanket approach preferred by most of the UNESCO representatives as it was consistent with the 100 year rule under ARPA. It has also been noted that nearly all shipwreck or heritage that has been underwater for 100 years would likely be considered historically significant under the NHPA and related laws. Thus, the scope of the UNESCO UCH Convention as well as most of its provisions implementing historic preservation and archaeological principals are consistent with current US law and practice, particularly those associated with the US programs associated with National Marine Sanctuaries, Parks and the US Navy.

Marine Protection Research and Sanctuaries Act of 1972 - National Marine Sanctuaries Act

In my opinion, the best US law specifically protecting UCH is Title III of the Marine Protection Research and Sanctuaries Act of 1972 now more commonly know as the National Marine Sanctuaries Act (NMSA).³ The NMSA authorizes the Secretary of Commerce, through the National Oceanic and Atmospheric Administration (NOAA), to set aside discrete marine areas of special national - and sometimes international - significance.⁴ NOAA protects and manages these '*areas of the marine environment possess[ing] conservation, recreational, ecological, **historical**, research, education, or aesthetic qualities which give them special national significance.*'⁵ While most of the sanctuaries focus on protecting ecosystems and natural resources, the first sanctuary established in 1973 was to protect the USS Monitor from looting and unwanted salvage. The most recent designation in 2003 was to solely protect UCH in Thunder Bay off the coast of Michigan. The NMSA shows much promise in protecting historical sanctuary resources⁶ because sanctuaries may be established in the 200 nm EEZ consistent with international law.

³ Also known as Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. s. 1431, *et seq.*

⁴ 16 U.S.C. s. 1433 sets out the standards and factors to consider in the designation process set out in s. 1434.

⁵ 16 U.S.C. s. 1431(a)(2) (emphasis added).

⁶ 'Historical' means a resource possessing historical, cultural, archaeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events': 15 C.F.R. s. 922.2(c).

In order to protect sanctuary resources, NOAA regulates activities, issues permits, assesses civil penalties and conducts other enforcement. The two activities that are regulated in sanctuaries to directly or indirectly protect UCH are the prohibitions against: 1) the removal of,⁷ or injury to, historic sanctuary resources and 2) any alteration of the seabed. There is no question that NOAA has the jurisdiction to apply the first measure to US nationals and vessels in the US EEZ. Of course, any exercise of jurisdiction against foreign flagged vessels and nationals must be done in a manner consistent with international law.

Under international law, the coastal State jurisdiction for the enforcement of the first measure against foreign flagged vessels and nationals is limited to UCH landward of the 24 nm limit of the contiguous zone. However, if a foreign flagged vessel or national is conducting salvage activities that involve altering the seabed, placing structures on the seabed or conducting some other activity that triggers the sovereign rights and jurisdiction that a coastal State has over activities in the EEZ/continental shelf, then they would be subject to US/NOAA jurisdiction. This approach to controlling treasure salvage is consistent with LOSC Article 81 which provides the coastal State with the authority to regulate drilling on the continental shelf *for any purpose*. As treasure salvage activities may also involve the installation of structures and installations on the seabed regulation of those activities is consistent with the coastal State authority under LOSC Article 80. Accordingly, NOAA regulations regulating activities to protect natural resources in the EEZ/CS would be enforceable against foreign salvors and thereby indirectly protect any associated UCH in the EEZ/continental shelf. The US efforts to protect UCH have gone beyond its EEZ/CS into UCH located under the High Seas. The international agreement on *Titanic* seeks to protect this historically significant shipwreck that is located over 300 nm off the coast of Canada relying on jurisdictional approaches that are consistent with international law, e.g., jurisdiction over flagged vessels and nationals and use of port state jurisdiction and jurisdiction in territorial sea and customs waters over foreign flagged vessels and nationals.

RMS Titanic Maritime Memorial Act

The 1985 discovery of *Titanic* raised concerns about how to protect it from looting and unwanted salvage and resulted in the enactment of the RMS Titanic Maritime Memorial Act of 1986.⁸ As there are no legal bars to such salvage and no nation may exert sovereignty or sovereign rights over this or any other shipwreck in the high seas, the US Congress recognized that coordination with other nations was necessary to fully protect *Titanic*. The Act suggested that the wreck site be treated as a maritime memorial, encouraged the negotiation of an international agreement⁹ and international guidelines for the exploration, research and, if determined appropriate, the possible salvage of artifacts. NOAA's published guidelines based on the Rules Annexed to the *Titanic* Agreement that were developed in consultation with representatives from the UK, France and Canada.¹⁰ These guidelines and rules are also based on the ICHMOS Charter and the Rules Annexed to the UNESCO UCH Convention.¹¹ The US signed the Agreement on *Titanic* on June 18, 2004.

The Bush Administration's Ocean Policy Action Plan expressly provides that it will submit recommended legislation along with the agreement to the US Congress for its consideration. Implementing legislation is necessary for the agreement to come into effect in the US. Although this agreement and the guidelines are not enforceable by NOAA or other federal agencies under the

⁷ Removal of any UCH in a national marine sanctuary requires a research and recovery permit which complies with professional archaeological standards and requirements as set forth in the Federal Archaeological Program.

⁸ PL No. 99-513, Oct. 21, 1986, 100 Stat. 2082, 16 U.S.C. s.450rr - 450rr-6 (2005).

⁹ s.450rr - 4.

¹⁰ 66 Fed. Reg. 18905-18907 (April 12, 2001).

¹¹ Ibid. See also Preamble of the draft guidelines at 65 Fed. Reg. 35326 (June 2, 2000).

current Titanic Act of 1986, the guidelines and agreement have been cited by the admiralty court asserting jurisdiction over salvage activities of *Titanic*.¹² The US and UK plan to protect this UCH in the high seas in a manner consistent with UNCLOS and the UCH Convention through state jurisdiction, port state jurisdiction and jurisdiction over their respective nationals. Back in 1986 when the US Congress enacted the statute regarding Titanic it was also considering legislation to protect and manage abandoned shipwrecks along the coast of the US.

Abandoned Shipwreck Act

Since the dawn of treasure hunting, US state governments have asserted ownership rights to the UCH pursuant to the Submerged Lands Act¹³ and control under their historic preservation laws. They were successful in some cases. However, in a majority of cases, salvors prevailed in obtaining ownership under the law of finds or salvage. In response, the US Congress passed the Abandoned Shipwreck Act (ASA).¹⁴ Unfortunately, the ASA has been only partially successful in protecting the UCH from unwanted salvage.

