

**The UNESCO Convention on the  
Protection of the Underwater Cultural Heritage 2001**

**An Impact Review for the United Kingdom**

**Final Report**

**February 2014**



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The views expressed in this report are not a statement of English Heritage policy in respect of the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*.

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## Abbreviations

AMAA 1979	Ancient Monuments and Archaeological Areas Act 1979
CAVV	Advisory Committee on Issues of Public Law (The Netherlands)
CoE	Council of Europe
CS	Continental Shelf
CZ	Contiguous Zone
DCOOA 2003	Dealing with Cultural Objects (Offences) Act 2003
DOALOS	United Nations Division for Ocean Affairs and Law of the Sea
EEZ	Exclusive Economic Zone
ICOMOS	International Council on Monuments and Sites
ICUCH	International Committee on the Underwater Cultural Heritage
ILA	International Law Association
JNAPC	Joint Nautical Archaeology Policy Committee
LOSC	United Nations Convention on the Law of the Sea
MCAA 2009	Marine and Coastal Access Act 2009
MHF	Maritime Heritage Foundation
MMO	Marine Management Organisation
MPS	Marine Policy Statement
MSA 1995	Merchant Shipping Act 1995
NGO	Non-governmental organisation
nm	nautical miles
NMR	National Monuments Record (now the National Record of the Historic Environment (NRHE))
OME	Odyssey Marine Exploration
PWA 1973	Protection of Wrecks Act 1973
STAB	Scientific and Technical Advisory Body
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UKHO	United Kingdom Hydrographic Office



## Executive Summary

In 2001, at the time of the vote on the UNESCO Convention on the Protection of the Underwater Cultural Heritage, the UK Government reaffirmed the great importance that it attaches to the preservation of underwater cultural heritage: 'There are many historic wrecks lying on the seabed in the waters off our shores and there are wrecks of British origin all over the world'. In consequence, the UK Government stated its commitment to a global convention for the protection of underwater cultural heritage.

Unfortunately, the UNESCO Convention did not resolve a number of concerns raised by the UK, and the UK was unable to vote in its support.

Time has since passed. The threats to underwater cultural heritage that motivated the Convention have intensified as technology has advanced, and the UK has become directly embroiled in some of the complex cases that have resulted. The Convention itself - to some surprise - has not only entered into force but has been ratified by an increasing number of states who shared concerns similar to the UK in 2001. Irrespective of whether the UK becomes party, there is now a global convention on the protection of underwater cultural heritage that has widespread support and is a feature of the framework of international law with which the UK must deal.

Against this background, UK UNESCO 2001 Convention Review Group has carried out a detailed examination of the 2001 Convention. In particular, it has revisited the concerns raised by the UK in 2001 in the light of subsequent discussion, the development of state practice internationally, and changes in the UK's own legal and policy frameworks. The Review Group has also considered what the legal, administrative and policy implications might be if the UK were to decide to ratify the 2001 Convention, to establish what difficulties might be presented by ratification. The substance of the review is set out in four papers below:

- Paper 1: Compatibility
- Paper 2: Sunken Warships and State Vessels
- Paper 3: Significance
- Paper 4: Impact

This review presents a balanced, factual account of the impact on the UK of giving effect to its original commitment to a global convention. The following conclusions can be drawn from the review:

- The concerns raised by the UK in 2001 are no longer as problematic as they might have appeared in the closing stages of negotiating the Convention.
- The 2001 Convention has entered force but has not given rise to state practice at odds with UK interests.

- Legal opinion and widespread support for ratification - even amongst countries that formerly shared concerns similar to the UK - is consolidating the 2001 Convention's status as a specialised mechanism for underwater cultural heritage wholly within the international legal framework provided by the United Nations *Convention on the Law of the Sea* (LOSC).
- Changes in UK domestic provisions mean that the UK is already compliant with many aspects of the 2001 Convention.
- Although some legal and administrative changes are required, these will not fundamentally expand or extend the existing regulation of marine activities.
- Ratification is unlikely to require significant additional resources; the 2001 Convention provides a template for systematically addressing some administrative tasks that are currently conducted *ad hoc*, so implementation may present potential savings.

The key messages from each of the four papers are:

#### **Paper 1: Compatibility with the United Nations *Convention on the Law of the Sea* 1982**

- The UK was concerned that the extension of Coastal State jurisdiction with respect to underwater cultural heritage might lead to 'creeping jurisdiction' over other matters, which the UK would find unacceptable.
- Although provisions in the 2001 Convention can be read as giving Coastal States enhanced powers in Exclusive Economic Zones and on Continental Shelves, these provisions can also be read as simply giving effect to State Parties' existing powers with respect to ships flying their flag or to their own nationals.
- The interpretation that these provisions do not alter the overall settlement achieved by the LOSC is reinforced by the provision that nothing in the 2001 Convention shall prejudice the former, and that the 2001 Convention is to be interpreted in a manner consistent with the LOSC.
- Although it is still early days for judging the implementation of the 2001 Convention, there are no signs that State practice will give rise to creeping jurisdiction.
- If it were to ratify the 2001 Convention, the UK would be able to reaffirm the primacy of the LOSC and assert the UK's interpretation of specific clauses from within the institutions set up by the Convention.

#### **Paper 2: Sunken Warships and State Vessels**

- The UK has strong interests in many wrecks all over the world: both Royal Navy warships and many other types of vessels that were built, operated or peopled from the UK.

- The 2001 Convention addresses sunken warships as vessels that were State-owned or -operated and used only for non-commercial government purposes at the time of sinking. None of the prescriptive measures of the Convention refer specifically to the notion of 'sovereign immunity' in the context of sunken vessels.
- As the 2001 Convention provides that the status of State vessels and aircraft is based on their ownership and operation at the time of sinking, subsequent changes - in ownership, for example - do not diminish the continuing rights of the flag State. The flag State does not need to know, or to be able to establish, the history of the wreck since sinking.
- The 2001 Convention provides that no activity is to be directed at a sunken State vessel or aircraft without the agreement of the flag State both in the EEZ / Continental Shelf of Coastal States and in the Area.
- In the Territorial Sea of a coastal State, the coastal State should inform the flag State of the discovery of a sunken State vessel or aircraft with a view to co-operating on the best methods of protection. The 2001 Convention affirms that none of its provisions is to be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities and Article 7(3) need not, therefore, be regarded by the UK as diminishing its view that the Coastal State is obliged to inform the flag state of a wreck that has sovereign immunity if any interference with the wreck is proposed.
- The 2001 Convention contains a series of provisions that require State Parties to recognise the interests of states with verifiable cultural, historical or archaeological links with vessels and aircraft in the Territorial Sea of Coastal States, in their EEZ / Continental Shelf, and in the Area.
- Taken together, the co-operative framework established by the 2001 Convention, the affirmation that sovereign immunities are not modified, the additional provision for State vessels and aircraft, and the clear requirements in respect of other verifiable links are likely to strengthen, rather than weaken, the position of the UK with respect to wrecks of British origin all over the world.

### **Paper 3: Significance**

- The Convention takes an approach to protection that is based on activities directed at underwater cultural heritage, rather than on the designation of individual sites as has been the practice traditionally in the UK.
- An activity-based approach does not impede the management of sites based on their significance.
- The scope of activities to which the Convention applies is quite limited and the likely numbers of activities are small, especially relative to the quantities that are routinely addressed in respect of cultural heritage on land.

- Recent updates to legislation on marine licensing mean that the UK now has systems in place that are capable of giving effect to the requirements of the 2001 Convention in the Territorial Sea.
- The number of known wrecks over 100 years old in the UK Territorial Sea is much lower than estimated in 2001. Notwithstanding, it is not the number of wrecks within a State Party's Territorial Sea that is critical for implementing the 2001 Convention, but the number of activities directed at such sites.

#### **Paper 4: Impact**

- The majority of the substantive clauses of the 2001 Convention appear to present no difficulty to the UK, and the UK has world-leading experience in some particular areas.
- Points that are likely to require further consideration are the regulation or removal of underwater cultural heritage from salvage law; and the development of mechanisms for reporting underwater cultural heritage especially in the UK EEZ / Continental Shelf and the Area.
- Issues such as provisions for human remains, and for the long-term preservation of archaeological archives are already problematic in the management of underwater cultural heritage domestically. Addressing them in the context of implementing the 2001 Convention would help alleviate the domestic situation.
- Formal administrative mechanisms to notify and in some cases consult with other States Parties and to notify the Director-General of UNESCO and the Secretary-General of the International Seabed Authority can build upon current procedures for notifying and consulting with other countries and agencies in respect of underwater cultural heritage.
- Some reallocation of resources may be required to provide contingency arrangements for underwater cultural heritage that is seized, but this may simply mean that arrangements that are currently made case-by-case are formalised in order to demonstrate compliance.

UK UNESCO 2001 Convention Review Group

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## Introduction

Given its situation on the maritime approaches to north-western Europe and its historic role as a major maritime and imperial power, the United Kingdom has a varied and rich underwater cultural heritage. In addition to a submerged prehistoric archaeological record of substantial time depth, the UK has a maritime archaeological record which comprises a wide range of shipwrecks from many nations within its Territorial Sea, Continental Shelf and adjacent international waters. Having been a major naval power since the late 16<sup>th</sup> century, and the world's largest such power from the early 18<sup>th</sup> century until well into the 20<sup>th</sup> century, supplemented by a merchant marine of equal scale, the UK also has historical ties to many shipwrecks in the Territorial Seas and adjacent waters of a considerable number of States elsewhere in the world.

The underwater cultural heritage in the UK's Territorial Sea can be afforded protection under domestic law, policy and practice. Threats to underwater cultural heritage in international waters adjacent to the coast of the UK, and on underwater cultural heritage elsewhere in the world - both within other States' jurisdiction and in international waters - in which the UK has an interest, continue to grow, however.

The discovery in the last few decades of wrecks of importance to the UK - for example, RMS *Titanic* (1912), HMS *Hood* (1941), HMS *Ark Royal* (1941) in water depths of 3800m, 2700m and 1070m respectively, and HMS *Victory* (1744) - demonstrates that continuing developments in underwater technology have put sites which were once inaccessible within the reach of those who can call upon this technology. This level of human accessibility also applies to submerged prehistoric land surfaces, which are located on the geological Continental Shelf extending in some places far beyond the 12 nautical mile limit of the Territorial Sea.

More than ten years have passed since the UNESCO *Convention on the Protection of the Underwater Cultural Heritage* was adopted at the 2001 UNESCO General Conference in Paris. The twenty ratifications required for the Convention to enter into force were obtained in January 2009, and forty-four States have now ratified this treaty which offers an international framework for addressing the protection of underwater cultural heritage.

The UK Government participated in the negotiation of the text of the Convention, but was one of a number of States that abstained from the vote on the final draft in 2001, citing unresolved concerns with a number of elements of the text. Since then there have been repeated calls for the Government to review the position it adopted in 2001; including two notable seminars, in 2005 and 2010, hosted by the Society of Antiquaries of London at Burlington House<sup>1</sup>.

Following the second Burlington House meeting it was apparent that there was a need to revisit the history of the UK's involvement with the Convention and to set down the current understanding of the implications for the UK of the 2001 Convention in factual terms. The purpose of such an exercise

would not be to advocate ratification, but rather to understand what ratification might mean, bearing in mind the Government's concerns raised in 2001.

Furthermore, although the UK expressed the view in 2001 that the Convention would 'not prove capable of attracting universal support'<sup>2</sup>, with its entry into force in 2009, and the steady increase in ratifications, even amongst countries that had expressed similar concerns to the UK, it was becoming clear that the 2001 Convention was going to become a key feature of the international framework on this topic. Whether the UK decides to ratify or not, a much firmer understanding of the 2001 Convention from a UK perspective is required.

A multi-disciplinary project team - the UK UNESCO 2001 Convention Review Group - was created to bring together experts with relevant specialisms from a range of organisations to undertake this *Impact Review for the United Kingdom*.

The *Impact Review* has focussed on the potential administrative and legal impacts of ratifying the Convention for the UK, on establishing the degree to which the UK is already compliant with the Convention and also on identifying what would be required for it to become fully compliant.

This report presents the results of the *Impact Review* as a series of papers which address the specific concerns and issues identified by the UK in its Explanation of Vote (see Appendix 1.1)<sup>3</sup> in 2001 as problematic in considering ratification. The report comprises the following:

- A review of the history of the development and entry into force of the Convention, to provide a context for the UK's position up to and at the vote in 2001, and since;
- A note on maritime jurisdictional zones that provides context for some of the content of the subsequent papers;
- A consideration of the compatibility of the 2001 Convention with United Nations *Convention on the Law of the Sea*;
- A consideration of the UK Government's concern in respect of the question of sovereign immunity and the manner in which the Convention deals with sunken State vessels and aircraft;
- A consideration of the perceived requirement in Article 7(2) of the Convention, to protect all wreck sites in waters adjacent to the UK; and
- A detailed, clause-by-clause review of the Articles of the 2001 Convention to assess the broad administrative, legal and other implications for the UK of ratifying the Convention.

The results of a desk-based survey carried out for the *Impact Review* and known as the Royal Navy Loss List are included as Appendix 2.1. This survey aimed to quantify the extent of Royal Navy vessel casualties between 1605 and 1945 and was created to support the consideration of the sovereign

immunity issue. Consideration has also been given in the *Impact Review* to the developing group of Western European State Parties to the Convention and its potential implications for the UK.

Every effort has been made in carrying out the *Impact Review* to conduct and present an objective evaluation of the issues and impacts. The papers below endeavour to present the evidence and impacts, but not to make specific recommendations.

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<sup>1</sup> Nautical Archaeology Society 2006 The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House Seminar October 2005; Yorke, R A, 2011 Foreword in Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar.

<sup>2</sup> FCO 2001 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote'

<sup>3</sup> FCO 2001 op. cit.



## History and Development of the 2001 UNESCO Convention

On 2 November 2001, after four years of intensive negotiation, the General Assembly of UNESCO<sup>4</sup> adopted the *Convention on the Protection of the Underwater Cultural Heritage*. The fact that the Convention was adopted by a vote, rather than by consensus, reflects reservations with aspects of the treaty's text held by a number of countries, the UK included. The UK's particular issues were formally articulated and expressed at the time of the vote (see Appendix 1.1)<sup>5</sup> and are dealt with individually in Papers 1-4, which follow.

This paper presents a timeline of the history and development of the 2001 Convention: its conception, negotiation, adoption, entry into force and current status. The paper also discusses relevant developments with respect to the protection and management of underwater cultural heritage, both in the UK and elsewhere, to provide context for the UK's position on the treaty, leading up to the vote in 2001 and since<sup>6</sup>.

### Early Developments

The roots of the 2001 Convention can be traced back to at least 1956 and UNESCO's *Recommendation on International Principles Applicable to Archaeological Excavations*<sup>7</sup> (also known as the London Convention) which sets out the responsibilities of each UNESCO member country with respect to cultural heritage within its borders, including archaeological sites situated inside its Territorial Sea.

Twenty years later, in 1976, the Parliamentary Assembly of the Council of Europe (CoE) began to examine issues concerning underwater cultural heritage in the wake of the adoption in 1969 of the *European Convention on the Protection of the Archaeological Heritage*. A two-year study, between 1976 and 1978, by the Assembly's Committee on Culture and Education was precipitated by the formal negotiations towards the *United Nations Convention on the Law of the Sea* (LOSC), which had started in 1974<sup>8</sup>. The Committee was charged with finding a common European approach to heritage within the bounds of the framework then under development at the Third UN Conference on the Law of the Sea. The result of the report produced by the Committee<sup>9</sup> was the adoption in 1978 by the CoE's Parliamentary Assembly of *Recommendation 848, on the underwater cultural heritage* which recommended to the Member States of the CoE the drafting of a European Convention on Underwater Cultural Heritage<sup>10</sup>.

A draft Convention text was prepared by an intergovernmental *ad hoc* Committee and was ready in 1985<sup>11</sup> but was never adopted, mainly because of a technical objection by Turkey in respect of maritime zones<sup>12</sup>. As a result of *Recommendation 848* and the Convention drafting exercise that followed, however, the issues related to underwater cultural heritage began to be taken more seriously by many European States; and although the CoE did not subsequently pursue underwater cultural heritage, the Parliamentary Assembly maintained its interest (see *Recommendation 1486* below).

The concept of 'underwater cultural heritage' was introduced in *Recommendation 848* and further elaborated by the draft European Convention, whose definition of underwater cultural heritage included all remains and objects and any other traces of human existence located entirely or in part in any water body, or recovered from such an environment, and which are more than 100 years old<sup>13</sup> - a definition which is very similar to that used in the 2001 Convention.

In the UK the first steps towards providing protection for underwater cultural heritage were taken in 1973 with the promulgation of the *Protection of Wrecks Act*. The legislation was introduced as a direct result of the high profile looting of several wrecks in the late 1960s and early 1970s, and aimed to secure the protection of wrecks considered to be of historical, archaeological or artistic importance 'from interference by unauthorised persons'<sup>14</sup>.

### **The Convention on the Law of the Sea**

As mentioned above, at the same time that the CoE was working on its draft Convention, the Third UN Conference on the Law of the Sea was undertaking the delicate negotiations which in 1982 resulted in the key international treaty regulating the law of the sea - the LOSC - which establishes the rights and obligations of States in respect of the sea and seabed<sup>15</sup>.

The LOSC was conceived in the 1950s and 1960s, at a time when scuba diving and underwater technology were in their infancy. Despite being intended as a holistic 'Constitution for the Oceans' the LOSC did thus not anticipate and cater for the revolution in underwater and diving technology and its consequences, particularly in respect of underwater cultural heritage.

The LOSC was not entirely silent on the question of underwater cultural heritage, however, and did envisage the need for some international legal protection for it, which was addressed in two Articles - 303 and 149<sup>16</sup>. Article 303 provides a mechanism by which Coastal States can control removal of underwater cultural heritage within the Contiguous Zone (i.e. the area between 12 and 24 nautical miles (nm) from the baseline) while Article 149 relates to underwater cultural heritage in the deep seabed 'Area' (i.e. the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction) primarily with a view to protecting it from the effects of mineral exploration and exploitation<sup>17</sup>.

By the time the LOSC was adopted in 1982 these articles were already inadequate, such was the pace of the development of technology for accessing the seabed<sup>18</sup>. What they did do, however, was to provide a starting point for the creation of an international legal regime for underwater cultural heritage. The exact meaning of these provisions has since been the subject of much debate and is comprehensively reported elsewhere<sup>19</sup>. In simple terms, however, they impose a general duty on States to protect underwater cultural heritage in all sea areas (Article 303(1)) and to co-operate for that purpose. Article 303(4) also anticipated the creation of a more detailed subject-specific treaty regime in the future.

## International Law Association Draft Convention

The next step on the path to the 2001 Convention was the establishment in 1988 of an International Law Association (ILA) internal Cultural Heritage and Law Committee, whose first task was to prepare a draft *Convention on the Protection of the Underwater Cultural Heritage*<sup>20</sup>.

Early in its work the Committee realised that State Parties to any future convention would need objective standards by which to judge the appropriateness of any action in respect of underwater cultural heritage. In 1991, therefore, the Committee approached a newly formed ICOMOS<sup>21</sup> scientific committee, the International Committee on the Underwater Cultural Heritage (ICUCH), for assistance in the preparation of set of archaeological principles and standards to be attached to the draft Convention<sup>22</sup>. The document produced by ICUCH is discussed below.

At the same time as the ILA was starting work on its draft Convention, the *International Convention on Salvage* was adopted in 1989 to replace the 1910 Brussels Convention<sup>23</sup>. The UK became a party to the *International Convention on Salvage* in 1995, the provisions of which were given the force of law through Section 224 of the *Merchant Shipping Act 1995* (MSA 1995). When depositing its instrument of ratification with the International Maritime Organisation, the UK made a specific reservation in respect of the non-application of the Salvage Convention to underwater cultural heritage, stating that it 'reserve[d] the right not to apply the provisions of the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the seabed'<sup>24</sup>.

Also coinciding with the ILA's work on a draft underwater cultural heritage Convention, the Council of Europe adopted the *European Convention on Protection of the Archaeological Heritage (Revised)* in 1992<sup>25</sup>. More generally known as the Valletta Convention, this treaty was a revision of the 1969 London Convention referred to above, and its emphasis is on the protection of archaeological sites for future study, the reporting of chance finds, the control of excavations and the use of metal detectors. Of note in respect of underwater cultural heritage was the broadening of the definition of 'archaeological heritage' in the Valletta Convention from that used in the London Convention, to include sites that are under water 'in any area within the jurisdiction' of signatories<sup>26</sup>. The UK ratified the Valletta Convention on 21 September 2000<sup>27</sup> and it now governs the UK's obligations to archaeological heritage.

