

Key facts about the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

British Academy/Honor Frost Foundation Steering Committee on
Underwater Cultural Heritage

November 2014

What is the 2001 Convention?

The 2001 Convention is an agreement between different countries about what those countries should do about underwater cultural heritage. The agreement was negotiated under the umbrella of the UN, namely the UN Educational, Scientific and Cultural Organisation (UNESCO).

The agreement set out in the Convention only applies to the countries that have agreed to be bound by it. These countries are known as 'States Parties' of which there are now forty eight¹. Other countries can join the Convention by agreeing to it too, through a process known as ratification.

The Convention only applies to States Parties, not to the individuals that belong to each State. It is not like some elements of European law that have 'direct effect' on citizens. As far as individuals are concerned, what matters is how each country decides to apply the measures that the country has agreed to. That is to say, what matters to people from the UK is how the UK Government might implement the Convention, if it was to choose to ratify.

¹ <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha> – accessed November 2014.

What is underwater cultural heritage?

Underwater cultural heritage (UCH) is the jargon used in the Convention to refer to wrecks, sites, and artefacts etc. that are submerged. To count as UCH, wrecks etc. must have been partially or totally underwater for 100 years. In common with a number of other international conventions, UCH is defined in the 2001 Convention as 'all traces of human existence' that have 'a cultural, historical or archaeological character'. That is to say, not everything that is a trace of human existence is necessarily UCH; only those traces whose character is cultural, historical or archaeological.

A broadly similar definition is already used in the UK. The UK Marine Policy Statement² describes the 'historic environment' as including 'all surviving physical remains of past human activity, whether visible, buried or submerged'. The term 'heritage asset' is used for elements of the historic environment such as buildings, monuments, sites or landscapes that are of archaeological, architectural, artistic or historic interest to this and future generations.

What does the Convention do?

In broad terms, the Convention does four things:

- The Convention clarifies existing international law relating to underwater cultural heritage. It is already established in the UN Law of the Sea Convention (which the UK joined in 1997) that countries have a duty to protect objects of an archaeological nature found at sea. Quite how this should be done, especially in the different maritime zones that make up the world's seas and oceans, was not very clear. Each State's rights and responsibilities in the different maritime zones are finely balanced, so the 2001 Convention is partly an agreement about what each State can do in each zone.
- The Convention sets out a standard for archaeological investigations, known as 'the Rules'. States are required to ensure that archaeological investigations under their control are in accordance with this standard. The standard itself is mainly concerned

² <https://www.gov.uk/government/publications/uk-marine-policy-statement>

with making sure that investigations are well thought-through in advance and don't involve unethical activity.

- The Convention sets out what States should provide for underwater cultural heritage, such as a 'competent authority', or in other words an underwater heritage service that can maintain an inventory of sites and provide protection, research and education, for example.
- The Convention sets out what other things States can or should do with respect to UCH, such as co-operating and sharing information.

How do the Rules work?

At the core of the Convention is a requirement that work conducted on underwater cultural heritage is carried out in accordance with the Rules. The Rules are annexed to the Convention.

The Rules require simply that proposed activities are detailed in a Project Design that is open to scrutiny. The Rules do not say what the outcomes of the work should be, but the Project Design has to show how the work will be funded, how the work will be undertaken, how the site and any recovered material will be looked after, how information about the work will be made available publicly, and so on.

The Rules make it clear that archaeological material is not to be traded or exploited commercially, that work should seek to cause as little disturbance as necessary, that human remains are not to be disturbed unnecessarily, and public access is to be promoted where possible.

The Rules only apply to activities intended to disturb underwater cultural heritage, such as excavation or recovery of artefacts. Activities that will not cause disturbance – such as divers making look-but-don't-touch visits to historic wrecks – are not subject to the Rules. In fact, the 2001 Convention requires countries to encourage non-intrusive public access, which is something the UK already does.

The Rules do not apply to activities that are not intended to affect underwater cultural heritage but may do so incidentally, such as dredging, fishing and construction. However,

countries are required to take steps to avoid or mitigate adverse effects from these kinds of activity. The UK's provision for these kinds of activities is already good.