The ASA directs states to protect abandoned shipwrecks and defers to the states to determine how they should be managed consistent with some broad provisions. The ASA establishes a multiple use management regime for the protection of shipwrecks that also incorporates the protection of natural resources. Since the implementation of the ASA is left to the states it may not necessarily be consistent with the US Federal Archaeological Program or the UNESCO UCH Convention. However, to the extent there are sunken military craft in state waters those wrecks are generally not abandoned and thus protected by the most recent addition to US laws protecting UCH - the Sunken Military Craft Act.

Sunken Military Craft Act (Treatment of Warships and other Sunken State Craft)

The Sunken Military Craft Act (SMCA)¹⁵ is a codification of US practice, international agreements and federal admiralty court cases. It clarifies that sunken military craft – both US and foreign – remain the property of their flag States unless expressly abandoned. It prohibits the application of the law of finds to any such craft. It also eliminates any award for the unwanted salvage of such craft.

Its scope is broad in protecting sunken US craft¹⁶ wherever located as well as foreign craft in US waters defined to include the internal waters, territorial sea and contiguous zone.¹⁷ Violators are subject to civil sanction¹⁸ as well as applicable criminal law sanctions.¹⁹ Activities otherwise prohibited may be carried on only as provided by a permit issued by the Secretary of the Navy, Air

¹² RMS Titanic Inc. v. Wrecked, and Abandoned Vessel, 323 F.Supp. 724 (E.D. Va. 2004).

¹³ The Submerged Lands Act establishes that title to and ownership of the lands beneath navigable waters, and the natural resources within such lands and waters within the boundaries of the respective States, is vested in the States. 41 U.S.C. s. 1311.

¹⁴ 43 U.S.C. ss. 2101-2106; for a more detailed analysis of this and other US UCH laws see [insert cite for article in 1999 publication].

¹⁵ Public Law Number 108-375 passed into law on October 8, 2004, and presented to the President on October 21, 2004.

¹⁶ The statute defines 'sunken military craft' as all or any portion of 'any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military non-commercial service when it sank[,]' along with sunken military aircraft and spacecraft, and their associated contents, and reaches them across debris fields.

s. 1408(3).

¹⁷ s.1403(d) and s.1408(7).

¹⁸ s.1405

¹⁹ s.1406(i)

force or other appropriate military unit.²⁰ The SMCA requires the consent of the foreign sovereign before permitting salvage of foreign craft in US waters.²¹

US Land Based Cultural Heritage Laws Applicable to certain UCH Sites

There are historic preservation statutes that were developed for the protection of heritage on terrestrial land sites but which also apply to UCH in certain circumstances including the Antiquities Act, the National Historic Preservation Act, and the Archaeological Resources Protection Act.

Antiquities Act

The public interest in the protection of American antiquities on federal lands, particularly those associated with prehistoric American Indians, led to the development of the Antiquities Act of 1906 (AA).²² The AA has two main components: (1) a criminal enforcement component, which provides for the prosecution of persons who appropriate, excavate, injure or destroy any historic or prehistoric ruin or monument, or any object of antiquity situated on lands owned or controlled by the US; and (2) a component that authorizes examination of ruins, the excavation of archaeological sites and the gathering of objects of antiquity on lands owned or controlled by the US through the granting of a permit. The criminal enforcement of the AA in cases where there is a question of whether an object is an antiquity, however, it is still good law and its permitting provision remains a potentially useful tool for protecting the UCH. These challenges to the Antiquities Act ultimately resulted in the enactment of the Archaeological Resources Protection Act in 1979.²³

Archaeological Resources Protection Act

The Archaeological Resources Protection Act²⁴ also applies to 'archaeological resources' of at least 100 years of age located in national parks, national wildlife refuges and other national public lands. The Act requires a permit for any excavation, removal, or alteration of archaeological resources. The enforcement provision provides for the imposition of both civil and criminal penalties against violators of the Act.

National Historic Preservation Act

The National Historic Preservation Act of 1966 was enacted to recognize that the nation is 'founded upon and reflected in its historic heritage.'²⁵ The Act requires that national government agencies survey, inventory²⁶ and assess the historical significance of heritage resources including the UCH, prior to undertaking any action, such as issuing permits, expending funds, developing projects, and taking other government actions.²⁷

Section 106 of the National Historic Preservation Act requires that national government agencies take into account the effect of any proposed federal, federally assisted, or federally licensed

²⁰ s.1403

²¹ s.1406(d)(2).

²² 16 U.S.C. s. 431, *et seq.* For a detailed analysis of the long twenty-five year process it took to enact this law see generally 'A Special Issue: The Antiquities Act of 1906, 42 J. Southwest 199-269 (2000).

²³ It should be noted, however, that the cases addressed enforcement of the criminal provisions of the AA, and not the permitting provision, which has never been subject to such a constitutional attack. It should also be noted that these challenges reveal the problems with not taking a bright-line approach to defining UCH.

²⁴ 16 U.S.C. § 470ee *et seq.*

²⁵ 16 U.S.C. ss. 470 *et seq.*, 470(b)(1).

²⁶ 16 U.S.C. s. 470h-2(a)(2).

²⁷ Another statute that requires national agencies to consider the effects of their activities on the environment, including heritage resources, is the National Environmental Policy Act: 42 U.S.C. s. 4321 *et seq.* Like the National Historic Preservation Act, the National Environmental Policy Act is procedural in nature and does not contain any enforcement mechanism to prevent harm to heritage resources committed by third parties.

'undertaking' on any historic property²⁸ that is included in, or eligible for inclusion in, the National Register of Historic Places.²⁹ The purpose of the section 106 process is to identify potential conflicts between historic preservation concerns and the needs for federal undertakings in the public interest.³⁰ Even though the NHPA, ARPA and the AA were developed to protect resources on dry terrestrial lands, they are consistent with the UNESCO Underwater Cultural Heritage Convention as are the US UCH laws, i.e. the ASA, NMSA, SMCA and Titanic Act.

Conclusion - A Way Forward

The US laws and polices are consistent with the UNESCO UCH Convention Annexed Rules and other provisions codifying the general principles of historic preservation including the general ban against the application of the law of salvage and finds to UCH. However, the US, UK and other nations have not supported the Convention as a whole because its treatment of foreign state owned UCH within territorial sea appears to dilute the important principle of sovereign immunity and the regime for UCH located in the EEZ/continental shelf appears to extend coastal State jurisdiction and sovereign rights beyond that authorized under the LOSC. Thus, one way forward would be to have bi-lateral or multilateral agreements protecting UCH in a manner that is consistent with US UCH law, the *Titanic* agreement, and US international agreements protecting sunken State craft and the Annexed Rules and Article 4 of the UNESCO UCH Convention.