It should also be noted that the ILA Draft Convention, then under preparation, was substantially influenced and informed by the various drafts of the Valletta Convention, and that many of the provisions of the two documents have the same effect, even if the wording and emphasis is not the same<sup>28</sup>. According to O'Keefe, there was, however, 'a fundamental difference in purpose of the two drafts': Valletta was 'intended to cover archaeological sites within the Territorial Sea and an area adjacent to it' but was 'never envisaged as extending further than the Continental Shelf or 200 miles'. In contrast, the ILA Draft was 'specifically intended to deal not only with the seawards jurisdiction asserted by States but also the seabed beneath the high seas'<sup>29</sup>.

The ILA *Draft Convention on the Protection of the Underwater Cultural Heritage* was presented at the Association's 66<sup>th</sup> Conference, held in Buenos Aires in 1994. The document was adopted by the meeting and then sent on to UNESCO for consideration where it formed the basis for the discussions which ultimately led to the 2001 UNESCO Convention<sup>30</sup>.

## **ICUCH and the ICOMOS Underwater Cultural Heritage Charter**

ICUCH was established by ICOMOS in 1992: the impetus being an approach from UNESCO for advice on issues around the trade in illicit or tainted underwater cultural heritage<sup>31</sup>.

As mentioned already, one of ICUCH's first tasks was to produce a set of professional standards of best practice in underwater archaeology and heritage management. The development of these principles took place at two meetings - the first in London in 1994 and the second in Paris the following year<sup>32</sup> - and the results were sent to UNESCO.

From this set of principles, ICUCH developed its *International Charter on the Protection and Management of the Underwater Cultural Heritage* which was presented and adopted at the 11<sup>th</sup> ICOMOS General Assembly in Sofia, Bulgaria in October 1996<sup>33</sup>.

The ICUCH principles and Charter not only informed the ILA Draft, but were ultimately central to the development of the 2001 Convention. The Charter was transposed almost verbatim into the rules of the Annex to the 2001 Convention and many States, including those like the UK which have yet to ratify the Convention itself, have stated that they will implement the rules of the Annex as a matter of policy in their management of underwater cultural heritage<sup>34</sup>.

## **Development of the UNESCO 2001 Convention**

In 1993, the year before the completion of the ILA Draft, the Executive Board of UNESCO invited the body's Director-General to 'consider the feasibility of drafting a new instrument for the protection of the underwater cultural heritage'<sup>35</sup>. The results of this feasibility study, which sought the views of UNESCO Member States on an underwater cultural heritage convention, were presented to the Executive Board in 1995, and later that year to the General Conference, which was in favour but felt that further discussion and consultation was necessary<sup>36</sup>.

As a result, an expert meeting was organised in Paris in May 1996 to discuss the proposal. The ILA Draft was the focal point of discussions and it became clear that this document (with modifications) should form the basis of any future UNESCO underwater cultural heritage convention. On that basis the UNESCO Executive Board recommended at a session in May 1997 that the General Conference request the Director-General to prepare a draft convention<sup>37</sup>. Later that year the 29<sup>th</sup> UNESCO General Conference decided that the protection of the underwater cultural heritage should be regulated at the international level by an international convention and asked the Director-General to prepare and circulate a first draft for comment and then convene a group of governmental experts to consider the draft<sup>38</sup>.

A draft Convention based on the ILA Draft was prepared between 1997 and 1998 by UNESCO and the United Nations Division for Ocean Affairs and Law of the Sea (DOALOS), and a meeting of Governmental Experts from UNESCO member and observer States on the *Draft Convention on the Protection of the Underwater Cultural Heritage* took place at UNESCO in Paris in June / July 1998. At this and subsequent meetings in held in 1999, 2000 and 2001, the draft text was negotiated before being adopted after a vote at the final meeting in the early hours of 8 July 2001.

The Convention was formally adopted by UNESCO on 2 November 2001 by the Plenary Session of the 31<sup>st</sup> General Conference<sup>39</sup> with 88 votes in favour, 4 against and 15 abstentions. It was signed by the Director-General of UNESCO and the President of the General Conference on 6 November, at which point it was open for ratification.

For European States which are signatories to the Valletta Convention, it is relevant to note that the 2001 Convention addresses what are core and widely accepted principles and issues in heritage management and does so in full conformity with the principles and rules set out in the Valletta Convention.

## **Other Developments**

While the draft UNESCO Convention was being negotiated, the Parliamentary Assembly of the Council of Europe passed *Recommendation 1486 on Maritime and Fluvial Heritage*<sup>40</sup>, which, amongst other things:

- 'Encourage[s] European co-operation for the protection of the maritime and fluvial heritage with regard to sunken wrecks and associated objects.
- Associate[s] the Council of Europe with the elaboration by UNESCO of an international convention on the underwater cultural heritage.
- Encourage[s] States to ensure that the underwater cultural heritage is protected from commercial recovery operations from the high seas.
- Encourage[s] regional co-operation on the underwater cultural heritage between countries (whether member states of the Council of Europe or not), bordering on the same sea or part sea'.

These recommendations reflected much that was being considered in the UNESCO Draft Convention, and referred back to the contents of CoE *Recommendation 848* and the Valletta Convention.

At around the time of the adoption of the 2001 Convention, a number of events were shaping international and UK policy and State practice with respect to underwater cultural heritage and its management.

In 1999, a Portuguese company, Arqueonautas Worldwide, recovered artefacts from the wreck of the *Yorktown*, a 16-gun US naval sloop wrecked in the Cape Verde Islands in 1850. The recovered material was subsequently auctioned at Sotheby's in London, but in 2001 the US Department of Justice informed Sotheby's that under United States law, specifically the *National Historic Preservation Act* (1966) (and subsequently the 2005 *Sunken Military Craft Act*) the wreck and its contents remained the property of the US Government. Sotheby's recalled and returned the objects, which included cutlery, coins, sword hilts and scabbards, a powder flask, and various ship fittings<sup>41</sup>.

In the UK, the Receiver of Wreck declared a wreck amnesty in 2001 under the terms of which 4000 previously unreported items were notified to the Receiver. During the same year the UK's Ministry of Defence activated, for the first time in relation to shipwrecks, the *Protection of Military Remains Act* 1986 and this resulted in the initial designation of 21 wrecks and a 'programme to review the status of all other maritime military remains in UK waters'<sup>42</sup>. In 2002 the *National Heritage Act* was amended to extend the remit of English Heritage to include all heritage resources 'in, on or under the seabed within the seaward limits of the United Kingdom territorial waters adjacent to England'<sup>43</sup>. Each of these developments was significant in its own right to the development of the protection and management of underwater cultural heritage in the UK, 'but taken together they transformed [its] 'social, economic and political environment'<sup>44</sup>.

At the same time the UK Government awarded a commercial contract to a salvage company in October 2002 for a wreck alleged to be the warship *Sussex*, lost in 1694 off Gibraltar while carrying a large quantity of specie. Under the terms of the agreement with the Ministry of Defence Disposal Services Agency and in return for taking on the whole financial risk, the salvor was entitled to the bulk of the proceeds from the sale of any bullion and artefacts recovered from the wreck<sup>45</sup>. The agreement raised serious concerns within the heritage and maritime archaeological community. Foremost amongst these was that this agreement ran counter to the international standards for maritime archaeological conduct and underwater heritage management 'only recently endorsed by those negotiating the UNESCO Convention [including the UK] and incorporated in [the] rules annexed to the Convention'<sup>46</sup>.

Questions were asked in the House of Commons and the Government was pressed on best practice in relation to underwater cultural heritage<sup>47</sup>. The answer given in a Parliamentary Question about the *Sussex* stated that 'the project must as far as possible be developed in line with the rules contained in the Annex to the Convention, which are seen as representing best practice for maritime archaeology'<sup>48</sup>. In response to Parliamentary Questions about when the UK planned to ratify the 2001 Convention in January 2005, July 2008 and most recently in December 2011, the Government restated this position, declaring that while it had no current plans to ratify the 2001 Convention it had 'adopted the Annex as best practice for archaeology'<sup>49</sup>.

The first ratification of the 2001 Convention was by Panama on 20 May 2003<sup>50</sup>.

In the UK, efforts to raise awareness of the Convention resulted in a seminar in October 2005 at The Society of Antiquaries in Burlington House, London attended by more than one hundred delegates from UK Government departments, national heritage agencies and key voluntary bodies. The meeting 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 UK National Commission for UNESCO. It concluded with the agreement of the *Burlington House Declaration* which called on the UK Government to re-evaluate its position regarding the 2001 Convention and enter into discussions with its heritage agencies, relevant non-governmental organizations and other interested parties with a view to taking the Convention forward<sup>51</sup>.

In March 2007 Odyssey Marine Exploration (OME) announced the discovery of a wreck on the Portuguese Continental Shelf, which they code-named 'Black Swan'. It soon became evident that the wreck, from which OME recovered about 17 tons of coins, was a Spanish frigate, the *Nuestra Señora de las Mercedes*, which exploded and sank in 1804 after an engagement with a British vessel. Spain, Peru and 25 alleged descendants of those aboard the *Mercedes* filed claims in the action taken by OME before a United States court. In December 2009 the court ruled in favour of Spain, requiring OME to return the coins and other artefacts recovered from the wreck<sup>52</sup>.

In 2008 the same company located the wreck of HMS *Victory* (1737), which sank in 1744 with the loss of more than 1100 lives. The wreck lies just outside the UK's Territorial Sea, but within the UK's Continental Shelf. OME sought permission from the Ministry of Defence to begin an excavation of the site and was given permission to raise two cannons for identification purposes. After a public consultation process about how to manage the wreck<sup>53</sup>, the Ministry of Defence gifted the site to a newly formed charitable trust, the Maritime Heritage Foundation (MHF), in January 2012. The Deed of Trust stipulated that the MHF was to hold the wreck and its contents 'upon trust for the education and benefit of the Nation' and reaffirmed the UK's acceptance of the rules of the Annex to the 2001 Convention by requiring that an Advisory Group be established to advise on the extent to which activities proposed on the site 'are consistent with the principles set out in [the] Annex'<sup>54</sup>. In February 2012 the MHF appointed OME as their contractor to excavate the site<sup>55</sup>.

## **Entry into Force of the Convention and Subsequent Developments**

On 20 January 2009 the 2001 Convention entered into force after the required 20<sup>th</sup> instrument of ratification was deposited with UNESCO.

The administration of the Convention is by a co-operative structure based on States Parties to the treaty, supported by UNESCO, provided for in Article 23. The first session of the Meeting of States Parties took place in March 2009. It resulted in the adoption of Rules of Procedure for the Meetings, the establishment of a Scientific and Technical Advisory Body (STAB) and the adoption of statutes for that body, and agreement on the need for a set of Operational Guidelines that 'might contribute to a better understanding and more effective implementation' of the Convention<sup>56</sup>. There have been three

subsequent Meetings of States Parties, in December 2009 and April 2011 and, most recently, in April 2013.

The STAB, which is also provided for in Article 23 of the Convention, is composed of experts in underwater archaeology and the management of underwater cultural heritage, drawn from and nominated by the members of the Meeting of States Parties. The purpose of the STAB is to assist the Meeting of States Parties 'in questions of a scientific or technical nature regarding the implementation of the Rules' (Article 23(5)). The STAB is required to 'consult and collaborate with non-governmental organizations (NGOs) having activities related to the scope of the Convention, namely ICUCH, as well as other competent NGOs accredited by the Meeting of States Parties<sup>57</sup>. The formal accreditation of a number of NGO's, including the Nautical Archaeology Society and the Joint Nautical Archaeology Policy Committee took place at the Meeting of States Parties and the STAB in April 2013. A further outcome of the STAB meetings, held annually since 2009, has been the approval of a *UNESCO Manual for Activities Directed at Underwater Cultural Heritage*<sup>58</sup>.

New legislation in the UK, the *Marine and Coastal Access Act 2009* and the *Marine (Scotland) Act 2010*, was introduced to provide a framework for a new marine licensing system that enables regulators to make sustainable and effective decisions on activities which may be carried out in the marine environment<sup>59</sup>. The Acts provide a consolidated system of marine licensing controls which brings together a number of disparate regulatory regimes and is overseen by new regulatory bodies in each home country<sup>60</sup>. In respect of underwater cultural heritage and the 2001 Convention, the importance of the licensing controls under new marine legislation in the UK stems from the geographical extent of their applicability and their effect. They require the licensing of many activities which may directly or incidentally affect underwater cultural heritage<sup>61</sup> anywhere on the UK's Continental Shelf. Partly in response to this, in October 2012 English Heritage and the Joint Nautical Archaeology Policy Committee, working at the request of the UK Minister in the Department of Culture, Media and Sport, produced a set of recommendations to inform the future management of wreck sites which lie outside the UK's Territorial Sea<sup>62</sup>.

A second Burlington House Seminar was held in London in November 2010. The aim of the meeting was to review progress made towards the UK ratifying the 2001 Convention since the previous seminar and to look forward to what was still required from a UK perspective in the context of international experience in the previous five years. The conclusion of the seminar was that there remained a case for the UK Government to review its position on the 2001 Convention. One of the outcomes of the meeting was support from all the UK's national heritage agencies and the UK National Commission for UNESCO for a project to review the 2001 Convention, the UK's position on it, and the implications for the UK of ratification<sup>63</sup>. The papers which follow comprise that review.

In August 2011 a Danish salvage company raised the 11 tonne bronze conning tower of a British World War I submarine, *G8*, which sank in January 1918 off the coast of Jutland, Denmark, with the loss of all 31 of her crew. The recovery of the conning tower was criticised by maritime archaeologists and the UK Ministry of Defence, and the latter indicated at the time that the wreck was to be declared

a war grave and that the UK would be raising the issue of the return of the conning tower with Denmark<sup>64</sup>.

## **The 2001 Convention and the Regional Seas of Western Europe**

To conclude this review of the history and development of the 2001 Convention there are a number of recent developments in Western Europe which must be mentioned.

At the time of writing, a number of Western European States have already ratified the 2001 Convention and several others are moving towards doing so. Spain was one of the first countries to ratify, in 2005, and the first in Western Europe. Portugal followed in 2006.

France expressed similar reservations to the UK about the treaty in 2001, namely the potential for jurisdiction creep and thus the Convention's compatibility with the LOSC, and the concern that the 2001 Convention would undermine its sovereignty over the wrecks of its warships and other State vessels located in the Territorial Seas of other States. According to a statement presented at the 2010 Burlington House Seminar, however, the French view had changed in light of further legal opinion and developing State practice in the intervening years. This led France to the conclusion that the 2001 Convention 'does in fact not change the pre-existing legal status of State vessels in a negative way'<sup>65</sup> and, as a result, France deposited its instrument of ratification with UNESCO in February 2013<sup>66</sup>.

More recently still, in August 2013, Belgium ratified the Convention<sup>67</sup> and elsewhere in Western Europe indications are that the Netherlands is considering ratification. The Dutch Government received a report from the Advisory Committee on Issues of Public Law (CAVV) in December 2011 which expressed the opinion that the 2001 Convention conforms to the law of the sea, although it is ambiguously drafted in some respects. In October 2013 the Dutch Parliament was informed of the findings of the report and the steps that the Dutch government wishes to take concerning the 2001 Convention: namely that it plans to study further what is required for ratification and its implications in terms of legislation, obligations, new responsibilities and whether additional capacity will be needed for offshore activities. Once the implications are known a decision will be taken on whether to ratify the 2001 Convention<sup>68</sup>.

In Germany, the Committee for Petitions to the German Parliament has recommended to its Ministry of Foreign Affairs that it should ratify the 2001 Convention. Recent indications are that the Ministry is now in favour, as are the relevant federal agencies. Consultation with the sixteen Laender (the constituent states of the Federal Republic of Germany) is taking place and if they are in favour, it is likely that Germany will also ratify the Convention<sup>69</sup>.

The Republic of Ireland is awaiting the passage of legislation which will allow it to meet the legal obligations that arise from being a party to the Convention, before it considers its position with respect to ratification<sup>70</sup>.

The existing ratifications bring a substantial portion of the Atlantic seaboard of Europe, from the Straits of Gibraltar to the Belgian border with the Netherlands and comprising the Atlantic coastlines and Territorial Seas of Spain, Portugal, France and Belgium, under the unified regime for the protection of underwater cultural heritage provided for in the 2001 Convention. Should the Netherlands and Germany ratify the Convention this would bring a further substantial portion of continental Western Europe's seaboard and Territorial Seas within the remit of the Convention.

Were the UK to ratify the Convention, this would have a marked effect in the region, as the UK accounts for two thirds of the total coastline and Territorial Seas in Western Europe south of the Baltic.

Such a regional network of States Parties would be advantageous to the UK, if it chose to ratify, because the existing and overlapping jurisdictional rights between neighbouring State Parties will potentially eliminate loopholes or safe havens for those wishing to conduct activities directed at the UK's underwater cultural heritage that are in contravention of the Convention, and thus render the protection offered by the Convention at both the national and regional level more effective overall.

A regional group of Western European State Parties to the 2001 Convention will also enhance the overall effectiveness of its provisions for the protection of underwater cultural heritage through the requirement for co-operation between State Parties and through the provisions on the non-use of territory which have the effect of denying access to infrastructure in the region (ports, supplies, markets) for activities not in conformity with the treaty.

As the centenary of the outbreak of World War I approaches, the wrecks of the UK's and other country's many State vessel losses start to fall within the remit of the 2001 Convention. For the reasons discussed in Paper 2 below, were the UK to ratify the Convention, as part of a regional group of Western European State Parties to the Convention, its World War I State vessel losses in the North Sea and North East Atlantic would be likely to enjoy enhanced protection. This is a potentially important consideration for the future management of this sensitive aspect of underwater cultural heritage.

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<sup>4</sup> United Nations Educational, Scientific and Cultural Organisation.

<sup>5</sup> FCO 2001 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote'.

<sup>6</sup> O'Keefe, P.J. 2002 Shipwrecked Heritage: A commentary on the UNESCO Convention on Underwater Cultural Heritage contains a detailed discussion of the background to the Convention, its relation to the United Nations Convention on the Law of the Sea, and a clause by clause analysis of the text of the Convention.

<sup>7</sup> See [http://portal.unesco.org/en/ev.php-URL\\_ID=13062&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13062&URL_DO=DO_TOPIC&URL_SECTION=201.html)

<sup>8</sup> O'Keefe op. cit; Maarleveld, T J. The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: Origin and Consequences, unpublished conference paper p 21.

<sup>9</sup> Doc. 4200, The Underwater Cultural Heritage, Report of the Committee on Culture and Education (Rapporteur: John Roper), Strasbourg 1978.

<sup>10</sup> See <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta78/EREC848.htm>

- <sup>11</sup> See CAHAQ, Ad Hoc Committee of Experts on the Underwater Cultural Heritage, Final Activity Report, (CAHAQ (85)(5), Strasbourg 1985.
- <sup>12</sup> Dromgoole, S., 2013 *International Law and the Underwater Cultural Heritage*, Cambridge University Press. p. 40
- <sup>13</sup> Strati, A. 1999 A. Draft Convention on the Protection of Underwater Cultural Heritage: A Commentary Prepared for UNESCO, CLT-99/WS/8.
- <sup>14</sup> Joint Nautical Archaeology Policy Committee, 1989. *Heritage at Sea: Proposals for the better protection of archaeological sites underwater*; Roberts, P and Trow, S, 2002 *Taking to the Water: English Heritage's initial policy for the management of maritime archaeology in England*.
- <sup>15</sup> O'Keefe 2002:op. cit. p 3.
- <sup>16</sup> Dromgoole, S. 2012 *Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage*. *Marine Policy* p 2.
- <sup>17</sup> Dromgoole, 2012 op. cit.
- <sup>18</sup> Robert Ballard's discovery of the wreck of the *Titanic* was only four years in the future. The towed sled which he used to locate *Titanic* was capable of operating depths of 6,000 metres (20,000 feet) and this meant that 98% of the world's seabed was within human reach.
- <sup>19</sup> See Strati 1999 op.cit. and O'Keefe 2002 op. cit.
- <sup>20</sup> O'Keefe 2002 op.cit.
- <sup>21</sup> International Council on Monuments and Sites
- <sup>22</sup> O'Keefe, 2002 op. cit. p 21.
- <sup>23</sup> Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea
- <sup>24</sup> United Kingdom and British Maritime Law Association's Joint Response to the IMO Questionnaire on Salvage Convention 1989 - see [www.bmla.org.uk/documents/Questionnaire.doc](http://www.bmla.org.uk/documents/Questionnaire.doc)
- <sup>25</sup> See <http://conventions.coe.int/Treaty/en/Treaties/html/143.htm> for the text of the Convention.
- <sup>26</sup> When it ratified the Valletta Convention the UK stipulated its area of application as UK territorial waters.
- <sup>27</sup> Entered into force in the UK on 21 March 2001.
- <sup>28</sup> O'Keefe 2002 op. cit. p 22.
- <sup>29</sup> *ibid*
- <sup>30</sup> See O'Keefe 2002 op. cit. pp 192-197 for the full text of the ILA Draft.
- <sup>31</sup> Maarleveld op. cit.
- <sup>32</sup> O'Keefe 2002 op. cit.; Maarleveld op. cit.
- <sup>33</sup> See [http://www.icomos.org/charters/underwater\\_e.pdf](http://www.icomos.org/charters/underwater_e.pdf) for the full text of the Charter.
- <sup>34</sup> Since the adoption of the Rules of the Annex by the UK Government in 2005, English Heritage (on behalf of the Department of Culture, Media and Sport) licences to access Protected Wreck Sites (lying in UK territorial waters adjacent to England) are issued in accordance with the Annex.
- <sup>35</sup> Para 15, Item 5.5.1, UNESCO Doc. 141EX/18, 29 May 1993. See <http://unesdoc.unesco.org/images/0009/000945/094597E.pdf>
- <sup>36</sup> UNESCO Doc. 146EX/27, 223 March 1995 (<http://unesdoc.unesco.org/images/0010/001010/101039eo.pdf>) and UNESCO Doc. 28C/39, 34 October 1995 (<http://unesdoc.unesco.org/images/0010/001026/102628e.pdf>)
- <sup>37</sup> O'Keefe 2002 op. cit.
- <sup>38</sup> Doc. 29C/Resolution 21. See O'Keefe, 2002:24 for details of the Resolution.