Are the Rules very different from what works on land in the UK?

No. The Rules are based closely on codes and standards that apply to archaeology on land. Specifically, the Rules are based on the Sofia Charter (the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996), which was itself based on the codes, standards and guidance of the UK's Institute for Archaeologists.

Why hasn't the UK ratified already?

The text of the Convention was agreed in 2001. Towards the end of the negotiations the UK Government said that it supported most of the articles. However, the UK felt that its remaining concerns had not been resolved, so it could not vote in favour of the agreement. A small number of other countries also had reservations so the UK did not think the Convention would gain enough support to become a global convention.

Since 2001, a number of things have changed and the Convention has become a central feature of international law relating to UCH. There has been a great deal of debate internationally about the concerns raised by the UK and others, and increasingly the conclusion is being reached that the benefits of ratification outweigh any imperfections the Convention may have.

A recent study in the UK – the Impact Review³ – has looked in detail at the concerns raised by the UK Government in 2001 and at the impact that each article of the Convention might have if the UK were to ratify. Changes in our own legislation since 2001 and a clearer sense of how the UK can interpret the Convention have led the Impact Review to conclude that ratification should no longer be ruled out.

Would ratification be a radical change for the UK?

³ http://www.unesco.org.uk/uploads/UNESCO%20Impact%20Review_2014-02-10.pdf

No. The UK already does most of the things that the Convention sets out. But the Convention has the advantage of tidying up some aspects of international law that will make it easier for the UK to look after wrecks in which it has an interest around the world.

Does the Convention discourage excavation?

No. Much of the Convention is focussed on 'activities directed at UCH', which is the Convention's term for excavation, recovery and other forms of investigations that involve disturbing UCH. The Convention provides a clear framework that will make it easier for a successful excavation (or any other intrusive investigation) to be achieved.

Excavation and other forms of disturbance have all sorts of practical and financial consequences, and once a site or feature is excavated it cannot be replaced. Because of this, the Convention requires people to think first about whether their objectives can be achieved without excavation. This is absolutely standard in archaeological practice on land and at sea. For the same reasons the Convention requires people to 'tread lightly' and keep their disturbance to a minimum. The Convention helps excavations to be clear about their purposes and planning; it only discourages thoughtless, pointless or unprepared excavations.

How many wrecks does the Convention apply to in UK Territorial Waters?

The Convention does not apply to individual wrecks, it only applies to 'activities directed at UCH'. The Convention only applies to an individual wreck if someone is proposing to carry out an archaeological excavation or some other intrusive works. There are only a small number of archaeological excavations directed at UCH in the UK each year, so the convention would only apply to a small number of wrecks. These excavations already require a licence under the UK's own domestic laws, so the Convention will not change the existing situation in UK Territorial Waters.

How many wrecks are there that are over 100 years old in UK Territorial Waters?

The main archaeological records of wrecks are kept by organisations in each of the home countries: England, Scotland, Wales and Northern Ireland. When the numbers for each country were reviewed in 2010, it showed that there were only about 1,000 wrecks known to be over 100 years old in UK Territorial Waters. However, there will be about 2,800 by 2018

because the 100 year anniversary of the First World War – in which so many ships were lost around the UK – means that many previously known wrecks are now falling within this definition. There are about 1,400 known wrecks dating to the inter-war period and the Second World War, giving a total of about 4,200 wrecks of known date in UK Territorial Waters.

There are around 3,700 further known wrecks that have not been dated. These undated wrecks are likely to be similar in proportion to the dated wrecks: i.e. two-thirds (perhaps 2,500) dating to the First World War or earlier. That is to say, a ‘best guess’ for the total number in UK Territorial Waters that will be over 100 years old by 2018 is about 5,300 known wrecks.

In 2002, English Heritage referred to there being 40,000 records in the maritime section of the National Monuments Record (NMR – now known as the National Record of the Historic Environment). This number is so large because it includes records of ships that are documented as having been lost but for which no wreck has been found. It also includes thousands of ‘net snags’ recorded on fishing charts for which no other information about their true character is available. These documented losses and net snags help to indicate the potential for further wrecks to be found, but they are not actually wrecks themselves.