The following points should be considered:

1. Maximize control over activities in all the maritime zones consistent with LOSC
 - Proclaim a contiguous zone and implement legislation asserting coastal State jurisdiction and control over all activities directed at UCH in internal waters, territorial sea and contiguous zone, including those of foreign flagged vessels & nationals in manner consistent with LOSC Art 303(2) and UNESCO UCH Convention Art -8?
 - Control all activities directed at UCH by UK flagged vessels and nationals regardless of location of UCH – this control is consistent with LOSC;
 - On continental shelf assert control over activities consistent with the LOSC. For example, regulate the placement and use of all installations, structures and devices on the continental shelf by foreign vessels and nationals consistent with LOSC Art 60 including the use of such objects in the salvage or recovery of UCH – this will indirectly help protect UCH in manner consistent with LOSC;
 - On continental shelf regulate 'drilling' for any purpose and expressly include excavation associated with salvage or recovery of UCH – this would be consistent with LOSC Art 81
 - This and other regulation of activities to protect the marine environment will also indirectly help preserve UCH in and on the continental shelf.
2. Along the lines of *Titanic*, consider other agreements and implementing legislation to protect other UCH seaward of 24 nm and in the high seas.
3. Along the lines of *La Belle* consider agreement to protect sunken military and other state craft in the territorial sea and internal waters of other States such as the United States:
 - Title to State craft, wherever located, must remain vested in the original flag State unless abandoned;
 - No salvage or recovery permitted wherever located (including in the territorial sea and contiguous zone) without consent of the flag State;

²⁸ 'Historic property' means any prehistoric or historic district, site building, structure, remains or object eligible for inclusion on the National Register, i.e., meets the National Register listing criteria: 36 C.F.R. s. 800.2 (e).

²⁹ 16 U.S.C. s. 470f.

³⁰ 36 C.F.R. s. 800.1(b).

- Coastal State would determine whether any recovery in the TS and CZ takes place and the manner of any recovery;
 - Recovery that is permitted by the flag and coastal States would have to be consistent with the UNESCO UCH Convention's Annexed Rules.
4. These agreements regarding UCH should incorporate the Annexed Rules of UNESCO UCH Convention, Article 4 Relationship of Salvage and perhaps other general archaeological and historic preservation that are consistent with the LOSC.

Perspectives from the Southern Hemisphere: Australia and South Africa **Craig Forrest¹ and John Gribble²**

Introduction

This paper will briefly examine the legal protection afforded to underwater cultural heritage (UCH) in two jurisdictions that not only have a similar common law legal structure to the United Kingdom (UK), but also have experience in regulating activities directed at underwater cultural heritage: the applicable states being South Africa and Australia.³

It is not intended that this paper provide a comprehensive account of the legal structure pertaining to UCH in these jurisdictions, but will address the extent to which these legal regimes accord with the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage (the Convention)⁴ with particular regard being paid to the protection afforded to UCH found beyond the state's territorial waters.⁵

The development of the Australian and South African statutory regimes

A central characteristic of the existing legal structure applicable to historic wreck in the UK is, at its core, the continued reliance on the law of salvage to govern recovery of wreck. This differentiates the UK approach to that of Australia and South Africa.

Both Australia and South Africa derived their original legal structure applicable to wreck from the UK, in the form of the *Merchant Shipping Act 1894*. While this legislation no longer applies in Australia or South Africa, a similar structure still applies in both jurisdiction in relation to wreck and salvage generally. In Australia, the *Navigation Act 1912* continues to provide for a legal regime applicable to wrecks, including the appointment of a Receiver of Wreck, to whom all recoveries are reported, and who is responsible for returning the wreck to its owner and rewarding the salvor for his efforts. Unclaimed wreck is vested in the Crown and may be sold and an award made to the salvor. In South Africa the *Merchant Shipping Act 1894* continues to influence the modern system in the form of the South African *Customs and Excise Act* and the *Wreck and Salvage Act 1996*. The former provides for a Controller who performs similar function to that of the Receiver of Wreck. However, what distinguishes the Australian and South African approach from that of the UK, is that while these regimes apply to wreck generally, they have been made inapplicable to historic shipwrecks, and have been replaced with a regime that provides protection for the historical and archaeological values of this limited resource.

The development of these regimes in Australia and South Africa followed very similar patterns. Beginning in the 1960's sport divers began to discover and salvage historic wreck. Not only did these activities lead to the inevitable development of conflicts between rival groups of salvors, but also raised concerns about the destruction of archaeological material and the resulting loss of

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³ While Australia has an extensive coastline, the number of wrecks along this relatively newly discovered land, by European standards, numbers only about 6500. However, the number of underwater cultural heritage sites in Australian waters that do not derive from shipwrecks or European exploration and habitation, but derive from the aboriginal community may be considerable.

⁴ (2002) 41 *International Legal Materials* 37; Doc. 31 C/24, Paris, 3 August 2001.

⁵ A comprehensive consideration of these regimes will be found in S. Dromgoole (ed.) *Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001* (forthcoming 2006).

information caused by salvors in their haste to recover economically valuable artefacts. Following the discoveries of important seventeenth and eighteenth century Dutch vessel off the coast of Western Australia, the commonwealth *Historic Shipwrecks Act* (HSA) was adopted in 1976.⁶ While this regime has been amended a number of times in order to raise the degree of protection provided, its basic structure was to remove historic shipwreck from the wreck and salvage regime and provide for a regulated regime that would protect the historic shipwrecks *in situ* and provide only for archaeological excavation rather than salvage. Thus, no person has a right to enter into possession of an historic wreck, and cannot therefore be recognised as a salvor in possession. No salvage award is obtainable, and the statutory protection regime replaces salvage in its entirety.

While the South African protection regime developed later than that in Australia, it followed a similar pattern. The discovery of the Portuguese wreck, the *Santissimo Sacramento*, sunk in 1647 and the English East Indiaman, the *Dodington* sunk in 1755, and the resulting conflict between salvors eager to strip the sites of their economically valuable artefacts, began a process which would continually strengthen the protection regime afforded to historic shipwrecks, culminating in a new protective legislation, the *National Heritage Resources Act* (NHRA), being adopted in 1999.⁷ The Act was drafted at the same time that UNESCO hosted a number of meetings to draft the Convention. While the drafting of the Act did not take specific account of the developments at UNESCO, the policy objectives pursued evince a strong resemblance to the emerging objectives of the Convention.

The statutory structures

Generally then, both the Australian and South African regimes provide for a level of protection compatible with that required by the Convention, with the exception that in both cases the legislation was designed to protect UCH within water under these states jurisdiction. As I will discuss later, some legislative amendment will be required by both states to address the protection of UCH found beyond these waters.

In terms of the basic protection regime provide for, the legal regime in both states are substantially similar. Both have opted for a system of blanket protection that removes UCH from the salvage regime, and effectively implements a precautionary approach that ensures that all UCH is preserved *in situ* until such time as a determination is made to recover.