- <sup>39</sup> See <http://unesdoc.unesco.org/images/0012/001246/124687E.pdf>
- <sup>40</sup> For the full text of the Recommendation see <http://assembly.coe.int/Documents/AdoptedText/ta00/erec1486.htm>
- <sup>41</sup> See <http://www.history.navy.mil/branches/org12-9b.htm#>
- <sup>42</sup> At the same time Historic Scotland scheduled several wrecks from the German High Seas Fleet scuttled in Scapa Flow under the Ancient Monuments and Archaeological Areas Act 1979.
- <sup>43</sup> See <http://www.legislation.gov.uk/ukpga/2002/14/contents>
- <sup>44</sup> Joint Nautical Archaeology Policy Committee 2003 An Interim Report on the Valletta Convention and Heritage Law at Sea.
- <sup>45</sup> For a discussion of the case, see Dromgoole, S, 2004 Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins Marine Policy 28:189-198. See also <http://www.archaeologyuk.org/ba/ba68/issues.shtml>.
- <sup>46</sup> Dromgoole 2004 op. cit. p 191. The government of Andalusia halted proceedings just before Odyssey was due to start the excavation in January 2006. After Odyssey had provided clarification on a number of issues and agreed to Spanish archaeologists taking part in the excavation to verify that the shipwreck to be excavated was the *Sussex* and not a Spanish galleon, Andalusia gave its consent to the project. This was withdrawn after Odyssey sent one of its survey vessels to begin its Black Swan Project (a.k.a. the *Mercedes*).
- <sup>47</sup> See, for example, Hansard 10 Dec 2002: Column 256W (<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/vo021210/text/21210w22.htm>) and Hansard 2 Feb 2005: Column 898W (<http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050202/text/50202w02.htm>).
- <sup>48</sup> Hansard 10 Dec 2002: Column 256W (<http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/vo021210/text/21210w22.htm>)
- <sup>49</sup> Hansard 24 Jan 2005: Column 46W (<http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050124/text/50124w13.htm>); Hansard 21 July 2008 : Column 805W (<http://www.parliament.the-stationery-office.co.uk/pa/cm200708/cmhansrd/cm080721/text/80721w0021.htm>); Hansard 12 Dec 2011: Column 601W (<http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm111212/text/111212w0006.htm>)
- <sup>50</sup> A list of States that have ratified the Convention to date can be found at: <http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E&order=alpha>
- <sup>51</sup> For the text of the Declaration and the papers presented see Nautical Archaeology Society 2006 The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House Seminar October 2005 (<http://www.jnapc.org.uk/Burlington%20House%20Proceedings%20final%20text.pdf>).
- <sup>52</sup> For a detailed discussion of the case see Aznar, M. 2010 Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, The International Journal of Marine and Coastal Law 25:222 and Dromgoole, S. 2013 Underwater Cultural Heritage and International Law, Cambridge University Press.
- <sup>53</sup> See [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/105731/victory\\_response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/105731/victory_response.pdf)
- <sup>54</sup> For the Deed of Gift and Advisory Group Terms of Reference see [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27932/victory\\_1744\\_deed.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27932/victory_1744_deed.pdf) and [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27931/victory\\_advisorygp\\_tors.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/27931/victory_advisorygp_tors.pdf)
- <sup>55</sup> See <http://www.shipwreck.net/pr240.php>
- <sup>56</sup> Draft Summary Record of the First Session, Doc. UCH/09/2.MSP/220/4, 15 September 2009.
- <sup>57</sup> Article 1(e) of the Statutes of the Scientific and Technical Advisory Body, UNESCO Doc. CLT/CIH/MCO/2009/PI/100, See <http://unesdoc.unesco.org/images/0018/001821/182130E.pdf>
- <sup>58</sup> Guèrin, U., Egger, B. and Maarleveld, T. (eds) 2013 UNESCO Manual for Activities Directed at Underwater Cultural Heritage (<http://www.unesco.org/culture/en/underwater/pdf/UCH-Manual.pdf>).
- <sup>59</sup> See <http://www.defra.gov.uk/environment/marine/protect/licensing/>
- <sup>60</sup> Marine planning and licensing are largely devolved to each of the home countries of the UK: England; Scotland; Wales and Northern Ireland.

<sup>61</sup> For example, activities which deposit or remove a substance or object on or from the seabed below the mean high water mark or in any tidal river to the extent of the tidal influence. This includes such activities as the construction of wind farms and ports, aggregate extraction, the dredging of channels or the use of munitions. See <http://www.marinemanagement.org.uk/licensing/marine.htm>.

<sup>62</sup> Robert Yorke, Chairperson JNAPC (Pers. comm. 6 June 2013)

<sup>63</sup> Yorke, R.A. 2011 Foreword in Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar. The published proceedings of the meeting can be found at: <http://www.jnapc.org.uk/UNESCO-Seminar-2010-final.pdf>

<sup>64</sup> The Times, Friday August 26, 2011

<sup>65</sup> L'Hour, M 2011 An update on France's position regarding the UNESCO Underwater Cultural Heritage Convention, in Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar.

<sup>66</sup> See [http://www.unesco.org/new/en/media-services/single-view/news/france\\_ratifies\\_the\\_unesco\\_2001\\_convention\\_on\\_the\\_protection\\_of\\_the\\_underwater\\_cultural\\_heritage/](http://www.unesco.org/new/en/media-services/single-view/news/france_ratifies_the_unesco_2001_convention_on_the_protection_of_the_underwater_cultural_heritage/)

<sup>67</sup> Dr Marnix Pieters, Flanders Heritage Agency: Maritime and Underwater Heritage (Pers. comm. via email, 25 July 2013). See also [http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/belgium\\_ratifies\\_the\\_2001\\_unesco\\_convention\\_on\\_the\\_protection\\_of\\_underwater\\_cultural\\_heritage/#.UkwexxZrUII](http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/belgium_ratifies_the_2001_unesco_convention_on_the_protection_of_underwater_cultural_heritage/#.UkwexxZrUII)

<sup>68</sup> Vevita Eichberger-Zandee, Department for cultural Heritage, Netherlands Ministry of Education, Culture and Science (Pers. comm. via email 29 November 2013).

<sup>69</sup> Dr. Ulrike Guérin (Pers. comm. via email 5 June and 1 December 2013).

<sup>70</sup> Sean Kirwan, National Monuments Service, Department of Arts, Heritage and the Gaeltacht (Pers. comm. via email, 14 January 2013).



# Note on Maritime Jurisdictional Zones

## Introduction

The United Nations *Convention on the Law of the Sea* 1982 codifies a series of maritime jurisdictional zones. These zones, which are described below, are referred to throughout the 2001 UNESCO Convention. The 2001 Convention is not intended to alter the zones set out in the Law of the Sea Convention 1982, but seeks to provide greater clarity about how underwater cultural heritage is to be protected by states in respect of each zone. The question of whether such clarification may have changed jurisdiction within the zones is addressed in the papers that comprise this report.

The LOSC generally defines the different maritime zones in relation to 'baselines'. The normal baseline is the low-water line as marked on large-scale charts<sup>71</sup>. Most Coastal States have an indented coastline so there is a series of rules that enable them to draw straight or closing lines across these indentations in specific circumstances<sup>72</sup>. Some States that are made up of groups of islands have the status of Archipelagic States<sup>73</sup> and can draw straight archipelagic baselines<sup>74</sup> around their outermost islands and reefs, again subject to a series of rules.

In order to facilitate peaceful maritime traffic, the LOSC provides for certain rights of navigation within zones where restrictions would otherwise apply. These rights include 'innocent passage'<sup>75</sup> and 'transit passage'<sup>76</sup>.

The unit of measurement used in the LOSC is the 'nautical mile' (nm) customarily used in maritime navigation, which corresponds approximately to one minute of latitude and has been fixed by international agreement at 1852 metres.

The principal maritime zones defined by the LOSC are:

- Internal and Archipelagic Waters: the waters on the landward side of the baselines<sup>77</sup>.
- Territorial Sea: not exceeding 12 nm from the baselines<sup>78</sup>.
- Contiguous Zone: extending from the seaward boundary of the Territorial Sea out a maximum of 24 nm from the baselines<sup>79</sup>.
- Exclusive Economic Zone (EEZ): extending 200 nm from the baselines<sup>80</sup>.
- Continental Shelf: extending to the outer edge of the continental margin or at least 200 nm from the baselines<sup>81</sup>. In some cases the outer edge of the continental margin exceeds 200 nm, so Coastal State can establish the limit of its Continental Shelf further offshore in accordance with a set of rules. As a result, the Continental Shelf may extend beyond the EEZ.
- High Seas: all parts of the sea that are not in the EEZ, Territorial Sea, Internal Waters or Archipelagic Waters of a Coastal State<sup>82</sup>. That is to say, High Seas commence no more than 200

nm from the baselines, but they may be closer if the Coastal State does not claim an EEZ, for example.

- The Area: the seabed, ocean floor and its sub-soil (but not the water column) that is beyond the limits of Coastal State jurisdiction<sup>83</sup>. The Area commences at the seaward limit of each Coastal State's EEZ and/or Continental Shelf.

Whilst the LOSC enables Coastal States to claim these zones up to the limits it sets out, Coastal States are not obliged to make such claims. Many states do not make use of all the zones, or their limits do not extend as far as the LOSC permits. Some states claim zones that are broadly consistent with the LOSC but do not make use of all their features, and are differently named. Equally, some states make territorial claims that exceed the LOSC, which are contested by other states.

The UK has not declared a Contiguous Zone or an EEZ, but it claims an Exclusive Fishing Zone of 200 nm. The UK included powers to designate an EEZ in the *Marine and Coastal Access Act 2009* (MCAA 2009)<sup>84</sup>. The overall extent of the UK's territorial jurisdiction as a Coastal State is referred to as the UK Marine Area, including the Territorial Sea (12 nm) and corresponding to the limits of the UK Continental Shelf. The UK Marine Area is divided into Inshore Regions (Internal Waters and Territorial Sea) and Offshore Regions (equating to EEZ / Continental Shelf); the UK Marine Area and Inshore and Offshore Regions are further divided between the four home countries.

## **Internal / Archipelagic Waters and Territorial Sea**

The sovereignty of the Coastal State extends to Internal Waters, Archipelagic Waters (where relevant) and the Territorial Sea, including to the air space, seabed, sub-soil and resources therein. Within these zones a Coastal State enjoys criminal and civil jurisdiction comparable to that exercised on its land<sup>85</sup>. Consequently, a State may make such provision as it wishes for protection of underwater cultural heritage within its Internal Waters, Archipelagic Waters and Territorial Sea. Such protection must be consistent with international law, however, including such rules on rights of navigation that may apply.

## **Contiguous Zone**

Within a Contiguous Zone a Coastal State has very limited rights in comparison to those within its Territorial Sea. These rights allow it to exercise control to prevent and punish infringement of its customs, fiscal, immigration and sanitary controls<sup>86</sup>. The Contiguous Zone in effect acts as a 'buffer' zone, allowing Coastal States some increased geographical distance to prevent infringements of these specified matters within its territorial jurisdiction.

However, there is also a measure of protection for underwater cultural heritage relating to the Contiguous Zone. In order to control traffic in objects of an archaeological and historical nature, Article 303(2) of the LOSC provides that a Coastal State may presume that removal of underwater cultural heritage from the seabed within the Contiguous Zone would result in infringement of customs, fiscal,

immigration and sanitary controls within its territory or Territorial Sea. This is a 'legal fiction', i.e. an artificial device, which allows a measure of control by a Coastal State over removal of underwater cultural heritage from the seabed within the Contiguous Zone. It is perhaps an unnecessarily clumsy device that raises some uncertainties as to its correct interpretation and scope<sup>87</sup>, but it does confer in respect of underwater cultural heritage a degree of extended jurisdiction upon a Coastal State beyond the limit of its Territorial Sea<sup>88</sup>.

It is also important to note that the provision is only applicable to removal of objects from the seabed within the Contiguous Zone. Surveying, diving upon, recording and even damaging underwater cultural heritage would not be covered by the provision, so long as no removal was intended.

## **Exclusive Economic Zone and Continental Shelf**

The LOSC provides that within its EEZ the Coastal State has sovereign rights for exploring, exploiting, conserving and managing natural resources of the seabed, subsoil and water column<sup>89</sup>, as well as for other activities of economic exploitation and exploration (such as energy production). The LOSC also provides that the Coastal State has jurisdiction within the EEZ over the establishment and use of artificial structures, marine scientific research, and the protection and preservation of the marine environment.

The LOSC provides that Coastal States have sovereign rights over the Continental Shelf for the purpose of exploring it and exploiting its natural resources<sup>90</sup>. Natural resources include mineral and other non-living resources of the seabed and subsoil, plus living organisms that are sedentary when they are harvested. The Coastal State also has jurisdiction over artificial structures and drilling on the Continental Shelf<sup>91</sup>.

It is generally accepted that natural resources do not encompass cultural resources, so a Coastal State may not impose direct controls upon activities directed at underwater cultural heritage within an EEZ or on the Continental Shelf. However, many countries - including the UK - provide a degree of indirect control with respect to underwater cultural heritage by requiring that activities directed at natural resources, such as oil and gas exploration, aggregate extraction, or offshore renewable energy generation, take into consideration their effects on underwater cultural heritage.

## **High Seas and the Area (beyond EEZs / Continental Shelves)**

The LOSC reaffirms the freedom of the High Seas, which includes freedom of navigation, over flight, the laying of submarine cables and pipelines, the construction of artificial structures, fishing, and scientific research<sup>92</sup>. No state may assert sovereignty over any part of the High Seas<sup>93</sup>. Jurisdiction over ships etc. is based on the nationality of the ship, according to the state within which the ship is registered and whose flag it is entitled to fly (the 'Flag State') and, in the case of warships and certain other government vessels, sovereign immunity (discussed in detail in Paper 2).

The Area comprises the seabed, ocean floor and sub-soil, but not the water column<sup>94</sup>, which is regarded as High Seas. The LOSC provides that no state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its mineral resources<sup>95</sup>. Exploration and exploitation of the mineral resources of the Area<sup>96</sup> - and marine scientific research in the Area<sup>97</sup> - is to be carried out for the benefit of humankind as a whole. Activities in the Area are organised and controlled by States Parties through the International Seabed Authority<sup>98</sup>.

Activities relating to underwater cultural heritage are generally regarded as falling within the scope of the freedom of the High Seas. Control cannot be asserted over underwater cultural heritage as such, only over activities relating to it: by the Flag State over its ships; or by states over their nationals. Even these controls can only be enforced once the ships or nationals return within the territorial jurisdiction of the relevant state. If the underwater cultural heritage is a warship or other government vessel then sovereign immunity may afford some control (see Paper 2).

Under Article 149 of the LOSC, all objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of humankind as a whole, having regard to the rights of states that are associated with the objects' origins. Again, no state can assert direct control over underwater cultural heritage in the Area; but any control arising from the Flag State, nationality, sovereign immunity or the conduct of activities in the Area - including marine scientific research - would have to accord with Article 149.

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<sup>71</sup> Article 5 LOSC.

<sup>72</sup> Articles 6-7, 9-14 LOSC.

<sup>73</sup> Article 46 LOSC.

<sup>74</sup> Article 47 LOSC.

<sup>75</sup> Articles 17 et seq. LOSC.

<sup>76</sup> Article 37 et seq. LOSC.

<sup>77</sup> Articles 8 and 49 LOSC respectively.

<sup>78</sup> Articles 3, 4 & 5 LOSC.

<sup>79</sup> Article 33 LOSC.

<sup>80</sup> Article 57 LOSC.

<sup>81</sup> Article 76 LOSC.

<sup>82</sup> Article 86 LOSC.

<sup>83</sup> Article 1(1) LOSC.

<sup>84</sup> Section 41.

<sup>85</sup> Articles 27-28 LOSC.

<sup>86</sup> Article 33 LOSC.

<sup>87</sup> For a discussion of these uncertainties see Forrest, C. 2010 International Law and the Protection of Cultural Heritage pp. 323-329; O'Keefe P.J. 2002 Shipwreck Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage pp.18-19.

<sup>88</sup> For a discussion of the use of Article 303(2) see Dromgoole 2013 op. cit. Chap 7 Section 3.3.

<sup>89</sup> Article 56 LOSC. This includes minerals as well as biological life forms.

<sup>90</sup> Article 77 LOSC.

<sup>91</sup> Article 77(4) LOSC.

<sup>92</sup> Article 87 LOSC.

<sup>93</sup> Article 89 LOSC.

<sup>94</sup> Article 135 LOSC.

<sup>95</sup> Article 137 LOSC.

<sup>96</sup> Article 140 LOSC.

<sup>97</sup> Article 143 LOSC.

<sup>98</sup> Article 157 et seq. LOSC.



# **Paper 1. Compatibility: The UNESCO 2001 Convention and the United Nations *Convention on the Law of the Sea* 1982**

## **Key Messages**

- The UK was concerned that extension of Coastal State jurisdiction with respect to underwater cultural heritage might lead to ‘creeping jurisdiction’ over other matters, which the UK would find unacceptable.
- Although provisions in the 2001 Convention can be read as giving Coastal States enhanced powers in Exclusive Economic Zones and on Continental Shelves, these provisions can also be read as simply giving effect to State Parties’ existing powers with respect to ships flying their flag or to their own nationals.
- The interpretation that these provisions do not alter the overall settlement achieved by the LOSC is reinforced by the provision that nothing in the 2001 Convention shall prejudice the LOSC, and that the 2001 Convention is to be interpreted in a manner consistent with the LOSC.
- Although it is still early days for judging the implementation of the 2001 Convention, there are no signs that State practice will give rise to creeping jurisdiction.
- If it were to ratify the 2001 Convention, the UK would be able to reaffirm the primacy of the LOSC and assert the UK’s interpretation of specific clauses from within the institutions set up by the Convention.

## **Background to the UNESCO Convention**

### **A Regulatory Lacuna**

The LOSC created an important duty on State Parties to protect objects of an archaeological and historical nature found at sea and to co-operate for this purpose<sup>99</sup>. This duty is of general application and has applied to the UK since it ratified the LOSC in 1997. Other than problematic clauses on underwater cultural heritage in Contiguous Zones<sup>100</sup> and in the Area<sup>101</sup>, however, the LOSC did not set out how States were to give effect to this general duty of protecting underwater cultural heritage across the system of maritime zones that the LOSC codified. The consequence is a significant jurisdictional lacuna for underwater cultural heritage.

Generally speaking, Coastal States have full jurisdiction over activities directed at underwater cultural heritage within their Territorial Sea, which is up to 12 nm from the baseline. Beyond that, up to 24 nm in the area known as the Contiguous Zone, Coastal States may exercise a degree of jurisdiction over underwater cultural heritage - limited to regulating its removal from the seabed - if they so wish.