As noted above, how the UK might implement the 2001 Convention is not affected by the number of wrecks. It is only the number of intrusive investigations that are proposed that will affect implementation.

Does the 2001 Convention require more wrecks to be designated under the Protection of Wrecks Act 1973?

No. The 2001 Convention does not require the UK to designate more wrecks under the Protection of Wrecks Act 1973 or under any other legislation. All the 2001 Convention requires in the Territorial Sea is that the Rules be applied to activities directed at UCH, i.e. to investigations that will excavate, recover or otherwise disturb UCH.

A series of marine acts has been introduced across the UK in recent years that make it necessary to apply for a ‘marine licence’ for activities that include excavation, removal and disturbance of the seabed. This legislation was introduced to protect the marine

environment as part of a wholesale modernisation of previous laws. It applies to activities directed at UCH too, not because they involve UCH but because they affect the marine environment.

It is already Government policy that marine licences for archaeological projects have to accord with the Rules set out in the 2001 Convention. This means that the UK already meets the requirements of the 2001 Convention as far as protecting UCH in the Territorial Sea is concerned. There is no need to designate any wreck sites because of the 2001 Convention.

Does the Convention prevent amateur marine archaeologists from helping to monitor and protect wrecks?

No. The 2001 Convention applies only to 'activities directed at UCH', that is to say activities that cause damage or disturbance such as excavation, removal or other intrusive works. All sorts of other activities involved in monitoring and protecting wrecks are unaffected.

Where disturbance or damage is planned, then the Rules apply. Rule 23 says that all members of the project team need to have qualifications and competence appropriate to their role, and Rule 22 says that the project has to be under the direction and control of a qualified and competent underwater archaeologist. That is to say, the person in charge has to be qualified and competent to be in charge, and the rest of the team need to have qualifications and competence to suit their roles.

The Rules are hardly different from the requirement set out back in 1973 that only those people who are 'competent and suitably equipped' can have a licence to conduct archaeological activities on a designated historic wreck site. The UK already makes sure that people have qualifications and competence appropriate to the archaeological works they are planning to do; the 2001 Convention does not change this.

The UK has an excellent tradition of involving a wide range of people in archaeology, both on land and at sea, ranging from complete beginners to highly experienced individuals. There are many opportunities to gain experience and to participate in training: the Nautical Archaeology Society (NAS), for example, has developed an internationally-recognised training scheme especially for UCH.

The 2001 Convention does not say who is and is not qualified or competent. There are no lists of 'acceptable' qualifications or essential skills in the Convention or the Rules. The Convention does not say that only 'archaeologists' can take part in investigations. In fact, UNESCO's Manual for Activities Directed at Underwater Cultural Heritage says that national authorities must encourage participation and involvement by the wider diving community in investigating and managing underwater heritage.

Will the Convention increase the cost of protecting wrecks?

No. As already noted above, the 2001 Convention does not change the way in which the UK already protects historic wrecks in Territorial Waters. The 2001 Convention will not increase the number of wrecks that are designated. The 2001 Convention does not prevent existing licensees from staying involved in monitoring designated wrecks.

Will ratifying the 2001 Convention be expensive?

No. The UK has made changes to its own laws since 2001 that mean it already meets most of the requirements of the Convention. The aspects of the Convention that might be regarded as new costs – such as notifying other countries of discoveries and activities in UK waters, and of UK interests in wrecks elsewhere – are things that the UK already does. Aligning its processes more closely with the 2001 Convention may in fact generate some savings.

The UK would have to make some changes to the mechanisms through which people report discoveries and activities so that they cover a wider variety of circumstances across different zones. The UK already has some very effective ways of handling reports, such as the Receiver of Wreck system, the Portable Antiquities Scheme on land, and a variety of protocols for offshore industries. These systems provide a basis for the relatively minor changes that are required.