As far as the subject matter to be protected in concerned, the South African Act applies to all historic shipwrecks older than 60 years, as well other submerged cultural heritage sites such as settlements and rock art. This is compatible with, and rather more generous, than the requirement of the Convention. The Australian legislation, however, suffers from an important limitation in that it only applies to 'historic wreck', which is defined as the remains of ships at least 75 years old.⁸ Some legislative amendment is thus needed to bring other cultural heritage such as submerged sites into the protection regime. The original version of the Act applied only to sites determined to be significant and specifically nominated as a protected site. Such an approach had been taken as it was believed that to apply blanket protection would involve too great an administrative burden on the State. However, the process of considering each new find for significance and possible protection created considerable administrative difficulties and time-delays, often to the detriment

⁶ See Bill Jeffrey and Viv Moran, 'Going Down?: The foundering of the National Historic Shipwreck Program' (2001) 25 *The Bulletin of the Institute for Maritime Archaeology* 121.

⁷ For an account of the wrecking and discovery of the *Sacramento*, see Geoffrey Allen and David Allen *The Guns of Sacramento* (London, 1978) and of the *Dodington*, see Geoffrey Allen and David Allen *Clive's Lost Treasure* (London, 1978).

⁸ Shipwrecks that sank less than 75 years ago may be protected by specific designation, determined by consideration to guidelines which prescribe criteria for the determination of the significance of the object.

of the site that required protection. The imposition of a blanket protection regime appears to have been more successful in streamlining the associated administrative load.⁹

In both states, the regulation of activities directed at historic shipwrecks is similar to that applicable to protected wrecks in the UK in that the method of control is through licensing. While public access is allowed and encouraged, a permit is needed to do more than view the site. The South African legislation for example, declares that no person may, without a permit issued by the state agency (South African Heritage Resources Agency - SAHRA), destroy, damage, excavate, alter, deface, remove from its original position, collect or own or otherwise disturb any archaeological site. As such, salvage of UCH is effectively replaced with a permit-based system that grants the agency a very wide discretion in relation to any activity relating to UCH.

While permits can be issued to museums, universities and archaeologists, a member of the public may also obtain a permit subject to a number of conditions.¹⁰ For example, project must have a museum partner, which will provide archaeological advice and guidance and which will act as a repository for recovered material. As such, any proposed project would have to be worked through thoroughly with an appropriate museum. The legislation also provides for the possibility for the division of any recovered objects between a permit holder and the museum. However, since, as I will discuss in a moment, ownership of all UCH is vested in the State, private individuals will have no proprietary rights until such time as they are vested in them pursuant to an agreement contained in the permit. Furthermore, under the policy regime pursued by the South African agency, the splitting up of archaeological collections is not ordinarily permitted, so effectively no division of recovered materials will take place. The wide discretion granted to the permit issuing agency allows for the Convention, and particularly the Rules in its annex, to be easily implemented. A similar permit based system applies in Australian, so that it is an offence to interfere with, destroy, damage, dispose of or to remove, an historic shipwreck or associated relic. Public access may also be denied by the establishment of a protected zone around the site.

Both Australia and South Africa require the compulsory reporting of finds of UCH and a failure to report amounts to an offence. As an incentive to report, the Australian legislation provides for the possibility of making a reward to the finder.¹¹ While the South African system does not provide for a reward, it does provide for the possibility of the finder participating in the recovery of such material though, as discussed earlier, it is unlikely that the splitting up of the recovered artefacts will be sanctioned by the state agency.

Perhaps one of the most contentious issues in the management of UCH in South Africa related to the question of ownership. Royal prerogatives in respect of unclaimed or un-owned objects were not received into South African common law and the Roman-Dutch common law principle of *res nullius* was applied. Thus, claims to wreck and their contents were amenable to *occupatio*, the finder or person who physically holds the material being capable of asserting ownership. The Act remedied this position by simply declaring all archaeological resources to be the property of the State. While clearly abandoned shipwrecks become State property, the Act does not specifically

⁹ Graeme Henderson, 'Significance assessment or blanket protection?' (2001) 30(1) *International Journal of Nautical Archaeology*, 3.

¹⁰ Salvage activity off the South African coast is tightly regulated and a permit is required for the search of a wreck or the search for a wreck, and this will include historic wreck. As such, any person engaged in such activity continue to be required to obtain a salvage licence from Customs and Excise

¹¹ The Act provides for the Minister to reward a finder to a maximum of Aus\$50,000 for the reporting of a site that is protected under the Act. While this is clearly to encourage compliance with the Act, in part this was originally designed to compensate a finder for the loss of the ability to salvage the wreck. Such a reward is not 'as of right' and takes into account the heritage value of the finds and not simply its financial value. The reward itself need not, therefore be financial, and the Minister may reward the finder by awarding a plaque or medallion commemorating the find, model or replica of the vessel or relic, or an actual award of an historic relic

deal with the issue of prior ownership being extinguished by this assertion of State ownership. This has not yet, however, been raised as an issue in a dispute.¹²

Unlike the situation in South Africa, the Australian Act does not automatically vest ownership of an historic shipwreck in the Commonwealth, but allows for such vesting if this is necessary for protection. The Act therefore specifically refers to the acquisition of property subject to the just terms clause of the Commonwealth Constitution¹³. The amount of compensation can either be agreed between the owner and the Commonwealth, or determined by a Federal or State court to which an owner can bring an action.

Given that in both Australia and South Africa, a system akin to the *Merchant Shipping Act 1894* had applied in relation to wreck and salvage, UCH recovered prior to the existing legislation is in circulation in the art and antiquities market. Both states thus provide for a system of continued private ownership subject to a system of compulsory registration and reporting that allows for a regulated system for sale and possible export.

In South Africa, for example, is it an offence to trade in, sell for private gain, export or attempt to export any shipwreck material without a permit. As such, the legislation provides, in a similar way to that of Australia, for registration and permits for the trade of existing 'heritage objects', including possible export. This system only applies to material lawfully recovered prior to the enactment of the 1999 Act.

Protection beyond the territorial waters

One of the driving forces behind the development of the UNESCO Convention was the need to provide protection for UCH beyond coastal state's territorial waters.