Beyond 24 nm, within the EEZ and Continental Shelf, underwater cultural heritage cannot be regulated by the Coastal State on the basis of Coastal State jurisdiction, except indirectly through the regulation of natural resources. However, other forms of jurisdiction may apply, such as the nationality

of the person or a vessel, or the jurisdiction for specific purposes of ports over ships that are entering or leaving. Also important is the doctrine of sovereign immunity<sup>102</sup>, which may preclude the exercise of jurisdiction over the wrecks of certain State Vessels by other countries and is a key concern of the UK (see Paper 2). Nonetheless, the LOSC offers no real help as to how States should exercise control either within the EEZ / Continental Shelf or the Area in order to give effect to the general duty to protect underwater cultural heritage that is set out in Article 303(1).

That there is a lacuna in regulation of activities directed at underwater cultural heritage situated outside the Territorial Sea is beyond dispute. Greatly enhanced underwater technology is directly contributing to the threat of inappropriate commercial exploitation of underwater cultural heritage located beyond the Territorial Sea, and it is this threat and regulatory lacuna that the 2001 Convention is designed to counter.

### **The 2001 Convention – the UK’s Concerns**

The UK is generally supportive of the objectives of the 2001 Convention<sup>103</sup> but has thus far declined to ratify. At the time of the vote on the Convention in 2001, the UK voiced two principal concerns: ‘the treatment of warships and State Vessels and the unqualified requirement to afford the same levels of protection to all underwater archaeology over 100 years old’<sup>104</sup>.

A further concern has also been suggested: the possibility of ‘creeping Coastal State jurisdiction’, which would upset the delicate consensus over Coastal State jurisdiction achieved in the LOSC<sup>105</sup>. In respect of warships and State Vessels, and the possibility of creeping jurisdiction, the UK has been insistent that the 2001 Convention is not in ‘full conformity’ with the LOSC<sup>106</sup> and it is this technical legal objection that underlies some of the UK’s refusal to ratify the Convention.

The question of wrecks of warships and State Vessels is addressed in Paper 2, whilst concern over the Convention’s ‘blanket’ application to all underwater cultural heritage irrespective of archaeological or historical significance is addressed in Paper 3. Here we focus on the question of ‘creeping jurisdiction’.

### **Creeping Coastal State Jurisdiction**

The UK acknowledged the LOSC’s jurisdictional vacuum relating to underwater cultural heritage located beyond 24 nm 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 jurisdictional framework established by the LOSC. No extension of Coastal State jurisdiction or sovereign rights over underwater cultural heritage located beyond the 24 nm limit could be contemplated. In short the UK regarded the jurisdictional framework established by the LOSC as sacrosanct:

‘The need for full conformity with [LOSC] 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 [LOSC]<sup>107</sup>.

From the perspective of the UK and a number of other maritime States, the 2001 Convention might infringe this delicate jurisdictional balance between the rights of Coastal States and other States by appearing to confer upon the former new jurisdictional powers and duties within their EEZ or Continental Shelf<sup>108</sup>. These possible innovations are contained within Articles 9 and 10 of the 2001 Convention. Article 9 could be interpreted as giving a Coastal State within its EEZ or Continental Shelf a power to require the notification of activities directed at underwater cultural heritage or its discovery and Article 10 could be seen as introducing a power to prohibit or authorise activities directed at underwater cultural heritage. If these interpretations were valid, such extension of Coastal State jurisdiction would be unacceptable to the UK, raising the prospect of a 'post-LOSC' series of developments in which Coastal States would acquire, by incremental innovations in international law, an enhanced jurisdiction beyond 24 nm over diverse matters in excess of that contemplated by the LOSC<sup>109</sup>. The spectre of this 'slippery slope' is unappealing to those States, including the UK, that regard the LOSC as the final settlement on the matter of Coastal State jurisdiction.

## **Reconciling the 2001 Convention with the LOSC**

The 2001 Convention entered into force in January 2009. Although it is currently too early for State practice in respect of the Convention to have clearly emerged - this being a legitimate tool in interpreting the Convention - there is as yet no sign of the 'slippery slope' feared by the UK of extended claims to Coastal State competencies beyond those established by the LOSC. To that degree it may be said that no undermining of jurisdictional structure and balance of rights and duties established between Coastal States and other States by the LOSC has occurred. There is evidence that this factor may have served to reassure some of the maritime States, such as Spain and France, which initially shared the UK's fears in this respect.

Recently, both Dromgoole<sup>110</sup> and the Dutch Advisory Committee on Issues of Public International Law<sup>111</sup> have demonstrated how Articles 9 and 10 can be interpreted as being consistent with the LOSC. In respect of Article 9, which imposes obligations to report activities directed at underwater cultural heritage and discoveries in the EEZ or on the Continental Shelf of a Coastal State, conformity with the LOSC arises because the Article merely requires a State party to impose obligations with respect to the EEZ or Continental Shelf on its nationals or flagged vessels. That is to say, the obligations arise out of jurisdiction based on the nationality of the person or vessel, using the EEZ and Continental Shelf to denote the zones in which these obligations apply, rather than arising out of Coastal State jurisdiction based on territorial principles. It is an accepted principle of international law that a State can impose such extra-territorial obligations on its nationals or flagged vessels and this interpretation would not involve any innovation in international law or extension to Coastal State competencies that might be contrary to the provisions of the LOSC<sup>112</sup>.

Similarly, it is reasonable to interpret Article 10 as merely being declaratory of the right of Coastal States to prohibit interference with their existing sovereign rights in their EEZ and on their Continental Shelf, as expressed in the Article itself. Such an interpretation confers no additional competencies upon Coastal States beyond those envisaged in the LOSC. Even if one interprets the 2001 Convention as conferring additional competencies upon Coastal States in the EEZ and Continental Shelf the Dutch Advisory Committee again regarded these as a 'minor shift' and merely a fulfilment of Article 303(1) of the LOSC.<sup>113</sup> Furthermore, as Dromgoole convincingly argues, those maritime States with reservations about the compatibility of the 2001 Convention with the LOSC can perhaps now best influence the interpretation of the Convention by becoming parties to the it, in effect arguing from 'within'<sup>114</sup>.

## Conclusion

In order to address the lacuna in international law with respect to underwater cultural heritage beyond 24 nm, the 2001 Convention includes specific provisions on its protection in EEZs and on Continental Shelves. These provisions could be read as giving Coastal States enhanced powers in these zones, going beyond the settlement achieved by the LOSC in respect of Coastal State jurisdiction, and potentially giving rise to further creeping jurisdiction. However, these same provisions can also be read as simply giving effect to State Parties' existing powers over ships flying their flag or their own nationals within the EEZ / Continental Shelf. The interpretation that these provisions do not alter the overall settlement achieved by the LOSC is reinforced by the reassertion of the primacy of the LOSC in the 2001 Convention itself. There are currently no signs that State practice on underwater cultural heritage is giving rise to creeping jurisdiction. Ratifying the 2001 Convention would provide the UK a positive platform upon which to argue its interpretation of clauses that might be regarded as ambiguous and to encourage State practice that reaffirms the LOSC.

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<sup>99</sup> Article 303(1) LOSC.

<sup>100</sup> Article 303(2) LOSC.

<sup>101</sup> Article 149 LOSC.

<sup>102</sup> Sovereign immunity will also potentially apply within the Territorial Sea and the Contiguous Zone, but see Position Paper 3 for full discussion.

<sup>103</sup> FCO 2001 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote'.

<sup>104</sup> Letter accompanying FCO 2001 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote' dated 31 October 2001.

<sup>105</sup> 'Comments of the United Kingdom', forwarded to UNESCO on 28<sup>th</sup> February 2000. (Unpublished).

<sup>106</sup> *ibid.*

<sup>107</sup> FCO 2001 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote' paras. 3 & 4: See also International Protection of Underwater Cultural Heritage' Blumberg, R.C. <http://www.state.gov/g/oes/rls/rm/51256.htm>

<sup>108</sup> A view apparently shared by the USA, Russia, Japan and Scandinavia. See further Blumberg *ibid.*

<sup>109</sup> This suspicion that some countries had jurisdictional ambitions extending beyond underwater cultural heritage was perhaps strengthened by the fact that this jurisdictional extension for underwater cultural heritage enjoyed the support of those developing countries, especially Latin American that had previously advocated Coastal State jurisdiction over many activities and resources up to 200 nm from their baselines.

<sup>110</sup> Dromgoole 2013 op.cit. pp. 6-8.

<sup>111</sup> 'Advisory Report on the UNESCO Convention on the Protection of the Underwater Cultural Heritage' Advisory Report No. 21, The Hague, December 2011.

<sup>112</sup> The Advisory Committee also expressed the view that even if one interpreted Article 9 as giving Coastal States such a new competency, it would be 'minor' and merely a fulfilling of Article 303(1) LOSC which imposes a duty on States to protect archaeological and historical objects found at sea and to co-operate for that purpose. See further *ibid.* p.8

<sup>113</sup> See further op.cit. p. 10-11

<sup>114</sup> Dromgoole 2013 op.cit. p.6.



## Paper 2. Sunken Warships and State Vessels

### Key Messages

- The UK has strong interests in many wrecks all over the world, both Royal Navy warships and many other types of vessels that were built, operated or peopled from the UK.
- The 2001 Convention addresses sunken warships as vessels that were State-owned or -operated and used only for non-commercial government purposes at the time of sinking. None of the prescriptive measures of the Convention refer to the sovereign immunity of sunken vessels.
- As the 2001 Convention provides that the status of State vessels and aircraft is based on their ownership and operation at the time of sinking. Subsequent changes - in ownership, for example - do not diminish the continuing rights of the flag State. The flag State does not need to know, or to be able to establish, the history of the wreck since sinking.
- The 2001 Convention provides that no activity is to be directed at a State vessel or aircraft without the agreement of the flag State both in the EEZ / Continental Shelf of coastal States and in the Area.
- In the Territorial Sea of a Coastal State, the Coastal State should inform the flag State of the discovery of a State vessel or aircraft with a view to co-operating on the best methods of protection. The 2001 Convention affirms that none of its provisions is to be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities. Article 7(3) need not, therefore, be regarded by the UK as diminishing its view that the Coastal State is obliged to inform the flag state of a wreck that has sovereign immunity if any interference with the wreck is proposed
- The 2001 Convention contains a series of provisions that require State Parties to recognise the interests of states with verifiable cultural, historical or archaeological links with vessels and aircraft in the Territorial Sea of Coastal States, in their EEZ / Continental Shelf, and in the Area.
- The co-operative framework established by the 2001 Convention, the affirmation that sovereign immunities are not modified, the additional provision for State vessels and aircraft, and the clear requirements in respect of other verifiable links, are likely to strengthen - rather than weaken - the position of the UK with respect to wrecks of British origin all over the world.

### Introduction

The question of sovereign immunity, particularly in respect of its sunken warships, was one of the issues cited by the UK Government in its explanation for abstaining from the vote on the Convention in 2001. Like the other major maritime States<sup>115</sup> the UK has large numbers of sunken State-owned or -operated vessels and aircraft, used during their lifetimes for non-commercial purposes, in many different waters and jurisdictions around the world.

The Royal Navy Loss List is a global inventory of Royal Navy losses between 1605 (when the Royal Navy was formally established) and 1945, created from a range of secondary sources to accompany this review (see Appendices 2.1-2.3 below for more detail).

The Loss List indicates that there were at least 3486 Royal Navy casualties across the world between 1605 and 1945. A review of the information contained in the Loss List highlights the following:

- 34.8% of Royal Navy losses occurred within the UK's own Territorial Sea, EEZ or Continental Shelf.
- 44.5% of Royal Navy losses occurred within the Territorial Seas, EEZs or Continental Shelves of other Coastal States around the world; and of the wrecks in coastal jurisdictions other than the UK, more than a quarter (27% of total losses) are within the jurisdiction of States that have either already ratified the 2001 Convention or are considering ratification.
- Only 20.7% of Royal Navy losses occurred in the Area.
- Two thirds of Royal Navy losses are relatively recent having occurred during World Wars I and II. Although these wrecks currently fall outside the scope of the Convention, by the end of 2018 a total of 1060 World War I losses will be more than 100 years old and will thereby qualify as underwater cultural heritage.

## **Sovereign Immunity and Sunken Warships and Aircraft**

Under customary and conventional international law, warships and other State vessels (including military aircraft), by virtue of their being official vessels representing a State or sovereign, are sovereign immune, which means that they are not subject to the jurisdiction of any other State. Sovereign immunity is applicable to State owned or -operated vessels and aircraft currently being used for non-commercial purposes. It does not apply to such vessels when they are used for commercial purposes, nor is it applicable to privately owned vessels.

While the application of sovereign immunity is not in question in respect of warships or other State vessels or aircraft whilst they are operational, there are three broad views amongst international jurists about the extent to which sovereign immunity continues to apply when such a vessel or aircraft is lost. The first position is that sovereign immunity remains applicable to all State owned or -operated vessels and aircraft used for non-commercial purposes, irrespective of the time elapsed since they were lost<sup>116</sup>. A second view is that sovereign immunity applies to such vessels and aircraft only for as long as it is necessary to protect State interests (for example, where secret or sensitive technology is on board the wreck). The third view is that sovereign immunity ceases to apply when the vessel or aircraft sinks or crashes, because it can no longer operate and has ceased to be a functioning unit for the purpose for which it was designed and built<sup>117</sup>.

In respect of the legal status of their sunken warships and State vessels the UK and other major maritime States subscribe to the first of these positions<sup>118</sup> and are of the view that unless expressly relinquished or abandoned by the flag State, the sovereign immunity of the wreck of any of their

warships or State vessels remains in place, regardless of where the wreck in question is located or the passage of time<sup>119</sup>. Historical wrecks, which by virtue of their age can be classified as archaeological sites, can thus remain sovereign immune in the eyes of the major maritime States.

The sovereign immunity of wrecks applies in all maritime zones, but is most apparent outside the territorial jurisdiction of Coastal States. Within Territorial Seas, there is at least tacit acceptance that the Coastal State has control over access, but that it should acknowledge the rights of the flag State of the sovereign immune vessel to some degree. The degree of such acknowledgement is not firmly established and varies in State practice from simply informing the flag State to requiring their express permission<sup>120</sup>.

Historically, the UK has generally been protective of the sovereign immunity of its wrecks, wherever located, and has intervened to assert sovereign immunity over its State vessels on a number of occasions when activities directed at these wrecks have been proposed<sup>121</sup>. At the same time, however, the UK has also sold the wrecks of many of its sunken warships and State vessels for salvage and scrap, which has had the effect of annulling the sovereign immunity of the wrecks in question<sup>122</sup>.

## **Sovereign Immunity and the 2001 Convention**

In order for the treaty text to be acceptable to the major maritime States, the 2001 Convention had to find a way of addressing the issue of the sovereign immunity of sunken warships that was acceptable to them and a good deal of time at the expert meetings in Paris which negotiated the text of the treaty went into trying to accommodate the concerns of these States<sup>123</sup>. In the end, however, the final text proved to be unacceptable to most of them, including the UK.

The position of the major maritime States has been set out in detail elsewhere<sup>124</sup>. In basic terms, however, they were concerned in respect of sovereign immunity that the measures in the 2001 Convention which deal with the wrecks of sunken warships in the Territorial Seas of other States would result in an unacceptable erosion of the rules related to the sovereign immunity of warships and State vessels in international law and codified in the LOSC, the Brussels *Convention on Salvage* 1910 and the *International Convention on Salvage* 1989.

Of particular concern were the provisions dealing with the regime for managing sunken State vessels in the Territorial Sea (Article 7(3)) of a Coastal State which was not the flag State. The major maritime States, including the UK, expressed the view that the Convention does not make it sufficiently clear that no action by another State and / or its flag vessels or nationals can be taken in respect of sovereign immune wrecks in the Territorial Sea of another State without the express consent of the flag State of the wreck<sup>125</sup>.

This view formed the basis of one of the UK's objections at the time of the vote in 2001: that the Convention used 'should' rather than 'shall' in respect of a Coastal State's obligation, under Article

7(3), to inform the flag State of the discovery within its Territorial Sea of identifiable State vessels and aircraft.

## **Definition of State Vessels and Aircraft**

The legal position of the major maritime States in respect of their sunken warships and aircraft, especially with regard to sovereign immunity, meant that the inclusion of these wrecks in any international treaty like the Convention would be contentious. The issue was in fact felt to be so contentious that the original 1994 ILA draft Convention, which formed the basis of the current UNESCO document, specifically excluded them from its scope<sup>126</sup>.

Because sunken warships and aircraft comprise a substantial and important portion of the world's underwater cultural heritage<sup>127</sup>, however, and the aim of the Convention is to create an international regime for dealing with all underwater cultural heritage the exclusion of these sites from the scope of the Convention would have substantially devalued the entire regime. Sunken warship and aircraft wrecks were, therefore, ultimately included in the 2001 Convention under a definition which broadly reflects that used in other treaties, including the LOSC (Article 32) and the 1989 *International Convention on Salvage* (Article 4(1))<sup>128</sup>. They are described as 'State vessels and aircraft' - which Article 1(8) defines as vessels which were State owned or -operated and used only for non-commercial government purposes when lost, which can be identified as such and which are more than 100 years old.

The key difference between this definition and those in the LOSC and the *International Convention on Salvage* is that the 2001 Convention limits its application to those State vessels and aircraft that meet the criteria for being underwater cultural heritage - i.e. they must have been partially or totally under water, periodically or continuously, for at least 100 years.

This means that modern sunken State vessels, to which potential security and technology-related sensitivities may be attached, do not fall under the purview of the 2001 Convention and continue to be governed by the LOSC, the *International Convention on Salvage* and customary international law.

## **Possible Resolutions to UK Concerns**

In respect of the 2001 Convention, like the UK, a number of other major maritime States expressed concern either during the negotiations or at the vote in 2001, about the treatment of sovereign immune wrecks. This concern was material to the positions taken by a number of these States, the UK included, at the vote on the adoption of the Convention in 2001.

That there is the potential for resolving these concerns is shown by a number of these States which have since ratified the 2001 Convention. Spain, for example, had concerns at the start of the Paris negotiations, but by the time of the vote in 2001 was of the opinion that the Convention 'did not prejudice its longstanding legal position' with regard to its sunken State vessels, and was thus able to support the treaty<sup>129</sup>. In 2005 Spain was one of the first States to ratify the Convention<sup>130</sup>.

France too, having cited the Convention's treatment of sunken State vessels as one of its reasons for abstaining from the 2001 vote, appears to have decided that the advantages which will flow from being a party to the Convention outweigh its other concerns with the treaty<sup>131</sup> and ratified the Convention in 2013<sup>132</sup>. As mentioned already, by 2010 the French view was that since the adoption of the Convention, 'practice ... showed that in all factual cases the cooperation between the concerned States functioned very well and France's sovereign rights were respected', leading France to the conclusion that the 2001 Convention 'does in fact not change the pre-existing legal status of State vessels in a negative way'<sup>133</sup>. This ratification has been described as an important breach in what has been called the major maritime States' 'wall of resistance' to the Convention<sup>134</sup>.

Other maritime States have, or are, thus coming to the conclusion that their technical objections in respect of the 2001 Convention's treatment of sunken warships are not insurmountable and appear to be outweighed by the benefits that the protective regime of the Convention affords underwater cultural heritage, including sunken warships<sup>135</sup>.

There appear to be four main reassurances or areas of potential benefit within the Convention with respect to sunken warships that have led these States to this change in position, and which the UK could consider were it to re-evaluate its position in respect of the Convention. These are:

- The so-called 'saving' clause in Article 2(8) which implies that the legal status of sunken State vessels will not be affected by the 2001 Convention;
- The use of a definition of sunken warships and State vessels that shifts the focus of what defines them away from one based on sovereign immunity, to such a vessel having been an official vessel of a particular State at the time of its loss;
- The concept of 'verifiable links' which allows for the notification of and consultation with States which express a cultural, historical or archaeological link to a site found in the Territorial Sea, the EEZ or on the Continental Shelf of another State; and
- The fact that one of the defining principles of the Convention is the requirement for co-operation between States Parties in the protection of underwater cultural heritage - particularly between Coastal States and flag States.

### **Article 2(8)**

Article 2(8) states that 'consistent with State practice and international law, including the LOSC, nothing in the Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft'.

The clause was included in the text of the Convention to provide reassurance for the maritime States, who believe that their policy and practice in respect of the sovereign immunity of their sunken State vessels (i.e. that it continues to apply after loss and that flag State approval is thus required for

activities directed at such sites) is a reflection of international law, despite this interpretation being by no means universally accepted. The clause implies that the legal status of sunken State vessels, as defined by State practice and international law, will not be affected by the 2001 Convention and that there will be no dilution of the concept of sovereign immunity under the Convention<sup>136</sup>.