The only area in which the Convention might require the UK to commit additional resources is in contingency arrangements for dealing with UCH that has been seized because it has been recovered contrary to the Convention. Some other parts of the Convention will require the UK to rearrange how it already administers UCH, but these costs are unlikely to be high and might even represent a saving over existing ad hoc arrangements.

Would the 2001 Convention prevent the UK from rewarding people who report what they find?

No. The Convention does not say anything about rewards for people who find things and report them to archaeologists. It does not say that there cannot be financial rewards. The Convention does not even place an absolute bar on the application of salvage law if activity is authorised, in conformity with the Convention, and ensures that recovery achieves protection.

Currently, the UK uses the Merchant Shipping Act 1995 to return wreck material to its original owner and to reward the finder. The finder is rewarded with a 'salvage award'.

The UK anticipated that it may wish to stop applying salvage law to UCH when it ratified the International Convention on Salvage in 1989, as it reserved the right not to apply salvage law to 'maritime cultural property of prehistoric, archaeological or historic interest'

If the UK were to decide not to apply salvage law to UCH, then the salvage award could be replaced with another form of reward, such as the rewards that are provided to people who report 'treasure' on land under the Treasure Act 1996.

Would ratifying the 2001 Convention cause historic wrecks to be neglected?

No. The Convention is largely concerned with ensuring that intrusive investigations are conducted properly. It does not prevent properly planned work from being carried out.

Some wreck sites are deteriorating due to natural processes, such as periodic movement in the sediments that cover them. The 2001 Convention does not stop such sites from being investigated, but nor does it provide any funds for such investigation to take place. The 2001 Convention does not set the priorities that countries should pursue in making decisions about which sites to investigate; it is left to each country to make its own decisions.

Does the Convention prohibit commercial activity being directed towards UCH?

No. The Convention only prohibits commercial exploitation of UCH for trade, speculation or its irretrievable dispersal. The Rules say that UCH shall not be traded, sold, bought or bartered as commercial goods. However, there are all sorts of commercial activities that do

not depend on UCH being sold that are perfectly acceptable. For example, the Convention encourages public access where it does not cause damage, and there would be no bar on running wreck tours on a commercial basis.

The Rules also make it clear that archaeological and other related services are not restricted by the prohibition on commercial exploitation, so long as they are authorised and otherwise consistent with the convention. In the UK, archaeological services on land and at sea are often provided by commercial companies. The same is true for people who provide diving vessels, geophysical surveys or other specialist services that archaeologists rely on. So long as these companies deliver the required standard of work and do not depend on selling or trading the material they investigate or recover, then there is no restriction on making money from marine archaeology.

What will ratification do?

As noted above, the Convention does not change very much as far as UK protection of UCH in its own Territorial Sea is concerned. However, ratification will provide the UK with a stronger position in international law to protect wrecks outside the UK Territorial Sea in which the UK has an interest.

Why does it matter?

There are probably more wrecks with links to the UK around the world than of any other single country. Only a fraction of these are in the UK's Territorial Sea. The 2001 Convention provides a variety of mechanisms through which the UK's interests can be respected. If it stays outside the Convention, the UK can only try to argue its interests case by case with no guarantee that they will be recognised.

How does the 2001 Convention protect the UK's interests in wrecks?

The 2001 Convention clarifies how the duty to protect objects of an archaeological and historical nature is to take effect beyond a country's Territorial Sea. There are four main zones to think about:

- The UK Continental Shelf and Exclusive Economic Zone - from the outer edge of the UK Territorial Sea (usually 12 nautical miles from the coast) to the limit of UK rights over the

seabed and its natural resources. Generally, the limit of Continental Shelf is 200 nautical miles offshore unless there are agreed boundaries with neighbouring states, but in places – off North West Scotland for example – it extends much further offshore. The UK has recently established an Exclusive Economic Zone (EEZ) that has largely the same extents as the UK Continental Shelf out to 200 nautical miles.

- The International Seabed Area – the deep seabed beyond the Continental Shelf of any country.
- The Continental Shelves and EEZs of other countries.
- The Territorial Sea of other countries.