The Australian Act provides for a protective regime that applies not only in Australian territorial waters and contiguous zone, but extends from the low water mark out to the edge of Australia's continental shelf.¹⁴ This would appear to reserve greater jurisdictional powers in relation to UCH than the Convention might be interpreted as recognising. It is not entirely clear exactly how Australia will reconcile these jurisdictional variations, though given Australia's vote in favour of the adoption of the Convention, it is probable that no conflict necessarily exists if the Convention is simply regarded as the minimum level of protection required by State Parties. This extended Australian competence resolves many of the issues regarding protection of UCH beyond the territorial sea. However, like the South African situation, some legislative amendment will be needed to implement the remaining provisions of the Convention

The South African legislation applies to UCH found within South Africa's territorial seas as well as its contiguous zone. In accordance with articles 33 and 303 of United Nations Convention on the Law of the Sea South Africa declared a maritime cultural zone, co-extensive with the contiguous zone, in respect of which South Africa 'shall have, in respect of objects of an archaeological or historical nature found in the maritime cultural zone, the same rights and powers as it has in respect of its territorial waters'.¹⁵ This will allow South Africa to give effect to Article 8 of the Convention and apply the Rules in the annex in this zone.

However, the South African Act was not drafted with a view to providing any form of protection for UCH found beyond the contiguous zone and which may be brought into South Africa. Nor does it

¹² See further Craig Forrest 'An International Perspective on Sunken State Vessels as Underwater Cultural heritage' (2003) 34 *Ocean Development and International Law* 41.

¹³ S.21, which refers to section 51(xxxi) of the Commonwealth Constitution 1901.

¹⁴ Because of Australia's federal political structure, this Commonwealth legislation applies beyond the 3nm limit, but the States have agreed to apply it to the State territorial waters within 3nm.

¹⁵ Maritime Zones Act No. 15 of 1994 s. 6.

provide for protection of UCH beyond the contiguous zone which may be the subject of attention of South African nationals or vessels flying the South African flag. Legislative amendment in a number of areas will therefore need to be taken before South Africa will be in a position to ratify and give effect to the Convention.

First, some amendment will be necessary with regard to UCH brought into South Africa's territory. The legislation provides that no person may import into South Africa any foreign cultural property that has been illegally exported from a reciprocating state after a cultural property agreement between South Africa and that state comes into force. This section gives only partial effect to Article 14 of the Convention for two reasons. First, Article 14 requires States Parties to take measures to prevent entry into their territory, the dealing in or possession of UCH illicitly exported from *any* State, not only from other States that are party to the Convention. The Act, however, only applies such a provision to reciprocating States. It would be preferable to give wider effect to this protective measure and adopt a broader perspective, as is taken by Australia which does not require the exporting State to be a party to any reciprocal agreement or convention before action will be taken by South Africa.

Secondly, the Act does not take into account UCH that has been recovered contrary to the provisions of the Convention in waters beyond any State's jurisdiction, and therefore not necessarily illegally exported from any State. Thus, material recovered in international waters is only covered if it is brought into South Africa's territory, and then specifically designated as a heritage object by the state agency. If it is not specifically declared a heritage object, it will be governed by the usual laws of salvage irrespective of its archaeological or historical importance.

This shortcoming has an impact in respect of a number of other articles of the Convention, including Article 18, which requires States Parties to ensure that UCH recovered in a manner not in conformity with the Convention is seized. The Act provides only for seizure in relation to cultural heritage that may have been illegally exported from a reciprocating State. As such, further legislative action will be needed to give full effect to Articles 14 and 18. A similar amendment will be needed in Australia to address the entry into the state, the dealing in or possession of UCH recovered in a manner contrary to the Convention.

Some consideration also needs to be given to the question of ownership of UCH brought into South African territory. UCH, particularly historic wreck, is defined in the Act to be 'archaeological' material. However, this provision is limited to material found in South Africa's territorial waters or contiguous zone (maritime cultural zone). As UCH recovered beyond the contiguous zone is not included in the definition of 'archaeological' for the purposes of the Act, it cannot be declared State property. Thus, while owners will retain ownership rights, abandoned property will be subject to *occupatio*, and the finder will be able to assert a proprietary right.¹⁶

Further legislative action will be required by both Australia and South Africa to give effect to Articles 15 and 16 of the Convention so as to ensure that nationals or vessels under that State's flag do not engage in activities directed at UCH in a manner not in conformity with the Convention and to ensure that the State's territory is not used in support of such activities by other nationals or vessels.

Conclusion

In relation to UCH found within South African waters, the legislation provides for a sound framework for its protection and management that is capable of implementing the Convention. More however will need to be done to bring the legislation in line with the requirements in relation

¹⁶ For a similar position in the UK, see *Pierce v. Bemis (The Lusitania)* [1986] *Queen's Bench* 384.

to UCH that lies beyond the jurisdiction of coastal States. Nevertheless, the management of UCH in South Africa is compatible with the policies that underpin the Convention and the Rules in its annex. South Africa voted in favour of the adoption of the ICOMOS Charter in Sofia in 1996, and the Convention in 2001, and it is expected that South Africa will ratify the Convention in due course. This is currently under consideration by the state agency.

Similarly, while the Australian legislation provides for a protection regime largely compatible with the Convention, a number of shortcomings need to be addressed. The most important of which is the narrow focus of the legislation to historic shipwrecks, rather than all UCH.¹⁷ Consideration of amending and updating the Act has emerged in Australia in recent times and the Department of Environment and Heritage has recently proposed a review of the Historic Shipwreck Program which will include consideration of the Convention and its implementation in Australia. Like South Africa, Australia voted in favour of the Convention in 2001.

South Africa and Australia have endeavoured to provide a sound protective regime for this valuable and limited resource. Though neither State has completed the process of becoming party to the Convention, it is hoped that this will not be far off and that these state's ratification will assist in bringing the Convention into force.

¹⁷ For a detailed consideration of a definition of underwater cultural heritage, see Craig Forrest, 'Defining underwater cultural heritage' (2002) 31(1) *International Journal of Nautical Archaeology*, 3.

How the United Kingdom can work towards a position of compliance with the UNESCO Convention 2001

Sarah Dromgoole¹

Introduction

The primary purpose of the UNESCO Convention 2001 is to create a concrete legal framework for the regulation of treasure-hunting activities beyond the generally accepted 12-mile territorial limit. Within their territorial limits States have sovereign and exclusive rights to control the activities of anyone as they see fit. However, beyond those limits their jurisdictional powers in respect of underwater cultural heritage (UCH) are more limited. The basic intention behind the UNESCO Convention is to construct as effective a regulatory regime as possible for all sea areas and to establish a uniform and global standard for activities directed at UCH. As we know, that standard is set out in the Rules in the Annex to the Convention. The building blocks for the UNESCO Convention are the existing principles of international law, and these include two articles specifically relating to UCH in the UN Convention on the Law of the Sea 1982, i.e. Articles 149 and 303.