By introducing a degree of flexibility into the manner in which problematic 2001 Convention articles (particularly Articles 7(3) and 10(7))<sup>137</sup> that address jurisdictional issues can be interpreted, this saving clause arguably reinforces, rather than dilutes, the major maritime State claims that consent for activities is required, whether their interpretation of the application of sovereign immunity is correct, or not. For States who claim sovereign immunity for their sunken State vessels by pre-existing law, this is not changed by the 2001 Convention.

Furthermore, Aznar<sup>138</sup> argues that recent State practice, particularly the judicial decisions in the US, regarding *in rem* actions directed at a number of sunken Spanish State wrecks, may underscore the 'without prejudice' clause included in Article 2(8) as it relates to sovereign immunities and State vessels, and potentially provide comfort to major maritime States like the UK.

### **State Vessel versus Sovereign Immunity**

A further area of importance in the way in which sunken warships are defined in the 2001 Convention relates to use of the term 'sovereign immunity'.

Other than in Article 2(8), the 2001 Convention text only refers to 'sovereign immunity' in respect of the activities of modern, operational warships in Article 13<sup>139</sup>.

In dealing with sunken warships, the 2001 Convention uses the term 'State vessels' - as defined in Article 1(8) (see above). This shifts the focus on what defines sunken warships away from one based on their retaining sovereign immunity, which may be arguable, to one based on their having been, at the time of their loss, official craft of a particular State. In other words, it is the fact that a vessel was operating as an official vessel of a particular State - that it had an official or government function - which is important, not that it was, or may be, sovereign immune.

This is a subtle but important distinction, and one which leaves unasked and unanswered the question of whether such wrecks are sovereign immune. Instead it gives maritime States like the UK the opportunity of participating, through the 2001 Convention, in the management of the wrecks of such vessels simply on the basis of their having been State vessels when lost. The question of whether such sites are sovereign immune, or the need for the UK's interpretation of the application of sovereign immunity in perpetuity to such sites being accepted by the Coastal State involved does thus not arise from the manner in which the Convention deals with these wrecks.

In this regard it is worth noting that the clause 'should inform' in Article 7(3) applies to the *discovery of State vessels and aircraft* and Article 7(3) need not, therefore, be regarded by the UK as diminishing

its view that the Coastal State is obliged to inform (i.e. 'shall inform') the flag state of a *wreck that has sovereign immunity* if any *interference* with the wreck is proposed.

The practical usefulness of application of the concept of 'State vessel' to the management of the UK's sunken warships can be seen in respect of those of its warship wrecks which the UK has historically sold or alienated. Because they have been sold or their ownership has been transferred away from the UK, these wrecks are no longer sovereign immune and the UK thus has no grounds for either expecting to be consulted, or being able to intervene in activities directed at such sites.

The recent salvage-driven interventions in the wrecks of the World War I cruisers, *Aboukir*, *Cressy* and *Hogue* referred to earlier are a case in point. These wrecks were sold for salvage and scrap in the 1950s. The UK is no longer able to claim that they are sovereign immune and thus has no rights in respect of these sites under the concept of sovereign immunity within international law. The fact that these wrecks represent ships which were UK State vessels at the time of their loss is not, however, affected by either the passage of time or their sale. As the State operating these vessels when they were sunk, the UK could - if both it and the Netherlands were parties to the Convention - expect to have its agreement sought by the Coastal State for activities directed at these sites, under the terms of Article 10(7).

Unlike sovereign immunity which can be alienated and the continued application of which would thus need to be proved on a wreck by wreck basis, the wrecks of such vessels do not lose their status as State vessels under the Convention, irrespective of their sale or other action by the State which operated them at the time of their loss<sup>140</sup>.

Under the Convention, the UK's interest in its sunken warships would thus always remain and no proof other than the identification of a wreck as a former British warship or State vessel lost on active or official service would be required for the UK to express an interest in, and expect to be consulted on the future management or investigation of such a site.

### **Verifiable Links**

The 2001 Convention creates the new concept of a 'verifiable link' to underwater cultural heritage. This allows, as part of the 2001 Convention's management regime, for the notification of and/or consultation with States which express a cultural, historical or archaeological link to a site found in the Territorial Sea, EEZ or Continental Shelf of another State, or in the Area.

The maximum benefit to any flag State in respect of the concept of a verifiable link accrues when it actually ratifies the 2001 Convention because in order to have the right to be consulted about a site in the EEZ or on the Continental Shelf of a State Party to the Convention, the State with a verifiable link also needs to be a State Party to the Convention (see Articles 9(5) and 10(3)). The same applies in respect of the Area (see Articles 11(4) and 12(2)).

In circumstances where questions arise over whether a particular wreck is a State vessel or not - something that becomes increasingly difficult to establish the further back in time you go - the concept of verifiable link offers a potential flag State another means of involvement in decisions regarding the management of the site which it would otherwise not have had on the basis of either sovereign immunity or the State vessel status of the site.

For countries like the UK, which have a substantial global underwater cultural heritage of vessels that were *not* State vessels - for example the numerous wrecks of English East India Company ships and other British merchant vessels<sup>141</sup> - the concept of verifiable link, through its applicability to a much broader range of underwater cultural heritage, also gives flag States new opportunities to be involved in determining the future of their wider underwater cultural heritage where it lies outside their own waters.

### **Co-Operation**

A fourth and critically important potential benefit of the 2001 Convention in respect of sunken warships and State vessels is the fact that one of the defining principles of the Convention is the *requirement* for co-operation between States Parties in the protection of underwater cultural heritage: particularly between Coastal States and flag States, required in Article 2(2), which provides that 'States Parties *shall* cooperate in the protection of underwater cultural heritage' (emphasis added).

The underpinning of the entire 2001 Convention by the *duty* to co-operate 'on the best methods of protecting the site of a sunken State vessel'<sup>142</sup> suggests that it would be most unlikely that a State Party to the 2001 Convention would fail to contact another State Party where the latter was the flag State. Practice already indicates that generally speaking Coastal States 'show considerable sensitivity in dealing with the discovery of State vessels in waters under their sovereignty and this cooperative spirit is only likely to be enhanced when States are operating under the requirements of the Convention'<sup>143</sup>.

In many instances the underwater cultural heritage in question may have as much, or more, cultural or historic significance to the Coastal State as it has to the flag State and collaboration in ensuring appropriate treatment and management of this mutual or shared heritage is best served by the cooperative framework established by Articles 7(3) and 10(7) and required in Article 2(2).

Through the co-operation they require from States and the strengthened roles they provide for the flag State in site protection and management, Articles 7 and 10 (and 12 - in relation to the Area), may thus in fact substantially increase, rather than diminish the UK's position with respect to its sunken State vessels.

Furthermore and as discussed above, co-operation between State Parties on the basis of a site being a State vessel, rather than its putative sovereign immunity is much more likely because it removes from the equation the fact that the application of sovereign immunity to such sites is not universally recognised.

## **Other Considerations**

Two further, general provisions in the 2001 Convention which will strengthen the protection offered to the UK's sunken State vessels are worth noting.

### ***In Situ Preservation***

*In situ* preservation of underwater cultural heritage is the first management option to be considered under the 2001 Convention (Article 2.5). Interference with or interventions in the wrecks of State vessels would thus not be permitted by States Parties to the Convention, unless justified and carried out in accordance with accepted archaeological practice. This principle and the applicable archaeological standards are codified in the Annex to the 2001 Convention - a document which most States, regardless of their position on ratifying the Convention itself, and including the UK, have accepted and endorsed.

### ***War Graves and Human Remains***

By virtue of their nature, sunken State vessels may have been part of important national and international historical events and their losses were often accompanied by substantial loss of life. These wrecks therefore represent the last known resting places of people whose lives were lost in the service of their country, and the sites can represent potent national symbols and memorials<sup>144</sup>. Their management and any intervention in these wrecks is thus bound to be a matter of political sensitivity for many nations, and flag State interest in sunken State vessels is often expressed as a concern to preserve the sanctity of the site and to ensure that any human remains present are afforded appropriate treatment<sup>145</sup>.

In the next few years the war grave status of sunken warships from World War I is likely to take on a new significance as the centenary of that conflict is commemorated. Recent salvage activities on a number of British World War I wrecks in the North Sea associated with large losses of life<sup>146</sup> have demonstrated that a reliance on sovereign immunity as a means to protect such sensitive sites from interference may be ineffective because many of these wrecks were sold for scrap after the war and are potentially no longer sovereign immune. In addition, there are the 25 sovereign immune British and German wrecks from the Battle of Jutland in 1916 in which 8645 sailors of both sides lost their lives, which are suffering regular damage from both salvage and fishing activities.

One of the fundamental principles of the 2001 Convention - Article 2(9) - requires, however, that States Parties must ensure that proper respect is given to all human remains<sup>147</sup>. This principle is not premised on concepts of sovereign immunity, flag or nationality, but is a general provision that has the potential, for flag States like the UK, with potentially large numbers of maritime graves around the world, to provide a further important strengthening of the protection offered to sunken State vessels.

## **Conclusion**

In respect of the UK's concerns in 2001 about its sunken warships and the measures in the Convention which deal with this category of sites, this review has found the following:

- More than a third of Royal Navy losses occurred within the UK's own Territorial Sea, EEZ or Continental Shelf. Only 20.7% of Royal Navy losses occurred in the Area.
- Over a quarter of the remaining 44.5% of losses are located in the Territorial Seas, EEZs or Continental Shelves of Coastal States around the world that have either already ratified the 2001 Convention or are considering ratification.
- Two thirds of Royal Navy losses currently fall outside the scope of the Convention, having occurred during World Wars I and II. By the end of 2018 a total of 1060 World War I losses will be more than 100 years old and will thus qualify as underwater cultural heritage.
- Other than in Article 2(8), the 2001 Convention text only refers to 'sovereign immunity' in respect of the activities of modern, operational warships in Article 13, which in the course of their activities may encounter underwater cultural heritage.
- Sunken warships are not referred to within the Convention in terms of their sovereign immunity, specifically because the interpretation of the application of the concept sovereign immunity to such sunken vessels in international law is not universally accepted.
- Although the Convention is silent on the question of the sovereign immunity of old wrecks, Article 2(8) provides reassurance that the treaty text will not affect their legal status and that there will be no dilution of the concept of sovereign immunity, as defined by State practice and international law, under the Convention. For States like the UK, who claim sovereign immunity for their sunken State vessels by pre-existing law, this is not changed by the 2001 Convention.
- Sunken warships are instead defined in Article 1(8) as vessels which were State-owned or -operated, used only for non-commercial government purposes when lost. It is the fact that a vessel was operating as an official vessel of a particular State which is key to the definition. The question of whether such sites are sovereign immune does not arise.
- As a party to the Convention, the State operating such vessels when they were lost can expect to be consulted by the Coastal State in respect of activities directed at these sites, simply on the basis of their having been State vessels when lost.
- Flag States, like the UK, are thus able to participate in the management of the wrecks of State vessels even in exclusive jurisdiction of the Territorial Seas of other States. The practical usefulness of this to the UK is clear in respect of those of its warship wrecks which it has historically sold or alienated, and which are thus no longer sovereign immune.
- The concept of a 'verifiable link' to underwater cultural heritage introduced in the Convention, provides a further reassurance to major maritime States in that they may express a cultural, historical or archaeological link to sites, including identifiable State vessels and aircraft, found in the

Territorial Sea, the EEZ or Continental Shelf of another State, or in the Area, and can expect to be either informed or consulted where activities are directed at such sites.

- The requirement for co-operation between States Parties in the protection of underwater cultural heritage in (Article 2(2)), particularly between Coastal States and flag States, is one of the defining principles of the Convention. The cooperative framework established by Articles 7(3) and 10(7) and the strengthened role it provides for the flag State in site protection and management may thus in fact substantially increase, rather than diminish the UK's position with respect to the 27% of its sunken State vessels located within the jurisdiction of States that have either already ratified the 2001 Convention or are considering ratification.

There are two Articles in the 2001 Convention which will strengthen the protection offered to the UK's sunken State vessels:

- *In situ* preservation of underwater cultural heritage is the first management option to be considered under the Convention (Article 2.5). Interference with or interventions in the wrecks of State vessels would thus not be permitted by States Parties to the Convention, unless absolutely justified and carried out in accordance with accepted archaeological practice.
- Article 2(9) requires that proper respect is given to all human remains. This provision has the potential, for flag States like the UK, with large numbers of maritime graves around the world, to provide a further strengthening of the protection offered to sunken State vessels.

In conclusion, this review has indicated that when viewed holistically the potential reassurances and special provisions in the 2001 Convention for sunken State vessels mean that, were the UK to ratify the Convention, the impact would be a strengthening, rather than weakening, of its position with respect to its identified sunken State vessels around the world.

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<sup>115</sup> Including the US, France, Germany, Spain, Netherlands and Russia.

<sup>116</sup> The Presidential Statement of United States Policy for the Protection of Sunken State Craft by President Bill Clinton on 19 January 2001, Public Papers of the Presidents: William J. Clinton, Vol. III, page 2956, Jan. 19, 2001, reprinted in Federal Register, Vol. 69, No. 24, Thursday, February 5, 2004, Notices, at 5648, and a series of unilateral declarations made by a number of maritime States also published in the Federal Register (Vol. 69, No. 24, 5 February 2004, Notices, at 5647-8) are a reflection of the position major maritime States in respect of sunken State vessels. See Aznar, M. 2010 Treasure Hunters, Sunken State Vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, *The International Journal of Marine and Coastal Law* 25 :222 and Dromgoole, S. 2013 *Underwater Cultural Heritage and International Law*, Cambridge University Press, for detail and further discussion of maritime State positions w.r.t. sunken warships.

<sup>117</sup> See O'Keefe, P.J. 2002 *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* and Williams, M.V. 2006 *UNESCO Convention on the Protection of the Underwater Cultural Heritage: An Analysis of the United Kingdom's Standpoint*, *The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House Seminar*, October 2005. For further discussion of this issue see also: Forrest, C, 2010 *International Law and the Protection of Cultural Heritage* pp.335-338; Calfish, L. 1982 *Submerged Antiquities and the International Law of the Sea* 13 *Netherlands Lawbook of International Law* 20; Roach, J.A. 1996 *Sunken warships and military aircraft* 20 *Marine Policy* 351; Bederman, D.J. 2000 *Rethinking the Legal Status of Sunken Warships* 31 *Ocean Development and International Law* 97; Forrest, C. 2003 *An international perspective on Sunken State Vessels as Underwater Cultural Heritage* 34 *Ocean Development and International Law* 41; Migliorino, L.1985 *The Recovery of Sunken Warships in International Waters* in Vukas, B. (ed.) *Essays on the New Law of the Sea*.

<sup>118</sup> See Aznar 2010 op. cit.

<sup>119</sup> The UK declaration in the Federal Register op. cit. states that 'State vessels and aircraft continue to enjoy sovereign immunity after sinking, unless they were captured by another State prior to sinking or the flag State has expressly relinquished its rights. The flag State's rights are not lost merely by the passage of time'. See Williams, op. cit.; O'Keefe, op. cit.

<sup>120</sup> Dromgoole 2013 op.cit. pp 139-146.

<sup>121</sup> For example, the case of HMS *Birkenhead*, lost off the South African coast in 1852 (see Gribble, J. 2009, HMS *Birkenhead* and the British warship wrecks in South African waters in Proceedings of the Shared Heritage Seminar, University of Wolverhampton, 8 July 2008).

<sup>122</sup> For example, the wrecks of three World War I cruisers, HMS *Aboukir*, *Cressy* and *Hogue*, which were all sunk by torpedo on 22 September 1914. The wrecks were sold for scrap by the UK Government in 1954.

<sup>123</sup> See O'Keefe 2002 op. cit. pp. 30–31.

<sup>124</sup> See O'Keefe 2002 op. cit., Dromgoole, S. 2011, Why the UK should reconsider the UNESCO Convention, in Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar; and Dromgoole, 2013 op. cit. for more detailed discussion of the these Articles and the issues related to them.

<sup>125</sup> FCO note to UNESCO, February 2000: '... it is essential that the Convention respects the sovereign rights of States over their sunken warships and other vessels or aircraft operated for non-commercial purposes. To this end, the Convention must make clear that no action may be taken in respect of such vessels without the consent of the flag State.' See O'Keefe, op. cit. and Dromgoole, S, 2012 Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, in Marine Policy for discussion of the debate regarding Articles 7, 10 and 12.

<sup>126</sup> O'Keefe, 2002 op.cit. pp 76 and Dromgoole 2013 op. cit.

<sup>127</sup> See Appendix 2.1: Royal Navy Loss List

<sup>128</sup> Article 4(1) refers to the non-application of the International Convention on Salvage to 'warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognized principles of international law...'; see also Article 14 Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea 1910.

<sup>129</sup> Aznar 2010 op. cit. pp 219.

<sup>130</sup> Aznar 2010 op. cit. and Dromgoole 2013 op.cit.

<sup>131</sup> L'Hour, M. 2011 An update on France's position regarding the UNESCO Underwater Cultural Heritage Convention, in Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK: Proceedings of the JNAPC 21st Anniversary Seminar.

<sup>132</sup> See [http://www.unesco.org/new/en/media-services/single-view/news/france\\_ratifies\\_the\\_unesco\\_2001\\_convention\\_on\\_the\\_protection\\_of\\_the\\_underwater\\_cultural\\_heritage/](http://www.unesco.org/new/en/media-services/single-view/news/france_ratifies_the_unesco_2001_convention_on_the_protection_of_the_underwater_cultural_heritage/)

<sup>133</sup> L'Hour, M 2011 op. cit.

<sup>134</sup> Dromgoole 2013 op. cit.

<sup>135</sup> *ibid*

<sup>136</sup> Aznar 2010 op.cit. 219.

<sup>137</sup> Particularly Article 7(3) which provides that within their archipelagic waters and Territorial Sea, Coastal States 'should inform the flag State Party ... with respect to the discovery of such identifiable State vessels and aircraft' and Article 10(7) which requires the agreement of the Flag State and collaboration of the Coordinating State in respect of activities directed at sunken State vessels within the EEZ or on the Continental Shelf.

<sup>138</sup> Aznar 2010 op. cit.

<sup>139</sup> Article 13 – Sovereign immunity: Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.

<sup>140</sup> This is particularly relevant to the UK which had a policy, until the passage of the *Protection of Military Remains Act* (1986), of selling such wrecks for salvage and scrap and numbers of World War I and II Royal Navy wrecks were disposed of after both wars. Examples include the World War I cruisers *Hogue*, *Aboukir* and *Cressy* lost in the North Sea off the Netherlands were sold to a German salvage company and HMS *Natal* in Cromarty Firth, although the latter has subsequently been designated under the PMRA 1986.

<sup>141</sup> For example Sir Francis Drake's vessels *Elizabeth* and *Delight* which were scuttled off the coast of Panama shortly after his death in 1596 and which may recently have been located (<http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/panama/8847105/Sir-Francis-Drakes-final-fleet-discovered-off-the-coast-of-Panama.html>)

<sup>142</sup> Dromgoole 2013 op. cit. pp 21.

<sup>143</sup> *ibid.*

<sup>144</sup> *ibid.* The wrecks of the SS *Mendi* (see <http://www.wessexarch.co.uk/projects/marine/eh/ssmendi/index.php>) and HMS *Hood* (see [http://en.wikipedia.org/wiki/HMS\\_Hood](http://en.wikipedia.org/wiki/HMS_Hood)) are examples.

<sup>145</sup> HMS *Birkenhead* (1852) referred to already is an example. After the then South African National Monuments Council issued a salvage permit for the wreck in the mid-1980s, the UK Government declared that it retained 'its interest in the wreck and contents as a war grave'. An agreement was reached between the two governments in 1987 in terms of which the South African authorities would seek to ensure that the salvors treated reverently and refrained from disturbing or bringing to the surface any human remains (see Gribble. 2009 op. cit.).

<sup>146</sup> For example, the wrecks of HMS *Cressy*, *Hogue* and *Aboukir* which together accounted for 1,459 lost lives. It should be noted with respect to the recent salvage work on these wrecks that the current Dutch salvor is not the one to whom the wrecks were sold in the 1950s.

<sup>147</sup> Rule 5 of the Annex also deals with human remains, stating that 'activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites'. Dromgoole (2013: 328) makes the point that guidance on Rule 5 in the UNESCO Manual for Activities Directed at Underwater Cultural Heritage emphasises the need for respect for people's feelings where human remains are associated with underwater cultural heritage and suggests that interested parties should be involved in both the planning and authorisation of activities directed at such sites.