There are also different types of wreck to think about:

- All wrecks that have been underwater for at least 100 years on the UK Continental Shelf and EEZ, irrespective of origin.
- Wrecks of historic UK warships (and other state-owned vessels) wherever they lie.
- Other wrecks with which the UK has cultural, historical or archaeological links around the world.

The articles of the Convention set out detailed mechanisms that cover these different types of wrecks in each of the different zones.

How does the 2001 Convention protect historic UK warships?

In the case of historic UK warships on the Continental Shelf of another country or on the International Seabed, the 2001 Convention makes it clear that in most circumstances any intrusive activities would require the agreement or consent of the UK. Even in the Territorial Sea of another country, implementing the Convention means that the UK could expect to be informed by the coastal state of any discovery of the wreck of a UK warship, with a view to cooperating on best methods of protection.

The provisions on historic warships in the 2001 Convention are based on the status of the wreck at the time of sinking, irrespective of the passage of time or any subsequent changes. At the moment, the UK relies on the concept of 'sovereign immunity', which ceases to apply if a warship wreck was sold at some point in the past. Also, some countries don't accept the UK's view that sovereign immunity applies to historic wrecks long after they sank. By avoiding these ambiguities, the 2001 Convention offers a major improvement in protecting the historic wrecks of UK warships around the world.

How does the 2001 Convention protect other wrecks with which the UK has links around the world?

For hundreds of years, the UK has been a major maritime power. As well as having a very large navy - ranging from major warships to many much smaller craft - the UK had immense fleets of merchant and fishing vessels. Even more ships were built in the UK but served under other flags. Many of the world's seafarers and passengers came from the UK, and much of the world's trade went through UK ports. As a result, wrecks with connections to the UK are located all around the world.

The 2001 Convention makes provision for countries with 'verifiable links' to wrecks to declare these interests. Verifiable links can be cultural, historical or archaeological, encompassing the tremendous variety of connections between the UK and wrecks globally that are outlined above. If the UK ratifies the 2001 Convention and declares a verifiable link, then other State parties would be obliged to consult the UK on how best to protect the UCH if the wreck is found on the Continental Shelf of another country, or on the International Seabed.

Does the 2001 Convention apply only to wrecks?

No. The Convention uses a very broad definition of 'underwater cultural heritage' that also includes submerged prehistoric sites and archaeological material that has been lost from eroding shorelines, for example. Hence, the Convention affords useful protection to more than just shipwrecks.

What happens if the UK does not ratify?

If the UK does not ratify it will have to rely on existing international law. This is not very effective in protecting UK interests in wrecks beyond its own Territorial Sea.

When it ratified the UN Law of the Sea Convention in 1997, the UK accepted a general duty to protect objects of an archaeological and historical nature found at sea. However, the Law of the Sea Convention did not say how this duty was to be given effect. This has not been a problem for the relatively narrow band of sea immediately around our coast – the Territorial Sea – but now the technological capability to explore and exploit zones that are further offshore is much more widespread. For archaeological sites outside the Territorial Sea, states have had to rely on a mixed bag of law to deal with underwater archaeology. Countries disagree about what this mixed bag of law means, and in any case it does not cover all the circumstances in which UK wrecks are found around the world.

The 2001 Convention introduced a set of legal provisions that covers each of the maritime zones. The provisions are not perfect because the Law of the Sea is a sensitive topic and there were tough negotiations. Even so, enough countries have already ratified the 2001 Convention to make it work, and many more are driving towards ratification. This means that the 2001 Convention is becoming increasingly established as the principal framework of international law for underwater archaeology. The UK will have to learn to live with this new framework even if it does not ratify.

Countries that have ratified the 2001 Convention are able to participate in meetings that are deciding how the Convention should be applied in practice. Despite playing a leading role globally in the development of underwater archaeology, the UK cannot participate in these meetings. If it does not ratify, the UK will not be able to influence the detail of how underwater archaeology is conducted internationally: its interests will be disregarded, and global opportunities will be lost.