It is extremely important to the overall success of the UNESCO Convention that it is ratified by the States whose nationals and flag vessels have the technology to access deepwater sites. The United Kingdom is one of those States and therefore we must work particularly hard to persuade the government to ratify the Convention. However, the Convention's regulatory regime will only become fully effective once it has been widely accepted, and this is going to take some time – perhaps a period of fifteen or twenty years. Clearly, treasure salvors will take full advantage of the opportunity this period provides to pursue their activities in the absence of a fully effective legal framework. It is therefore important that the government is not only persuaded to ratify the Convention, but also to take interim measures to plug the gap until the Convention comes into full effect. It needs to be reminded that it is already under a legal duty by virtue of Article 303(1) of the Law of the Sea Convention to protect objects of an archaeological and historical nature found in *all* sea areas, not just within its territorial waters. Simply taking the step of ratifying the UNESCO Convention, by itself, is not enough to fulfil this duty. Protective measures need to be put in place as a matter of urgency.

The purpose of this paper is to identify the jurisdictional means that are currently available to the United Kingdom to enable it to act in this respect. What I aim to show is that there are a variety of legal mechanisms available, which are in conformity with existing international law and, importantly, are also in conformity with the UNESCO Convention. By making full use of these mechanisms now, not only will the United Kingdom be fulfilling its duty under Article 303(1) of the Law of the Sea Convention, but it will also be drawing its domestic legal regime more closely in line with the regime set out in the UNESCO Convention. Among other things, this will facilitate the possibility of our ratifying the Convention, either in the immediate future, or at some point thereafter. It is apparent that States around the world are increasingly turning their attention to extra-territorial waters and to exploring the mechanisms that they can use to protect UCH beyond the 12-mile limit. The very existence of the UNESCO Convention seems to have prompted States to do this, whether or not they are in favour of the Convention. We need to closely monitor, and examine, the development of State practice in this regard. In particular, we should keep an eye on developments in the other so-called 'maritime' States and in States with a common law tradition:

¹ Reader in Law, University of Leicester. Email: skd2@le.ac.uk. An earlier, and more detailed, version of this paper will appear in the publication arising from the Institute of Field Archaeologists' Marine Affairs Group conference, 'Managing the Marine Cultural Heritage', held in Portsmouth in September 2004.

these are the States with which, from a law of the sea and a general legal standpoint, we have most in common.

Jurisdictional rights in the contiguous zone

The contiguous zone is a 12-mile broad strip of sea running adjacent to the 12-mile territorial sea and therefore extending out to 24 miles from the coast. The fact that such a zone is recognised in international law does not mean that it exists *ipso facto*. Instead, a State may claim such a zone if it wishes. If it does so then the Law of the Sea Convention (Article 33) allows it to exercise certain powers in that zone in order to control infringement, within its territory including its territorial sea, of its customs, fiscal, immigration or sanitary laws. However, the Law of the Sea Convention also makes separate, and special, provision in respect of the UCH in this zone. Article 303(2) of the Convention provides a potentially powerful provision for controlling salvage activities in the 12 to 24 mile zone. The provision makes it clear that its purpose is to 'control traffic' in 'objects of an archaeological and historical nature' and that it relates to the 'removal of UCH from the seabed' (emphasis added). These limitations need to be borne in mind – they mean that a State is probably only sanctioned to act to control actual or planned recovery of material, rather than, say, inadvertent damage to a site. However, the action can be taken against *anyone*, including foreign flag vessels and nationals, just as is the case in the exercise of sovereignty in the territorial sea. The exact limits of the action a State can take under this provision have yet to be established because there is fairly limited State practice in this regard. However, the provision was inserted in the Law of the Sea Convention for a purpose: it is there to be used, and States should examine how they can do so. Indeed, I would argue that they are under a positive duty to do so.

The precursor to taking action under this provision is that a State must give notice to the international community by formally declaring a contiguous zone. Quite a number of States have done so for reasons relating to smuggling, immigration, etc. and a number of States have also done so specifically to provide protection for UCH. The United States proclaimed a contiguous zone in 1999. In the formal declaration President Clinton made explicit reference to the need to prevent the removal of cultural heritage. The very fact that the US has proclaimed a contiguous zone and done so with *specific reference* to the UCH sends a powerful signal that it considers the UCH to be of value and is prepared to take positive action to protect it.

Several other maritime States have recently, or are now, taking action in this regard. Norway, for example, proclaimed a contiguous zone in 2004 and is now regulating the removal of UCH in that zone. The Netherlands too is presently considering the extension of its heritage legislation to apply to its already declared contiguous zone.

I believe that we should be pressing the government to follow the United States in formally declaring a contiguous zone with explicit reference to the need to protect the UCH. Formal declaration has to be the first step, and there is no reason why the declaration cannot be made before the precise means for implementing Article 303(2) are fully worked out. The Declaration in itself would make a powerful point. However, careful thought would need to be given to exactly how to amend UK legislation to make the most of the powers the Law of the Sea Convention affords over this zone. Among other things, the question of the territorial remit of the national heritage agencies would arise and resource issues would need to be addressed as well.

It is important to note that the assertion of jurisdiction over the contiguous zone is in accordance with the UNESCO Convention 2001. Article 8 of that Convention provides that States Parties may regulate and authorise activities directed at the UCH in their contiguous zone, in accordance with Article 303(2) of the Law of the Sea Convention. This reaffirmation of the basis for action in Article 303(2) is likely to encourage even more States to exert jurisdiction over the contiguous zone for

the purpose of protecting the UCH. In my view the United Kingdom should be encouraged to be in the vanguard of this movement.

Art. 303(2) of the Law of the Sea Convention undoubtedly provides a potentially very useful basis for action. However, its effectiveness is limited from a geographical point of view: the contiguous zone is after all only a 12-mile strip of sea adjacent to the territorial sea. The question we therefore have to ask next is: what can be done *beyond* the 24-mile limit?

Jurisdictional rights on the continental shelf (and in the EEZ)

Unfortunately, beyond the contiguous zone the legal basis for a coastal State to exert jurisdiction over the activities of foreign vessels and nationals becomes more tenuous. A number of States, including Australia and Ireland, have asserted jurisdiction further afield by extending the legislation they apply in their territorial sea out over the continental shelf, or perhaps over a zone coinciding with the 200-mile Exclusive Economic Zone (EEZ). There is no suggestion in their legislation that it is applicable only to their own nationals and flag vessels. Therefore there is at least an implicit suggestion that they are seeking to regulate the activities of *anyone* in this zone. In so far as it attempts to regulate the activities of foreign flag vessels and nationals, this legislation is highly controversial. The maritime States would argue that it has no basis in international law and is an example of 'creeping jurisdiction' (or as some have referred to it, '*horror jurisdictionis*').