# **Paper 3. Significance: The meaning of underwater cultural heritage, activities directed at underwater cultural heritage, the application of the Rules, and their implications for managing underwater cultural heritage in the UK**

## **Key Messages**

- The Convention takes an approach to protection that is based on activities directed at underwater cultural heritage, rather than on the designation of individual sites as has been the practice traditionally in the UK.
- An activity-based approach does not impede the management of sites based on their significance.
- The scope of activities to which the Convention applies is quite limited and the likely numbers of activities are small, especially relative to the quantities that are routinely addressed in respect of cultural heritage on land.
- Recent updates to legislation on marine licensing mean that the UK now has systems in place that are capable of giving effect to the requirements of the 2001 Convention in the Territorial Sea.
- The number of known wrecks over 100 years old in the UK Territorial Sea is much lower than estimated in 2001. Notwithstanding, it is not the number of wrecks within a State Party's Territorial Sea that is critical for implementing the 2001 Convention, but the number of activities directed at such sites.

## **Introduction**

In the letter accompanying its Explanation of Vote in 2001, the UK characterised one of the reasons for not voting in favour of the Convention as 'the unqualified requirement to afford the same levels of protection to all underwater archaeology over 100 years old'<sup>148</sup>. This reason was elaborated in the Explanation of Vote<sup>149</sup> (emphasis added):

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

The concern for being able to concentrate effort on 'the most important' - which the UK had advocated in the course of the negotiations<sup>150</sup> - has caused this reason to be referred to as the 'significance'

point. 'Significance' is the term used by archaeologists in the UK to refer to the specific value to this and future generations of any particular item of cultural heritage ('heritage asset')<sup>151</sup>, equating to the term 'importance' that is commonly used in UK heritage legislation<sup>152</sup>. Understanding the UK's concern about significance requires that the points highlighted in the Explanation of Vote are explored; but this exploration must first take into account how the 2001 Convention might affect Coastal States' protection of underwater cultural heritage in their own domestic waters.

The 2001 Convention is concerned principally with creating mechanisms that offer protection to underwater cultural heritage that lies outside the boundaries within which the rights of Coastal States to exercise protection are already recognised<sup>153</sup>. That is to say, the substantive clauses of the Convention are largely intended to set in place a system that can be applied outside the Territorial Sea. However, the UK Government's concern about significance was framed not in terms of the more distant zones, but of the perceived implications within its own Territorial Sea.

The key clause of the Convention referring to the Territorial Sea is Article 7(2):

'States parties shall require that the Rules<sup>154</sup> be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea'.

The UK does not have archipelagic waters in the sense employed in the international law of the sea, and internal waters form part of 'tidal waters' – with the Territorial Sea – for the purposes of UK marine legislation<sup>155</sup>. Practically, therefore, Article 7(2) would require the UK to apply the Rules to activities directed at underwater cultural heritage in the UK's tidal waters to the limit of the Territorial Sea.

Three aspects of this requirement warrant further consideration: first, the meaning of underwater cultural heritage; second, the meaning of 'activities directed at underwater cultural heritage'; and third, applying the Rules.

## **Underwater Cultural Heritage**

Underwater cultural heritage is defined in Article 1(a) as:

'All traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years'.

The encompassing scope of this definition - that underwater cultural heritage means *all* traces - appears at least partly responsible for the UK Government's concern that the Convention required the same level of protection irrespective of the significance of individual sites. Notwithstanding, the UK has since ratified the Valletta Convention - which has a similarly encompassing definition<sup>156</sup> - and has also used very broad definitions when formulating policy under the UK Marine Policy Statement (emphasis added):

'The historic environment includes **all aspects** of the environment resulting from the interaction between people and places through time, including **all surviving physical remains** of past human activity, whether visible, buried or submerged'<sup>157</sup>.

As innumerable instances of heritage management practice demonstrate, this use of a broad definition - 'all aspects; all surviving remains' - in UK domestic policy does not preclude protection from being tailored to the significance of different heritage assets. Equally, the broad definition of underwater cultural heritage in the 2001 Convention need not preclude an approach centred on significance.

It is notable in the Article 1(a) definition that 'all traces' is tempered by the phrase 'having a cultural, historical or archaeological character'<sup>158</sup>. This indicates that there are traces of human existence that have been underwater for at least 100 years, but which are not underwater cultural heritage because they do not have a cultural, historical or archaeological character. As we inhabit a world in which the traces of human existence are all-pervasive, even in the deep oceans, this clause draws an essential distinction between traces whose character is such that they can convey cultural or historical or archaeological meaning, and all those traces of human existence that are meaningless from these perspectives. Of course, this is not an absolute or unchanging threshold, and traces of human existence can have archaeological characteristics alongside other characteristics. Whether traces of human existence qualify as underwater cultural heritage involves, therefore the exercise of judgement and balance by State Parties as to whether the character of specific traces at a particular time and place is predominantly cultural, historical or archaeological. The scope to apply judgement to the identification of underwater cultural heritage can be regarded to some extent as meeting the UK Government's concern about significance.

The application of judgment about character pervades archaeological practice and warrants elaboration. Artefacts and structures typically survive in a matrix of seabed sediment that is itself a trace of human existence; seabed sediment can certainly be interpreted to address questions of sequence, chronology, human environment and so on. During excavation, samples of the matrix of sediment will usually be obtained, analysed and even retained as part of the project archive, but the bulk of the matrix is discarded or disregarded. Once disturbed, the sediment itself is unlikely to be regarded as underwater cultural heritage. Equally, peaty deposits may contain traces that are hugely informative about now-submerged environments in which people lived in prehistory. However, such peaty deposits are unlikely to be regarded as being underwater cultural heritage in themselves unless artefactual material is also present or there is some other key attribute that conveys archaeological value<sup>159</sup>. In a further example from the North Sea, Palaeolithic flints are being found within gravel horizons that can be interpreted for what they mean about early human occupation; but the gravel itself is not considered to be underwater cultural heritage.

As the 100 year period set out in Article 1(a) increasingly encompasses sites of the industrial age, there are other aspects of character that need to be considered. Ordnance, chemicals, fuel oil and bulk cargoes are traces of human existence that are also hazardous to people and the environment;

their characteristics as hazards could be judged as outweighing their archaeological character, such that they are not treated solely or even principally as underwater cultural heritage. The same may be true of bulk materials that may be recorded and discarded in the course of investigation, such as ballast stones, cargoes of bulk materials such as coal, ore or cement, or the steel plates of a hull. The archaeological character of such material is sufficient that it be considered as underwater cultural heritage in the course of investigation, but this character then subsides and the material is treated in terms of other characteristics that become dominant. This line of argument does not encompass, however, material that retains its cultural, historical or archaeological character and is manifestly valued for those characteristics; cargoes of amphora, porcelain or specie will remain underwater cultural heritage irrespective of their quantity for as long as people are willing to trade, sell, buy or barter them because of their cultural, historical or archaeological character.

To summarise, the definition of underwater cultural heritage in the 2001 Convention does not preclude an approach to protection that acknowledges significance. Although framed in broad terms, the definition is consistent with other all-encompassing definitions to which the UK subscribes both internationally and domestically. Furthermore, the caveat about cultural, historical or archaeological character allows the exercise of a degree of judgment as to which traces of human existence are to be regarded as underwater cultural heritage.

## **Activities Directed at Underwater Cultural Heritage**

‘Activities directed at underwater cultural heritage’ are defined in Article 1(6) of the 2001 Convention to mean:

‘Activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage’.

This definition has two components that must both be satisfied if activities are to be regarded as ‘activities directed at underwater cultural heritage’, namely:

‘Underwater cultural heritage must be the primary object of the activities’

AND

‘The activities may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage’.

It can be seen, therefore, that the scope of ‘activities directed at underwater cultural heritage’ is much narrower than the full range of activities that may involve underwater cultural heritage. Article 7(2) requires only that the Rules be applied to activities that fall within this narrow scope.

To elaborate, activities that have underwater cultural heritage as a primary objective but that are non-intrusive - that is to say they do not risk disturbing or damaging underwater cultural heritage - do not qualify as ‘activities directed at underwater cultural heritage’ for the purposes of the Convention. This

means that the Rules need not be applied to non-intrusive activities in the Territorial Sea (though of course the Coastal State may choose to do so in their domestic laws). Many forms of archaeological survey, for instance, do not require or risk physical disturbance or damage. O’Keefe cites visits by tourists to a site which involve only viewing of the wreck as another activity that falls outside the definition<sup>160</sup>. Indeed, Article 2(10) of the 2001 Convention obliges State Parties to encourage responsible non-intrusive access.

Similarly, activities that disturb or damage underwater cultural heritage but which do not have underwater cultural heritage as their primary object also fall outside the narrow scope of activities to which the Rules apply. Where underwater cultural heritage is not a primary object, activities fall within the scope of ‘Activities incidentally affecting underwater cultural heritage’ as defined in Article 1(7) and for which provision is made in Article 5.

There is, of course, scope to debate the circumstances in which underwater cultural heritage is ‘a primary object’, and whether ‘activities may, directly or indirectly, physically disturb or damage’. O’Keefe suggests that the test of whether something is a primary objective is not the actual intent of the person undertaking the activity, but of what a normal person would conclude about the intention<sup>161</sup>. It is clear from the Convention as a whole that seeking to exploit underwater cultural heritage for financial gain such that the assemblage would be irretrievably dispersed would be a case where underwater cultural heritage was the primary object, even if the ultimate aim is to make money.

This suggests that where the attributes of the underwater cultural heritage itself are motivating the activity because of its cultural, historical or archaeological character, or because of the value of the materials from which it is made, then the underwater cultural heritage is to be regarded as the primary object. If the attributes of the underwater cultural heritage do not motivate the activity - that is to say, the activity would take place irrespective of its characteristics as cultural heritage - then underwater cultural heritage is not a primary object. To take fishing for crabs or lobsters as an example, fishermen may deploy their pots over a historic wreck simply because its upstanding features provide an attractive habitat to the shellfish they are targeting. The fact that the wreck is underwater cultural heritage does not add or detract from the fishermen’s motivation, so theirs is an activity incidentally affecting underwater cultural heritage rather than an activity directed at underwater cultural heritage.

Some activities may appear to be finely balanced with respect to their motivation. For example, an ecologist wishing to take seabed samples to examine the benthic habitat that has developed around a historic wreck is motivated in part by the character of the wreck. The salvage of unprocessed ore from a 19<sup>th</sup> century cargo ship is not motivated by the character of the wreck, but the salvage process is highly likely to have implications for its future condition. The emergence of finely balanced interpretations of the ‘primary object’ of activities is likely to take place through the international development of State practice. The UK may have an interest in ratifying the Convention in order to take a direct and active role in the fora provided by the Convention in which State practice will be debated and codified.

With respect to whether activities ‘may, directly or indirectly, disturb or damage’, it is again state practice that will help establish the detailed interpretation of this clause. The use of ‘may’ can be taken to imply either a precautionary approach or a risk-based approach. A precautionary approach might mean that the Rules are to be applied if there is even a chance that the activity might physically disturb or damage underwater cultural heritage; whereas a risk-based approach is more likely to mean that broad guidance can be drawn-up about which activities require application of the Rules and which activities are generally exempt. Such a risk-based approach would help guide the application of judgement where there is a possibility that disturbance or damage may occur unintentionally, as it would appear to a normal person<sup>162</sup>.

By way of example, many forms of survey are non-intrusive; but it might be very hard to provide absolute assurance that in no circumstances would disturbance or damage ensue. A risk-based approach might conclude that the possibility of damage occurring was very slight and that consequently non-intrusive survey need not be subject to the Rules. Again, guidance on how to address such situations is likely to emerge from state practice as discussed through the fora provided by the Convention; UK perspectives on these points can only have weight if it is able contribute formally to these fora.

It is certainly conceivable - in certain circumstances and subject to various caveats - that activities directed at underwater cultural heritage that are not intended to cause disturbance or damage, including visits and non-intrusive surveys, might be regarded as not being subject to the Rules. Currently, visits and surveys are activities that are subject to specific forms of licence when they take place on sites designated under the *Protection of Wrecks Act 1973*, and which are thereby subject to the UK’s commitment to apply the Rules to its current operations. Visits and surveys are in fact the most common form of licensed activity, accounting for 52 of 66 (79%) licences in 2010-2011<sup>163</sup>.

It is not the suggestion here that visits and surveys should not be subject to licence on designated wrecks, as the UK is free to adopt such higher levels of protection as it sees fit. However, the application of the Rules to such forms of activity can be regarded as having arisen voluntarily from UK domestic practice rather than being an obligation required by the 2001 Convention. This is relevant in considering activities directed at underwater cultural heritage on non-designated sites should the UK ratify the Convention. If activities that are not intended to cause disturbance and damage are considered to fall outside the obligation in Article 7(2) about application of the Rules, then the number of activities each year that will require authorisation by virtue of the 2001 Convention may be very small.

## **Applying the Rules**

In the sections above it has been argued that the Convention requires that the Rules be applied only to a very narrow range of activities concerned with underwater cultural heritage. Many archaeological activities need not be subject to the Rules. However, if the activity is motivated by the attributes of the underwater cultural heritage and where disturbance or damage is intentional, intrinsic or very likely to

occur, then the Rules must be applied in all instances: irrespective of the importance of the underwater cultural heritage; and irrespective of designation. The excavation of underwater sites and recovery of artefacts falls squarely within this scope; it is these forms of activity that the 2001 Convention plainly seeks State Parties to regulate.

The Rules are set out in the Annex to the Convention. They are modelled on the provisions of the 1996 ICOMOS *Charter on the Protection and Management of Underwater Cultural Heritage* (the Sofia Charter) which was, in turn, modelled on professional codes for archaeological practice, including those of the UK's Institute for Archaeologists. The Rules do not prescribe outcomes for archaeological activities; rather, they offer a standard for how archaeological work should be conducted. This standard sets out, as general principles, a series of norms for archaeological activities. It then provides that work should be carried out in accordance with a formal project design, which is to be authorised in advance of the proposed activities by the competent archaeological authority. The purpose of the project design is to describe explicitly every aspect of the proposed work so that it can be scrutinised; the scope of the project design - encapsulating all the matters that need to be addressed - is the focus of much of the substance of the Rules.

The norms that are provided as General Principles are as follows:

- Protection by preserving *in situ* is to be the first option.
- Commercial exploitation for trade, speculation or irretrievable dispersal is incompatible with protection and proper management. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.
- Adverse impacts on underwater cultural heritage arising from archaeological activities are to be minimised.
- Non-destructive techniques and methods are to be preferred over recovery of objects, and excavation and recovery are to make use of techniques and methods that are as non-destructive as possible.
- Unnecessary disturbance of human remains or venerated sites is to be avoided.
- Activities directed at underwater cultural heritage are to be strictly regulated to ensure proper recording.
- Public access is to be promoted.
- International co-operation is to be encouraged.

Bearing in mind the pedigree of the Rules, it is not surprising that these general principles are consistent with professional standards of archaeological practice and with government policy towards the historic environment in the UK.

The role and scope of project designs is set out in Rules 9-10. Rules 11-36 then set out in further detail the requirements that apply under each of the headings of the project design. As well as practical matters, the Rules include the obligation to set out details of funding and the project timetable, including contingency plans if funds or timetable are disrupted. Again based on existing professional practice, the Rules require only that those wishing to carry out activities directed at underwater cultural heritage must set out the measures that they anticipate in order to conduct, and deal with the consequences of the work they propose. The Rules do not themselves present hurdles; they simply ask the applicant to address the hurdles to which their work will give rise. Although not onerous to those who are prepared to consider the conduct and consequences of their activities in advance, the Rules make it difficult to hide practices that are incompatible with the protection of underwater cultural heritage.

Having looked in detail at the meaning of Article 7(2) in its application to the protection of underwater cultural heritage in the Territorial Sea, consideration can return to the reasons offered by the UK in the Explanation of Vote in 2001 for its concern about significance.

### **Protecting all Underwater Archaeology over 100 Years Old**

‘... the text obliges signatory States to extend the same very high standards of protection [already followed by the UK with regard to designation of wreck sites within its territorial sea and internal waters] to **all underwater archaeology over 100 years old**’.<sup>164</sup>

Many countries protect archaeological sites by regulating archaeological activities wherever they take place. This can be regarded as an ‘activity-based’ approach to heritage protection. Activity-based approaches are generally based on a legal regime that applies to all forms of archaeological material that meet criteria under a definition of ‘archaeological’; all activities that are concerned with archaeological material, broadly defined, require some form of authorisation. In the UK, the tradition has been to regulate activities only where they occur on specific sites, by applying restrictions to the sites themselves. This can be regarded as a ‘site-based’ approach to protection; of all the material that meets criteria of being ‘archaeological’, only a selection is protected. The 2001 Convention takes the first, activity-based, approach: it makes no reference to protecting sites, referring only to regulating ‘activities directed at underwater cultural heritage’.

Because of its site-based tradition, the main way in which the UK would have been capable of regulating activities directed at underwater cultural heritage in 2001 was through its licensing of wrecks that had been designated, which were (and remain) few in number. It would be relatively straightforward to give effect to the Convention in respect of these few designated wrecks through existing licensing procedures. However, in order to extend the application of the Rules to *all* underwater cultural heritage, the UK Government expressed the belief that it would be obliged to designate every wreck site over 100 years old in its Territorial Sea.

This perceived obligation to designate all wreck over 100 years old was not a requirement of the Convention. Rather, it was a consequence of the UK's site-based approach to protection. The 2001 Convention does not oblige State Parties to designate all sites over 100 years old.

## The Number of Wrecks in the UK's Territorial Sea

'It is estimated that there are probably about **10,000 wreck sites** on the seabed under the United Kingdom's territorial sea and it would be neither possible nor desirable to extend legal protection to all of them'.<sup>165</sup>

As noted above, the Convention is concerned with activities rather than sites and, to this end, it is the number of activities directed at underwater cultural heritage that is of direct relevance to implementing the Convention, rather than the number of sites. Notwithstanding, even the number of 10,000 wrecks stated in the UK Explanation of Vote is open to question.

A review in 2010<sup>166</sup> of the number of wrecks recorded in the national records pertaining to England, Scotland, Wales and Northern Ireland indicated that the actual number of known wrecks (i.e. wrecks which have been located and are known to exist on the seabed) that would meet the Convention's definition of underwater cultural heritage in UK Territorial Sea is less than 1000, i.e. less than 1/10th of the figure that the Government suggested.

Much larger figures are sometimes cited. For example in 2002, English Heritage stated that the National Monuments Record (NMR - now the National Record of the Historic Environment (NRHE)) contained records of over 40000 marine sites for England alone<sup>167</sup>. This number was so large because 'marine sites' in the NMR include ships that are documented as being lost in English waters even though no traces have yet been found, and sites where fishing nets have snagged but the cause of the snag – or its age – are not known. The actual number of known wrecks in English waters at the time these records were assessed in a 2007 study was 5307<sup>168</sup>.

Because of the way in which wreck data were incorporated into the NMR – which relied heavily on records of wrecks that might be hazardous to navigation held by the UK Hydrographic Office (UKHO) – this figure of 5307 known wrecks is biased towards the last 150 years or so. Prior to the mid-nineteenth century, wrecks were built predominantly of wood with relatively few major components of metal. In UK waters, wood that is exposed at or above the seabed tends to deteriorate quite quickly, so older wooden wrecks generally present little danger to navigation and are not particularly visible to hydrographic survey. In contrast, ships dating from around 1860 onwards – built of metal or having major metal components – are more robust; they are quite visible to survey equipment and can present a major concern for navigation. As a consequence, the wreck data of the UKHO – and hence English Heritage's national record – is heavily biased towards late 19<sup>th</sup> and 20<sup>th</sup> century wrecks.

There is a further bias in that loss of shipping in UK waters was particularly intense during World Wars I and II. The wrecks of these ships – often in relatively shallow coastal waters – presented a significant hazard to navigation, so they were subject to a great deal of survey and clearance after

each war. As a consequence, World War I and II wrecks are very common in both UKHO data and the national record.

The 2007<sup>169</sup> study showed that of the 5307 actual, known wrecks in English Waters, only about 600 were over 100 years old. About 2,200 dated to 1914 or later. A further 2,500 are known to be wrecks, but are of unknown date. Because of the biases noted above, these wrecks of unknown date are highly likely to exhibit a similar age profile to those that are dated, i.e. to be predominantly of 20<sup>th</sup> century date.

The 2010<sup>170</sup> review referred to above extended these figures across the UK. A broadly similar pattern was apparent. The national records include about 7,900 known wrecks in total, which is approaching the figure of 10,000 wrecks given in 2001. However, nearly 3,700 of these wrecks are not dated and would thus not be subject to the Convention. Of the dated wrecks, only 936 are over 100 years old. Even including the surge in wrecks dating to World War I, which will start to qualify as underwater cultural heritage over the next few years, the number of known wrecks in the UK Territorial Sea subject to the Convention will approach only about 2,800 by 2018.

More wrecks will undoubtedly be discovered in the UK Territorial Sea, and some of the wrecks that are currently undated will prove to be more than 100 years old. However, the evidence held by UK authorities does not support the suggestion made in the Explanation of Vote in 2001. There are not 10,000 wrecks in the UK's Territorial Sea to which the Convention applies.

Noting that the number of wrecks qualifying as underwater cultural heritage is very much lower in 2001 than implied, it should be recalled again that in terms of the obligations of the Convention, it is the number of activities directed at underwater cultural heritage which is important, not the number of underwater cultural heritage sites.

## **Treating Sites Irrespective of Their Importance**

'The United Kingdom believes that it is better to focus its efforts and resources on protecting **the most important** and unique examples of underwater cultural heritage'.<sup>171</sup>

In the UK, great emphasis is placed on managing heritage assets on the basis of their significance or importance. As noted above, not all archaeological sites are designated; only those that have been assessed as meeting a high threshold of importance<sup>172</sup>. Indeed, not even all those sites that meet this threshold are designated and a range of other measures is used to protect undesignated assets, including the town and country planning system<sup>173</sup>.

Because the Convention regards underwater cultural heritage as 'all traces', and the UK's principal approach to controlling archaeological activities at sea was through site-based designation, the UK appears to have interpreted the Convention as requiring designation of all underwater archaeology over 100 years old irrespective of its importance. That is to say, the Convention was considered to require 'blanket' protection. Such blanket protection would be entirely contrary to the UK's selective

approach, which ‘focuses efforts and resources on protecting the most important’ as it is phrased in the Explanation of Vote.

Again, it would appear that the UK’s interpretation of the Convention arose out of the UK approach to heritage management, not from the Convention itself. As noted above, the Convention only requires that activities directed at underwater cultural heritage are subject to the Rules. The Rules themselves are essentially procedural: they require that anyone intending to carry out activities directed at underwater cultural heritage should first prepare a project design that is agreed with the relevant authority. Other than some general principles about the conduct of archaeological activities, neither the Convention nor the Rules set out any specific outcomes for underwater cultural heritage; neither the Convention nor the Rules require State Parties to ignore the importance of underwater cultural heritage when authorising project designs. The Convention does not impede heritage managers from taking into account the relative importance of underwater cultural heritage in making decisions about effort or resources.

There is no obligation within the 2001 Convention for State Parties to introduce blanket designation within their Territorial Sea and the Convention does not require that all sites are treated the same, irrespective of their importance. The UK’s preference for designating selectively on the basis of importance / significance would not be curtailed.

## **An Impossible Task?**

‘It would simply be **impossible** to enforce the application of the rules in the Annex to every one of the thousands of wreck sites’.<sup>174</sup>

The Explanation of Vote in 2001 suggested that the number of wrecks was so high that it would not be possible to extend legal protection to all of them, and that it would be impossible to enforce the application of the Rules to them all. The preference for focussing efforts and resources was born partly from the principle of managing sites according to their significance, but – it would appear – also by what was possible in practical terms.

Sticking with the estimate of 10,000 wrecks provided in 2001, the task may have seemed daunting; especially relative to the small number of wrecks that were designated. However, from the perspective of providing legal protection on land even this number is not impractical. There are, for example, 19,759 scheduled monuments and 375,588 listed buildings in England alone<sup>175</sup>. In quantitative terms, underwater cultural heritage in the UK is dwarfed by cultural heritage on land that is already designated.

On the basis that the Convention is concerned principally with the regulation of activities rather than regulating sites, it is perhaps more instructive to consider the volume of activities directed at cultural heritage that are already subject to authorisation in the UK. Again using figures only for England, in 2012 there were 29,391 listed building consent decisions and 988 scheduled monument consent decisions<sup>176</sup>; i.e. over 30,000 authorisations. Against a backdrop of 30,000 authorisations per year for

cultural heritage on land in England alone, it is not clear why the UK Government thought that the task would 'simply be impossible' in the 2001 Explanation of Vote.

Decisions on activities directed at underwater cultural heritage are likely to be a tiny fraction – much less than 1% - of the figures for equivalent activities on land. Most activities directed at underwater cultural heritage in the UK focus on wrecks designated under the Protection of Wrecks Act 1973. Throughout the whole UK in 2010-11, there were only 66 sets of activities licensed on these sites<sup>177</sup>. Of these, only 14 licences involved excavation or recovery of artefacts; 27 were survey licences; and 25 were visitor licences. Insofar as visitor licences are not intended to allow disturbance or damage, they might be considered to fall outside the scope of activities directed at underwater cultural heritage and, thereby, outside the scope of the 2001 Convention<sup>178</sup>. Irrespective, the evidence indicates that the amount of activity directed at underwater cultural heritage within UK Territorial Sea – to which the Rules must be applied by virtue of the Convention – is very low. Most of these activities will already be subject to licensing under the *Protection of Wrecks Act 1973*, which is already implemented in a manner that gives effect to the Rules of the 2001 Convention.

Considered in the light of heritage management on land and existing practice in respect of licensing work on designated sites, the requirement to apply the Rules to activities directed at underwater cultural heritage in the UK Territorial Sea is not onerous. The 2001 Convention does not present an impossible task.

## **Meeting the Requirements of the Convention**

In the Territorial Sea, the Convention itself only requires that activities directed at underwater cultural heritage be subject to the Rules. As indicated above, the number of activities each year is low and many are already subject to the application of the Rules through existing site-based legal protection. Nonetheless, there are some activities directed at underwater cultural heritage in the UK Territorial Sea that do not occur on protected sites. In order to become fully compliant, the answer is not to designate more sites, but to adopt an activity-based approach to protection.

As a response to its own domestic requirements, the UK has recently updated its activity-based approach to managing marine sectors in such a way that provides legal protection for underwater cultural heritage. The *Marine and Coastal Access Act 2009* (MCAA 2009) and the *Marine (Scotland) Act 2010* include measures on the licensing of marine activities, such that a range of activities which may affect the seabed require authorisation before the activity can legally take place<sup>179</sup>. The activities include using a vessel to remove any object or substance from the seabed; any form of dredging; constructing works on or under the seabed; depositing any object or substance on the seabed; and so on.

The activities subject to the new marine licensing legislation encompass almost all forms of activities<sup>180</sup> directed at underwater cultural heritage that may cause physical disturbance or damage of sites. These activities are not subject to licence because of their archaeological intent, but because they fall within the scope of marine activities for which a license is required. The provisions of the

marine licensing legislation apply both to activities directed at underwater cultural heritage themselves and to ancillary activities such as the installation of grids, positioning instruments, excavation equipment and other archaeological infrastructure.

The use of marine licensing and other statutory provisions to protect underwater cultural heritage has been stated explicitly in the UK *Marine Policy Statement* (UK MPS). This policy has statutory effect through the MCAA 2009: marine plans must be in conformity with the UK MPS (MCAA 2009 s. 51(6)); and public authorities must take authorisation and enforcement decisions in accordance with the relevant marine plan and UK MPS (MCAA 2009 s. 58(1)). Policies with respect to the historic environment are set out in paragraphs 2.6.6.1 to 2.6.6.9 of the UK MPS, including the following (emphasis added):

‘The view shared by the UK Administrations is that heritage assets should be enjoyed for the quality of life they bring to this and future generations, and that they should be conserved through marine planning **in a manner appropriate and proportionate to their significance**’ (UK MPS 2.6.6.3).

The historic environment policies of the UK MPS – and marine plan policies that are necessarily in conformity with the UK MPS – apply to all forms of activity subject to authorisation, irrespective of whether they are directed at underwater cultural heritage. Because the approach is comprehensive, they apply to most activities directed at underwater cultural heritage also; that is to say the majority of activities directed at underwater cultural heritage are already subject to authorisation which, by virtue of the statutory UK MPS, is explicitly concerned with protecting underwater cultural heritage. The UK Government has previously stated its commitment to implementing the Rules, hence there is a mechanism already in place and operational to give effect to the requirements of the Convention.

The application of the mechanism provided by the MCAA 2009 is in fact much wider than required by the Convention, which requires in Article 7(2) only that the Rules be applied to activities in internal waters and the Territorial Sea. The MCAA 2009 and UK MPS apply throughout the UK Marine Area, which encompasses not only the Territorial Sea but also the EEZ and Continental Shelf. In this respect, UK provision is more extensive than is required by the Convention.

As noted above, the central role of significance in managing underwater cultural heritage has been reinforced by the UK MPS. Implementing the requirements of the MCAA 2009 regime in respect of activities directed at underwater cultural heritage has not been dismissed as impossible. As indicated above, the number of activities directed at underwater cultural heritage each year is small and unlikely to grow markedly, so the amount of casework that will be generated will not be impractical; it will certainly not run to thousands of cases each year.

## **Conclusion**

In the 2001 Convention, underwater cultural heritage has a very wide scope, but it is not dissimilar to the wide definitions that are applied in UK policy, nor does it interfere with the UK’s preference for

protecting and managing sites on the basis of their significance. Some traces of human existence fall outside the scope of underwater cultural heritage because they are not of a cultural, historical or archaeological character.

‘Activities directed at underwater cultural heritage’ is narrower in scope than might be presumed, as both activities incidentally affecting underwater cultural heritage and archaeological activities that are intended to be non-intrusive – including non-intrusive visits by recreational divers – do not fall within the definition. Questions are likely to emerge about the detailed interpretation of what is within and outside of the scope of the 2001 Convention; but these are likely to be resolved on the basis of emerging state practice. The UK’s capacity to influence emerging state practice is currently very limited because it is not a State Party and cannot join the fora established by the Convention through which emerging practice will be debated. Existing provisions on marine licensing mean that the requirement in Article 7(2) to apply the Rules to intrusive activities in the Territorial Sea is already being met by the UK.

The Rules are based on professional standards for the conduct of archaeological activities, including those of the UK’s Institute for Archaeologists. The Rules do not prescribe outcomes. Instead, they require that people who are intending to carry out activities address the likely outcomes of the activities they are proposing. The Rules are not onerous, but they will make it difficult to disguise practices that are not consistent with the proper management of underwater cultural heritage.

The reasons given in the UK Government’s Explanation of Vote in 2001 on the significance point appear to have arisen from concerns about the Convention that were born of the UK’s approach to managing underwater cultural heritage rather than the requirements of the Convention itself. The Convention does not require State Parties to designate all sites over 100 years old and it does not require that all sites are treated the same irrespective of their importance; there are not 10,000 wrecks in the UK’s Territorial Sea to which the Convention applies; and implementation of the 2001 Convention does not present an impossible task.

By looking at the evidence for the number of known wrecks over 100 years old and for the likely number of activities directed at underwater cultural heritage, especially in the light of evidence of the protection of cultural heritage on land, the concerns expressed in 2001 appear unfounded. Furthermore, the updating of the UK’s system of marine licensing in a manner that is comprehensive in terms of licensable activities and makes explicit provision for protecting underwater cultural heritage means that the UK already has systems in place that meet the requirements of the 2001 Convention in the Territorial Sea.

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<sup>148</sup> FCO Letter 31 October 2001 ‘UNESCO Convention on the Protection of the Underwater Cultural Heritage’.

<sup>149</sup> FCO 2001 ‘UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote’.

<sup>150</sup> O’Keefe, P.J. 2002 Shipwrecked Heritage: A commentary on the UNESCO Convention on Underwater Cultural Heritage p 42.

- <sup>151</sup> See, for example, Department for Communities and Local Government, March 2012, National Planning Policy Framework, Glossary.
- <sup>152</sup> See, for example, Protection of Wrecks Act 1973, s. 1(1)(b); Ancient Monuments and Archaeological Areas Act 1979, s. 1(3); Marine (Scotland Act) 2010, s 73(1).
- <sup>153</sup> See 'Note on Maritime Jurisdictional Zones'.
- <sup>154</sup> The Rules concerning activities directed at underwater cultural heritage, as set out in the Annex to the 2001 Convention.
- <sup>155</sup> The application of the Rules to inland waters not of a maritime character – such as freshwater rivers and lakes– is subject to a separate declaration under Article 28 of the 2001 Convention
- <sup>156</sup> European Convention on the Protection of the Archaeological Heritage (revised) 1992 Article 1: 'all remains and objects and any other traces of mankind from past epochs'.
- <sup>157</sup> UK MPS para. 2.6.6.1.
- <sup>158</sup> According to O'Keefe (2002, pp. 42-43), the insertion of this phrase was proposed by the UK. O'Keefe states that it is doubtful whether it actually adds anything to the definition.
- <sup>159</sup> See for example, Historic Scotland, March 2012, Marine Protected Areas in the Seas around Scotland: Guidelines on the selection, designation and management of Historic Marine Protected Areas, para. 3.17.
- <sup>160</sup> O'Keefe 2002 op. cit. p. 46.
- <sup>161</sup> *ibid.*
- <sup>162</sup> *ibid.*
- <sup>163</sup> Department for Culture, Media and Sport 2011 Advisory Committee on Historic Wreck Sites Annual Report 2010 (April 2010 – March 2011). pp 28-38.
- <sup>164</sup> FCO 2001 op. cit.
- <sup>165</sup> *ibid*
- <sup>166</sup> Firth, A. 2011 'Underwater Cultural Heritage off England: character and significance' in Yorke, R.A. (ed.) Protection of Underwater Cultural Heritage in International Waters adjacent to the UK: proceedings of the JNAPC 21<sup>st</sup> Anniversary Seminar, Burlington House November 2010. pp. 15-22.
- <sup>167</sup> Roberts, P. and Trow, S. 2002 Taking to the Water: English Heritage's Initial Policy for the management of Maritime Archaeology in England. p. 5.
- <sup>168</sup> Wessex Archaeology 2008 Selection Guide: Boats and Ships in Archaeological Contexts. Review Draft. p. 11.
- <sup>169</sup> Wessex Archaeology 2008 op. cit.
- <sup>170</sup> Firth 2011 op. cit.
- <sup>171</sup> FCO 2001 op. cit
- <sup>172</sup> See e.g. English Heritage 2010 Protected Wreck Sites: moving towards new ways of managing England's historic environment; Historic Scotland (no date) Determination of 'National Importance' for the Designation of Marine Historic Assets under the Marine (Scotland) Act 2010.
- <sup>173</sup> See e.g. Department for Communities and Local Government, March 2012, National Planning Policy Framework, para. 139.
- <sup>174</sup> FCO 2001 op. cit
- <sup>175</sup> English Heritage 2012 Heritage Counts 2012. p. 38.
- <sup>176</sup> *ibid.* p. 39.
- <sup>177</sup> Department for Culture, Media and Sport 2011 Advisory Committee on Historic Wreck Sites Annual Report 2010 (April 2010 – March 2011). pp 28-38.

<sup>178</sup> See Annex 4.1.

<sup>179</sup> MCAA 2009 s. 66.

<sup>180</sup> The activities relating to underwater cultural heritage that are subject to a marine licence largely fall into three main categories: removal of any substance or object (s. 66(8)); any form of dredging (s. 66(9)); and depositing any substance or object (s. 66(1)), which would include placing infrastructure on the seabed to facilitate activities directed at underwater cultural heritage. Under the MCAA 2009, the clauses on removal and deposition apply only if the activity occurs from or using a vessel or other platform. In England the Marine Management Organisation (MMO) currently interprets these caveats to the effect that there must be a direct connection between the activity and the vessel, platform etc. such as a supply of breathing gas or power for tools, winches etc. There are also some specific exemptions for the removal of small samples and for deploying scientific instruments, for example. In consequence, there is a small range of circumstances in which activities directed at underwater cultural heritage might fall outside the requirements of licensing as currently interpreted. One example might be the removal entirely by hand of archaeological material that is resting on the seabed, such that there is nothing that could be interpreted as dredging and no use of a vessel. These circumstances are very narrow and might become narrower still in the event of any change to the exemptions or to current interpretation. Moreover, recourse could be had to heritage legislation (Protection of Wrecks Act 1973 etc.) to require a licence to which the Rules would apply, even in these narrow circumstances.

## **Paper 4. Impact: A Clause-by-Clause Review of the Implications of Ratification**

### **Key Messages**

- The majority of the substantive clauses of the 2001 Convention appear to present no difficulty to the UK, and the UK has world-leading experience in some particular areas.
- Points that are likely to require further consideration are the regulation or removal of underwater cultural heritage from salvage law; and the development of mechanisms for reporting underwater cultural heritage especially in the UK EEZ / Continental Shelf and the Area.
- Issues like the provision for human remains and for the long-term preservation of archaeological archives are already problematic in the management of underwater cultural heritage domestically. Addressing them in the context of implementing the 2001 Convention would help alleviate the domestic situation.
- Formal administrative mechanisms to notify and in some cases consult with other States Parties and to notify the Director-General of UNESCO and the Secretary-General of the International Seabed Authority can build upon current procedures for notifying and consulting with other countries and agencies in respect of underwater cultural heritage.
- Some reallocation of resources may be required to provide contingency arrangements for underwater cultural heritage that is seized, but this may simply mean that arrangements that are currently made case-by-case are formalised in order to demonstrate compliance.

### **Approach**

The purpose of this paper is to outline the results of a review of the impact that a decision to ratify the 2001 Convention would have on the legal and administrative frameworks of the UK.

The review has sought to identify the degree to which UK frameworks are already compliant with the obligations on States Parties that arise from the 2001 Convention. The review has also sought to identify where the UK is compliant in part but further domestic provision is necessary. The review has also identified obligations with which the UK is not compliant at present, where new provisions are required.

Reflecting this intention, the degree to which the UK is compliant with each of the obligations on states parties has been coded green and amber. No clauses appear to present such difficulty to the UK that compliance could not reasonably be achieved; hence no clauses have been coded red.

In order to carry out the review, the 2001 Convention was split into its individual clauses. In some cases these clauses correspond to numbered articles or sub-sections, but in a few cases there are

multiple clauses embedded within a paragraph, and these have been distinguished with additional identifiers (bis; ter; quater).

The separated clauses were then classified according to their overall role within the 2001 Convention. The classification of clauses used in the review is as follows:

- Statements of law, including permissive and prohibitive statements
- Direct obligations on State Parties
- Statements and obligations to which State Parties can volunteer as ‘Co-ordinating States’

- 
- Obligations on the Director-General of UNESCO
  - Administrative Provisions
  - Definitions
  - Final Clauses

The first groups of clauses are of central interest because they create obligations on State Parties or make general statements of international law relating to underwater cultural heritage that State Parties must accept. These clauses are considered in further detail below and were the focus of the matrix prepared in support of this paper (see Appendix 4.1). The second group of clauses, however, are concerned with the administration of the 2001 Convention itself or are not otherwise contentious. They have been reviewed for anything anomalous that might concern the UK but are not considered further. They are listed in Appendix 4.2.

The MCAA 2009 and the *Dealing with Cultural Objects (Offences) Act 2003* (DCOOA 2003) already provide a statutory basis for implementing many clauses of the 2001 Convention. These acts are relatively new to the management of underwater cultural heritage in the UK and practice is still developing. The licensing provisions of the MCAA 2009 have already been discussed in detail in Paper 3. It is also worth noting that the DCOOA 2003 was introduced to complement and reinforce UK implementation of the 1970 *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import and Transfer of Ownership of Cultural Property*, to which the UK acceded in 2002. The 2001 Convention reflects aspects of the 1970 Convention, hence the suitability of DCOOA 2003 in facilitating implementation of the 2001 Convention<sup>181</sup>.

## **An International Lead in the Protection and Management of Underwater Cultural Heritage**

The UK has a relatively advanced framework for protecting underwater cultural heritage. It is already compliant with many of the provisions of the 2001 Convention. In fact, UK activity with respect to

many of the topics addressed by the Convention is world-class and innovative; provisions of the 2001 Convention for which UK experience is recognised as world-leading include:

Article 5	Activities Incidentally Affecting Underwater Cultural Heritage
Article 20	Public Awareness
Article 21	Training in Underwater Archaeology.

## **Opportunities for Compliance**

The statements that present a difficulty to the UK – on the relationship between the 2001 UNESCO Convention and the LOSC 1982, and on sovereign immunity (Arts. 2.9, 3) – are addressed in detail in Papers 1 and 2, and are not considered further in this paper.

The remaining provisions of the 2001 Convention that might present challenges for the UK can be split into four main groups, as follows:

- Provisions that may require the UK to make substantive changes to its legal and / or policy frameworks.
- Provisions where minor legal / administrative gaps need to be addressed.
- Provisions requiring new administrative arrangements.
- Provisions that are likely to require reallocation of resources.

Each of these groups is discussed in the following sections.