However, there is another course of action that States may take on their continental shelf or in their EEZ (a zone the UK has not declared) that the maritime States would regard as having greater legitimacy. In these zones States have certain sovereign rights and jurisdiction, which they are entitled to protect. *In the course of doing so*, they may be able to provide some level of protection to the UCH. We might refer to this as the 'piggy-back' approach. Indeed, the arch maritime State, the United States, provides what may be the best example of this form of action with its National Marine Sanctuaries Act (see further, Ole Varmer's paper). A State has sovereign rights over the *natural resources* on its continental shelf and within its EEZ, and it has a right to protect these resources. Although shipwrecks are *not* a natural resource, marine life often congregates in and around wrecks. In many cases, therefore, it can be argued that interference with a wreck will necessarily also interfere with living natural resources, and hence a State has the right to stop the interference. This right can be exercised against *anyone*, including foreign flag vessels and nationals. (See also Ole's comments regarding the coastal State's exclusive right to regulate drilling on the continental shelf for *all purposes*.)

Again, the 'piggy-back' approach accords with the UNESCO Convention 2001. In fact, arguably the most powerful provision in the Convention is Article 10(2), which provides that States Parties have the right to prohibit or authorise any activity directed at the UCH in their EEZ or on their continental shelf, provided that their sovereign rights or jurisdiction under international law are threatened. Among other things, this provision confirms that there is a legitimate link between interference with natural resources and interference with the UCH, and reinforces rights that already exist by virtue of the Law of the Sea Convention. However, the very fact that the UNESCO Convention makes use of this basis for action adds force to its legitimacy and means that more States may be inclined to make use of it. Indeed, in the UK it seems that a suitable legislative vehicle on which the UCH can 'piggy-back' may be waiting in the wings: the proposed Marine Bill. The preparations for this Bill are at a fairly early stage and it is not clear if there will be an opportunity to provide UCH with any particular protection against treasure hunting, i.e. activities 'directed at the UCH', as opposed to activities 'incidentally affecting' the UCH. However, we should certainly be trying to make the most of *any* opportunities that this Bill provides.

Domestic legislation utilising the nationality and territorial principles of jurisdiction

The jurisdictional mechanisms outlined above arise from rights afforded to coastal States by the Law of the Sea Convention. However, there are two other general principles of international law that States can also make use of in order to provide the UCH beyond the 12-mile limit with protection. These principles may be of particular value in providing some means for controlling activities on the deep seabed, that is the area *beyond* the edge of the continental margin or EEZ, which other forms of jurisdiction cannot reach. These are the 'nationality' and 'territorial' principles of jurisdiction. The United Kingdom is in fact already making some use of these principles to protect the UCH and it has actually been quite pioneering in this respect. However, further use could no doubt be made of them.

The Protection of Military Remains Act 1986 is an example of legislation that utilises the *nationality* principle of jurisdiction. The principle allows a State to restrict the activities of its own flag vessels and nationals in whatever waters they happen to be, and the 1986 Act restricts their activities in respect of designated sunken military vessels in international waters. This means that the State can legitimately extend its regulatory arm right out to waters across the world, even as far as the sites of the *Prince of Wales* and the *Repulse* off Malaysia, but it can do so only in respect of its own nationals and flag vessels. (Obviously, the effectiveness of such legislation is limited, partly because it cannot be enforced against foreign flag vessels and nationals, and partly because it is difficult to police sites far from UK waters.)

Under the *territorial* principle of jurisdiction, a State has a right to exercise jurisdiction over anyone that comes within its territory, including its territorial waters. With the exercise of a little imagination, a State can make good use of this principle to control interference with wreck sites in international waters. For example, it could hamper the activities of foreign vessels operating *outside* its territorial waters by imposing certain restrictions on the use of its ports, or by making their use dependent upon consent. Here in the United Kingdom we already have an interesting example of legislation utilising this principle and this is the Dealing in Cultural Objects (Offences) Act 2003. This statute creates an offence of 'dealing in tainted cultural objects' and the scope of this offence is remarkably broad. For example, if someone – *anyone* – who is in the UK, acquires, disposes of, imports or exports an item from one of the sunken British warships designated under the Protection of Military Remains Act, they may well be guilty of the offence. (When the Titanic Agreement comes into effect, the same may well apply to objects from that site as well.)

The regulatory regime under the UNESCO Convention relies heavily on the exercise by individual States Parties of the nationality and territorial principles of jurisdiction. In fact, States Parties to the Convention will be under a *specific duty* to exercise these principles. By introducing legislation such as the 1986 Act and the 2003 Act the United Kingdom is already going some way down the road to fulfilling these duties. However, more could be done.

Inter-State agreements

One way that the nationality and territorial principles can be utilised particularly effectively is if States *co-ordinate* their use of them. One of the cornerstones of the UNESCO Convention 2001 is that States must *co-operate* to protect the UCH, and the United Kingdom is already under a duty to do this by virtue of the Law of the Sea Convention. Art. 303(1) of the Law of the Sea Convention provides that States Parties are not only under a duty to protect objects of an archaeological and historical nature found at sea, but must also co-operate for that purpose.

The most obvious way that States can co-operate is by negotiating an 'inter-State' agreement. Under such an agreement they can make arrangements for the protection of a particular wreck site, a number of specific sites, or indeed UCH more generally. Over the last fifteen or twenty

years a number of these agreements have been negotiated around the world and the UK has in fact been particularly active in this respect. In the past these agreements have been most commonly used to resolve a potential jurisdictional dispute where a State vessel belonging to one State has been found in the territorial waters of another. However, there are also one or two examples of multilateral agreements between perhaps four or five States to protect a wreck that lies *beyond the jurisdiction* of any of the States. The agreement of 1995 in respect of the passenger ferry *Estonia* is one example and the *Titanic* agreement is another. These agreements rely on each of the participating States making full use of the nationality and territorial principles of jurisdiction. The co-ordination of the use of these principles by all the States in the vicinity of a wreck site, possibly joined by States whose nationals have the technology to access the site, will clearly have much greater effectiveness than if one State attempts to take such action by itself.

The development of inter-state agreements is a course of action that is entirely in line with the UNESCO Convention. Article 6 of the Convention *encourages* States Parties to enter inter-State agreements, recognising that in certain circumstances such agreements can provide greater protection for particular sites, or regions, than the Convention's regime itself.

A problem with many of the inter-State agreements to date is that they were negotiated to control activities on a particular site *after* that site had been located and some interference had taken place. Instead of affording protection *in situ*, they have been used to regulate recovery activities. However, inter-State agreements are flexible creatures and could be put to good use in a broader range of circumstances than has hitherto been the case. Regional agreements are one possibility, although as the UK is not situated in proximity to an enclosed or semi-enclosed sea, they are perhaps of limited relevance to us. However, another possibility might be to negotiate an agreement with one or more other States relating to a number of associated wreck sites, whether or not all the sites have yet been discovered. The sites relating to a particular battle - the Battle of Jutland, for example, or perhaps even the Battle of Trafalgar - come to mind. Another possibility might be some kind of reciprocal agreement between States to provide protection for each other's sunken warships and other State vessels. (One point we should just note is that to implement an agreement relating to *military* wrecks lying outside UK territorial waters, we may need to first amend s. 24 of the Merchant Shipping and Maritime Security Act 1997, which is the enabling provision for the *Estonia* and *Titanic* Agreements, and which currently applies only to non-military shipwrecks. However, this is not an insurmountable obstacle).

Conclusion

The aim of this paper has been to show that the UK already has a number of options available to it for taking action to protect UCH beyond its territorial limits. By fully investigating these options and making good use of them, it will be going some way to fulfilling its duty under the Law of the Sea Convention to protect the UCH in all sea areas and to co-operate for this purpose. However, at the same time it will also be bringing its regime more closely into line with the UNESCO Convention 2001, thereby facilitating the possibility of ratifying the Convention in the future. The UK government has made it clear that it supports the general principles and objectives of the Convention, including the Rules in the annex. In exercising the options already open to it, at all times it should therefore *apply* these principles and Rules: *in situ* protection should be viewed as the first option, any recovery that is permitted should be undertaken in accordance with the Rules in the Convention, and there should be no commercial exploitation of the UCH. A final point is that these principles should be applied *explicitly* in any relevant legislation or agreements, in order to provide transparency and, ultimately, accountability.

The Burlington House Declaration

Adopted at a seminar hosted by the Society of Antiquaries of London, Burlington House, London, on 28 October 2005

In the year that marks the bicentenary of Trafalgar, one of the most significant sea battles in history, the marine historic environment community of the United Kingdom:

Conscious of the great diversity and richness of underwater cultural heritage within UK Waters and of Britain's maritime heritage around the world,

Deeply concerned by the lack of a comprehensive international regulatory framework for the marine historic environment situated beyond the territorial limits of sovereign States,

Recognising that Her Majesty's Government may only act in accordance with international law,

Mindful of the duty, to protect archaeological and historical material found in all sea areas and to co-operate for that purpose, placed upon the United Kingdom and other States Parties to the United Nations Convention on the Law of the Sea (UNCLOS) 1982 by Articles 149 and 303(1) of that Convention,

Welcoming the support of Her Majesty's Government for the general principles and objectives of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (hereafter the '2001 Convention'), particularly those set out in the Annex, and *noting* that the Rules in the Annex represent internationally accepted standards of archaeological good practice,

Convinced that the 2001 Convention represents

- the first multilateral treaty specific to the protection of underwater cultural heritage, in the spirit of Article 303, Par.4 of the UNCLOS Convention, and
- the only realistic opportunity for a comprehensive international regulatory framework for the marine historic environment,

Calls upon Her Majesty's Government to:

1. Re-evaluate its position regarding the 2001 Convention with a view to considering how its specific reservations to that convention may be overcome; in particular, consideration should be given to:

(a) Articles 2, Paragraphs 8 and 11, and Article 7 Par.3, of the 2001 Convention with regard to sovereign immunity

(b) Rule 5 of the Annex to the Convention with regard to respect for human remains

(c) The fact the United Kingdom is already a State Party to international conventions for the protection of cultural property that, as the 2001 Convention, do not use a significance test for such heritage.

2. In the interim, pursue the general principles and objectives of the 2001 Convention to the maximum extent possible within the confines of existing international law. To this end, Her Majesty's Government is specifically urged to:

(a) Ensure that the Rules in the Annex to the 2001 Convention are applied to activities directed at the marine historic environment which are licensed by Government Departments or regulated by Statute.

(b) Co-operate with the Director-General of UNESCO, States Parties to the 2001 Convention, and the International Seabed Authority, in their implementation of the Convention when it enters into force.

(c) Continue especially within the framework of the 2001 Convention its policy of concluding bilateral or multilateral agreements for the protection of specific aspects of the marine historic environment situated outside the territorial limits of the United Kingdom and give active consideration to how it might co-operate with other States to utilise fully such agreements in the interests of the marine historic environment.

(d) Explore the desirability of declaring a contiguous zone, referred to in Article 33 of the United Nations Convention on the Law of the Sea 1982, in order that measures to regulate the removal of archaeological and historical objects from the seabed in that zone may be introduced, in accordance with Article 303(2) of that Convention. In so far as such measures are introduced, Her Majesty's Government is urged to ensure that activities are regulated in accordance with the Rules in the Annex to the 2001 Convention.

(e) Ensure that the proposed Marine Bill takes into account and mitigates to the full extent as necessary the impact of marine activities on the marine historic environment.

Her Majesty's Government is urged to enter into discussions at the earliest opportunity with its heritage agencies, relevant non-governmental organisations and other interested parties with a view to taking these matters forward.

Burlington House, London, the 28th of October 2005

Notes:

1. The importance of the 2001 Convention relates to the protection that may be afforded to numerous locations beyond the UK Territorial Seas where underwater cultural heritage may be considered at risk from destructive salvage operations that do not follow clearly defined archaeological objectives.
2. It should be noted that the specific courses of action outlined in point 2(c), (d) and (e) of the Declaration are in conformity with the 2001 Convention (specifically, Articles 6, 8 and 10(2)). By taking such action now, not only would the United Kingdom be improving the legal protection it affords to the marine historic environment, but also it would be drawing its legal regime more closely in line with that set out in the 2001 Convention, facilitating the possibility of ratification in the future.
3. The relevance of the 2001 Convention should not be understated for Overseas Territories and the protection that would be afforded to the underwater cultural heritage. We encourage Her Majesty's Government to seek the views of the Overseas Territories to ensure that they have the opportunity to request inclusion under the protection provided by the UK as signatory to the 2001 Convention.
4. Her Majesty's Government is reminded that to ensure implementation of the 2001 Convention beyond the limit of the United Kingdom's Territorial Seas competent advice on underwater cultural heritage from appropriate bodies will be required.

5. Statutes regulating activities directed at the marine historic environment include the Protection of Wrecks Act 1973, Ancient Monuments and Archaeological Areas Act 1979, Protection of Military Remains Act 1986, and the Merchant Shipping Act 1995.

6. Her Majesty's Government is encouraged to declare to the Director-General of UNESCO its interests in being consulted in respect of 'underwater cultural heritage' (as defined by the 2001 Convention) that has a verifiable link to the United Kingdom. Her Majesty's Government is also encouraged to collaborate and share information with States Parties, and to seek to attend - as an observer - the anticipated Meetings of States Parties and meetings of the Scientific and Technical Advisory Body.

7. This Declaration is supported by the members of Joint Nautical Archaeology Policy Committee.