## **Substantive Changes to Legal and / or Policy Frameworks**

The provisions that seem likely to require substantive changes to legal frameworks or policy in the UK - devolved as appropriate to England, Scotland, Wales and Northern Ireland - are as follows:

Article 4	Application of Salvage Law
Article 2(7)	Commercial Exploitation
Article 9(1)(a)	Reporting Discoveries in UK EEZ / Continental Shelf
Article 9(1)(b)	Reporting Discoveries / Activities in Others' EEZ / Continental Shelf
Article 11(1)	Reporting Discoveries / Activities in the Area.

### **Application of Salvage Law (Article 4)**

In the UK, underwater cultural heritage is not exempt from the application of salvage in common law or statute. The provisions of the Merchant Shipping Act 1995 on finding and disposing of 'wreck' apply

to underwater cultural heritage and are in fact used to offer a degree of heritage protection, and material recovered from wrecks designated under the *Protection of Wrecks Act 1973* (PWA 1973), the *Ancient Monuments and Archaeological Areas Act 1979* (AMAA 1979) or the *Marine (Scotland) Act 2010* is subject to the *Merchant Shipping Act 1995* (MSA 1995) as a matter of course. The common law property rights of salvor in possession are also applicable to underwater cultural heritage, and the UK Government has been party to salvage-based contracts in respect of underwater cultural heritage in recent years – a recent example being the agreement over the wreck alleged to be the *Sussex*.

It is worth noting that the UK made a reservation when ratifying the IMO *International Convention on Salvage 1989* to the effect that it reserved the right not to apply the Convention to maritime cultural property<sup>182</sup>. Although the UK has not yet given effect to this reservation, it effectively recognised that it may wish to not apply the IMO 1989 Convention to underwater cultural heritage and safeguarded its position in this respect.

Many forms of salvage with respect to underwater cultural heritage in the UK Territorial Sea and Continental Shelf are likely to require authorisation in the form of a Marine Licence under the MCAA 2009, thereby satisfying Article 4(a). Recovery of material from designated sites would, in addition, require further authorisation under the *Protection of Wrecks Act 1973*, the *Ancient Monuments and Archaeological Areas Act 1979*, or the *Marine (Scotland) Act 2010* for example. Importantly, the requirement for a licence under MCAA 2009 in most circumstances<sup>183</sup> counters the incentive presented by the MSA 1995 and its administration to systematically recover underwater cultural heritage pre-emptively without first considering whether such recovery is in the best interests of the objects and / or site.

Licensing under the MCAA 2009 / *Marine (Scotland) Act 2010* or heritage legislation alike can be used to implement the Rules annexed to the 2001 Convention, according to the Government's stated policy, thereby satisfying Art 4(b) on ensuring that salvage achieves conformity with the Convention. Application of the Rules to licences for removal of underwater cultural heritage would help achieve Art 4(c) on maximum protection for it.

It may be possible for the UK to implement further policy and administrative measures that enable statute- and common-law based salvage to continue to apply in such a way as to meet requirements (a)-(c) of Article 4. For example, the Government could decide not to engage in salvage-based contracts in respect of underwater cultural heritage. Similarly, under s. 243(5) of the MSA 1995, the Secretary of State could declare generally that the amount of salvage to be paid on underwater cultural heritage will be based on the measures taken by salvors to achieve its maximum protection. This would help to incentivise careful consideration of if and how to recover underwater cultural heritage in cases not subject to licensing under MCAA 2009 / *Marine (Scotland) Act 2010*.

Alternatively, provision could be made to remove underwater cultural heritage from the application of salvage law in line with the reservation made in respect of the IMO 1989 Convention. This need not remove underwater cultural heritage from the provisions the MSA 1995 (such as obligation to notify

the Receiver of Wreck of finding / taking possession of wreck and the mechanisms for advertising and receiving claims of ownership) only that underwater cultural heritage be removed from the application of s. 243(3) and related provisions. Other means of administering reports of underwater cultural heritage, including valuing underwater cultural heritage, rewarding people who report and arranging disposal to museums etc., could build upon on existing mechanisms that are applied to the implementation of the *Treasure Act* 1996 in England and Wales.

A declaration in statute to the effect that underwater cultural heritage was not subject to the law of salvage would remove the scope for common law claims of salvor in possession in respect of underwater cultural heritage. The PWA 1973, which was modelled on the concept of salvor in possession, already has the capacity to provide equivalent protection at very short notice to the interests of people who find and wish to investigate underwater cultural heritage, by preventing competing activities. There is also provision within the *Marine (Scotland) Act* 2010 for urgent designation of Historic Marine Protected Areas. The inapplicability of salvor in possession to underwater cultural heritage would not, therefore, result in any less protection either for underwater cultural heritage or for the interests of individuals wishing to investigate it.

Although compliance with Article 4 could be achieved by meeting requirements (a)-(c) by policy and administrative measures, the option of removing underwater cultural heritage from the application of salvage law by primary legislation may be regarded as a more pragmatic solution that avoids the need to reconcile 'regulated salvage' of underwater cultural heritage with international salvage law.

### **Commercial Exploitation (Article 2(7))**

Although the UK Government has been party to arrangements that imply commercial exploitation of underwater cultural heritage, including the agreement over the wreck alleged to be the *Sussex* and referred to above, the UK has stated that it will apply the Rules contained in the Annex of the Convention to underwater cultural heritage. The Rules include an equivalent to Article 2(7) in Rule 2. That is to say, the UK already appears to accept that underwater cultural heritage should not be commercially exploited. A policy decision to no longer participate in agreements to commercially exploit underwater cultural heritage would go no further than the existing commitment to implement the Rules of the Annex.

It is worth stating that the caveat in respect of professional archaeological services contained in Rule 2(a) is very important for UK interests. A clear commitment in policy and practice on not exploiting underwater cultural heritage commercially would provide the Government with an unambiguous platform for promoting UK professional services with respect to it globally.

The caveat set out in Rule 2(b) safeguards the kinds of property transfer that accompany the deposition and subsequent management of cultural heritage in museums and archives. Rule 2(b) reinforces professional standards, the primacy of the scientific and cultural integrity of assemblages, the prevention of irretrievable dispersal, and authorisation by competent authorities, all of which are consistent with UK policies with respect to cultural heritage in museums and archives<sup>184</sup>.

## **Discoveries and Activities in UK EEZ / Continental Shelf (Article 9(1)(a))**

In the EEZ / Continental Shelf, the 2001 Convention identifies two kinds of actions by nationals or vessels flying their flag that require a response by State Parties: first, discovery of underwater cultural heritage; second, intending to engage in activities directed at underwater cultural heritage. Although the responses required of a State Party are the same in each case, it is worth dividing discoveries and activities because they arise in different circumstances and – at least in the UK – they fall under different legal provisions.

UK provision with respect to **activities** directed at underwater cultural heritage in the EEZ / Continental Shelf already exceeds the requirements of the 2001 Convention. In the EEZ / Continental Shelf, activities directed at underwater cultural heritage are likely to require authorisation in advance – not just reporting of the intention – under the marine licensing provisions of the MCAA 2009 / *Marine (Scotland) Act 2010*<sup>185</sup>. This requirement does not arise because it concerns underwater cultural heritage, but because intrusive activities of virtually any type require a licence by virtue of the UK's management of its sovereign rights on the Continental Shelf. Marine licensing applies to the nationals and flag vessels of other states as well as to all UK nationals and flagged vessels, hence the UK already has more extensive control over activities than the 2001 Convention requires.

In contrast, the UK does not have currently a comprehensive mechanism for reporting **discoveries** of underwater cultural heritage by its nationals or vessels that would apply in the EEZ / Continental Shelf. Instead, it has a number of mechanisms that provide partial coverage:

There is a statutory obligation on any person who finds or takes possession of any wreck outside United Kingdom waters and brings it within those waters to give notice to the Receiver of Wreck (MSA 1995 236(1)). However, underwater cultural heritage which is not wreck – such as prehistoric artefacts deposited on land that has subsequently been submerged by rising sea levels – falls outside the terms of the MSA 1995. Equally, if the discovered wreck is not brought within the UK Territorial Sea then the obligation to report does not apply. The need to 'bring it within' also suggests that the obligation applies only to wreck that has been taken into possession (i.e. recovered) and not to discoveries that still lie on the seabed.

There are several protocols that require people who find underwater cultural heritage to report it to archaeologists<sup>186</sup>. These protocols apply to the EEZ / Continental Shelf and include all forms of underwater cultural heritage, including discoveries that are still on the seabed. They have proved highly effective, resulting in reports of very significant material that would otherwise have been lost. The protocols are sectoral in that they apply to specific industries such as aggregates and offshore renewables. Even though the protocols are not legally binding in themselves, they are often invoked by licensing / consenting arrangements that have a statutory basis and are enforceable. The sectoral protocols are not comprehensive, however: many marine industries do not have

equivalent provision and there is no scheme for private individuals other than for wreck under the MSA 1995.

Full compliance with the 2001 Convention in respect of reporting discoveries in the EEZ / Continental Shelf would require either an extension of the MSA 1995 to forms of underwater cultural heritage in addition to 'wreck' and to require reporting even if the underwater cultural heritage was not brought within the UK Territorial Sea; or extension of reporting protocols to apply to all sectors including private individuals. A comprehensive system for reporting, building on the, albeit voluntary, Portable Antiquities Scheme on land, would be a valuable step.

It is worth noting that the MSA 1995 and the sectoral reporting protocols are not limited to UK nationals or UK flagged vessels; they apply to all persons / vessels and therefore exceed the requirements of the 2001 Convention in this respect.

### **Discoveries and Activities in the EEZ / Continental Shelf of Other Countries (Article 9(1)(b))**

The same division between discoveries and activities is drawn in Article 9(1)(b) as in Article 9(1)(a), discussed above<sup>187</sup>. The UK does not currently have a mechanism that requires nationals / masters to report either **discoveries** or **activities** when they are in the EEZ / Continental Shelf of other countries. The exception is that if a UK national or master brings underwater cultural heritage from a foreign EEZ / Continental Shelf that is 'wreck' into the UK Territorial Sea they would be required to report it to the Receiver of Wreck (MSA 1995 236(1)), which would give partial effect to option (ii) of Article 9(1)(b) of reporting back to the UK for onward transmission.

UK nationals / masters would be expected to follow local laws in respect of reporting discoveries / activities in the EEZ / Continental Shelf of other states, as indeed other nationals would be required to obey existing UK laws (such as MSA 1995, MCAA 2009) that have effect on the UK Continental Shelf. The UK assists prosecutors and investigators from other countries in respect of offences by UK nationals abroad through Mutual Legal Assistance and other forms of co-operation. Hence, if each State Party has laws requiring all nationals to report activities and discoveries to it, then such requirements are likely to be enforced against UK nationals and masters, giving effect to option (i) of Article 9(1)(b).

The UK could support this approach by providing advice to UK nationals / masters in respect of laws relating to underwater cultural heritage in other countries, either country-by-country or in general terms, as it does for wildlife and habitats<sup>188</sup>.

Under the DCOOA 2003, any objects that were recovered from another country's EEZ / Continental Shelf without satisfying local domestic law on reporting would be 'tainted' under UK law. Anyone dealing with the tainted objects would be committing an offence in UK law. The DCOOA 2003 therefore provides a mechanism that 'requires' UK nationals and masters to abide by laws relating to underwater cultural heritage in the EEZ / Continental Shelf of other countries.

An obligation on UK nationals and masters to report discoveries and activities in the EEZ / Continental Shelf of other countries directly through UK law is likely to require primary legislation. The UK has a variety of laws that apply to its nationals irrespective of where in the world the offence is committed, including bribery, fraud and sexual offences against children, in addition to crimes for which there is universal jurisdiction. The DCOOA 2003, referred to above, is a further example; it does not matter where in the world an offence was committed for an object to become tainted. Moreover, masters and seamen employed in UK ships are subject to UK law at any place outside the UK by virtue of MSA 1995 (e.g. s. 282). In consequence, a mechanism that requires UK nationals / masters to report discoveries and activities in the EEZ / Continental Shelf of other countries is certainly conceivable, potentially as an extension of the DCOOA 2003. A mechanism that invoked option (i) of Article 9(1)(b) would not place any particular administrative requirement on UK authorities, as it would simply require UK nationals / masters to report to the relevant authorities locally.

It is worth noting that the UK will benefit reciprocally from the arrangements made by other State Parties to require their nationals / masters to report discoveries and activities when they are in the EEZ / Continental Shelf of other countries, including when they are in the EEZ / Continental Shelf of the UK.

A review of how existing and prospective States Parties to the 2001 Convention are giving effect to Art 9(1)(b) may assist the UK in identifying practicable options for implementing this clause.

### **Discoveries and Activities in the Area (Article 11(1))**

Again, Article 11(1) distinguishes discoveries and activities as in Article 9(1). And as for Article 9(1), the UK does not currently have a comprehensive mechanism for reporting **discoveries** or **activities** by its nationals or vessels that would apply in the Area.

The obligation under MSA 1995 236(1) to give notice of wreck brought within the UK Territorial Sea to the Receiver would also apply to wreck from the Area, but this applies only to 'wreck' and only if it is brought within the UK Territorial Sea.

Although the MCAA 2009 includes provisions on licensing of activities beyond the UK Continental Shelf such as dumping and incineration from UK registered vessels<sup>189</sup>, these would not encompass activities directed at underwater cultural heritage. Hence the MCAA 2009 does not provide a mechanism that would satisfy this clause in respect of activities directed at underwater cultural heritage in the Area. Equally, the sectoral protocols on reporting underwater cultural heritage apply only to activities that occur on the UK Continental Shelf, so they also do not provide any cover with respect to the Area.

As the Area is beyond Coastal State jurisdiction, there are no 'local' laws on activities with which UK nationals could be expected or required to comply. This also diminishes the potential application of DCOOA 2003 in this respect. It is conceivable that activities with respect to underwater cultural heritage in the Area could incur offences asserted other than through Coastal State jurisdiction, e.g.

'theft' from underwater cultural heritage that was owned by other countries, which might then be pursued through legal co-operation or result in objects becoming 'tainted' in UK law. However, such scenarios would fall short of the comprehensive coverage implied by the 2001 Convention.

Masters and seamen employed in UK ships are subject to UK law at any place outside the UK by virtue of MSA 1995 (e.g. s. 282). That is to say a requirement to report discoveries / activities could be placed on masters and seamen that would apply to the Area. It is this type of mechanism that is applied through the *Protection of Military Remains Act* 1986 to provide a degree of control over military remains throughout the world as far as UK registered ships and nationals are concerned<sup>190</sup>.

As noted above, the UK has extra-territorial laws so an extra-territorial requirement on UK nationals to report discoveries / activities in the Area could be anticipated, perhaps modelled on DCOOA 2003. Even though behaviour by UK nationals in the Area could be prescribed, it could only be enforced if the perpetrators came back within more direct UK jurisdiction.

Article 11 provides only the option of reporting discoveries / activities in the Area to the UK's own authorities, as there is no local State Party to which UK nationals could be required to report. Meeting the requirements of Article 11 would require, therefore, accompanying administrative provision for receiving and dealing with discoveries / activities recovered from the Area.

## **Minor Legal and Administrative Gaps**

Relatively minor legal and administrative gaps may need to be addressed in the following areas:

Article 2(9)	Human Remains
Article 13	Discoveries of Underwater Cultural Heritage by UK Warships and Other Vessels that have Sovereign Immunity
Article 15	Non-use of Territory
Article 16	Measures Relating to Nationals and Vessels.

### **Human Remains (Article 2(9))**

UK law in respect of human remains from underwater is currently deficient because the principal act through which disturbance is licensed – the *Burial Act* 1857 – applies to 'places of burial'<sup>191</sup>; human remains at sea are not usually in 'places of burial' because burial was not intended even if they have become physically buried. Discussions are underway about making better provision for human remains from the sea. It should be noted that the obligation of Article 2(9) is to 'ensure proper respect', which could probably be achieved administratively. Moreover, current archaeological practice in the UK puts considerable emphasis on treating human remains with respect and a range of guidance and codes of practice apply, irrespective of legal provision<sup>192</sup>.

### **Discoveries of Underwater Cultural Heritage by UK Warships etc. (Article 13)**

Under the main clause of Article 13, sovereign immune vessels such as warships and other state vessels or aircraft are not required to report discoveries of underwater cultural heritage in EEZs / Continental Shelves or the Area. However, the UK would be obliged to introduce measures that would enable sovereign immune vessels to comply with the relevant articles 'as far as is reasonably practicable', where such measures would not impair operations or operational capabilities.

This provision could be met by introducing appropriate policies for UK warships and other Government vessels / aircraft. The Royal Navy, for example, is guided by *Secretary of State for Defence's Policy Statement on Safety, Health, Environmental Protection and Sustainable Development in the Ministry of Defence*<sup>193</sup>. The Royal Navy states that it:

'... strives to meet all applicable environmental standards and even where warships and auxiliaries are specifically exempt from elements of environmental legislation we put in place measures, so far as is reasonably practicable, which produce outcomes at least as good as those required by law'.<sup>194</sup>

The addition of specific reference to underwater cultural heritage to this Policy Statement, as a recognised facet of sustainable development and the environment, would facilitate implementation of Article 13.

### **Non-use of Territory (Article 15)**

Article 15 requires States Parties to prohibit the use of their territory – such as ports – for activities directed at underwater cultural heritage which are not in conformity with the 2001 Convention. The intention here is to make it impracticable for people to pursue unwanted activities by denying them access to the infrastructure necessary to mount marine operations, as well as preventing them from gaining access to markets and auction houses. The provisions of the DCOOA 2003 may be sufficiently broad to inhibit many uses of UK territory with respect to underwater cultural heritage that is tainted by being removed or excavated not in conformity with the 2001 Convention, insofar as removal or recovery involved an offence.

With respect to underwater cultural heritage that is designated, the UK already has provisions that effectively prohibit support for activities that are themselves offences relating to it. The AMAA 1979 (s. 2(1)), the PWA 1973 (s. 1(3)) and the *Marine (Scotland) Act* 2010 (s. 20(1)(b)) include offences of permitting others to carry out offences. The MCAA 2009 (s. 65(1)(b)) provides a similar offence with respect to marine licensing, which has the effect of prohibiting support for intrusive activities with respect to underwater cultural heritage that are not within the terms of a licence, and is applicable to the entire UK Continental Shelf.

Given this degree of cover, it seems unlikely that an additional specific measure would be necessary.

## **Measures Relating to Nationals and Vessels (Article 16)**

Article 16 requires States Parties to take all practical measures to ensure that national and flagged vessels do not engage in activities directed at underwater cultural heritage that are not in conformity with the 2001 Convention. As noted above, the definition of ‘deals’ under the DCOOA 2003 may be sufficiently broad to inhibit UK nationals / vessels engaging in activities involving the removal or excavation of underwater cultural heritage not in conformity with the Convention, insofar as removal or recovery involved an offence. The offence of permitting others to carry out activities that are offences in the PWA 1973, AMAA 1979 and MCAA 2009 extend the measures that apply to UK nationals and flagged vessels, so it seems unlikely that an additional specific measure would be necessary.

## **Administrative Measures**

Administrative measures seem likely to be required to meet the following obligations:

Article 7(3)	Notifying Flag States / States with a Verifiable Link about Discoveries in UK Territorial Sea
Article 9(3)	Notifying Discoveries / Activities in UK EEZ / Continental Shelf to the Directorate-General
Article 10(3)	Consulting States Parties over Underwater Cultural Heritage in UK EEZ / Continental Shelf
Article 11(2)	Notifying Discoveries / Activities in the Area to the Directorate-General
Article 18(3)	Notifying States with Verifiable Link of Seizure of Underwater Cultural Heritage.

### **Notifying Flag States / States with a Verifiable Link of Discoveries within UK Territorial Sea (Article 7(3))**

This clause is unlikely to be problematic in principle in that the UK expects due regard to be given to its interests as a Flag State and would offer mutual recognition where other States’ vessels are found within UK jurisdiction. However, a specific administrative mechanism may be required to ensure that Flag States and states with a verifiable link to State Vessels and aircraft are always informed of discoveries in the UK Territorial Sea. The administrative mechanism would need to take account of the devolved character of the management of underwater cultural heritage in the UK, but there may be useful parallels in how the devolved administrations give effect to UK-wide international obligations under the World Heritage Convention 1972, for example.

### **Consulting States Parties over Underwater Cultural Heritage in UK EEZ / Continental Shelf (Article 10(3))**

This clause creates an administrative requirement to consult State Parties that have declared under Article 9(5) an interest in underwater cultural heritage in the UK EEZ / Continental Shelf. UK authorities already liaise with the authorities of other countries, though probably informally and to varying degrees. This clause would require such existing practice to be formalised and be consistent, taking account of the devolved character of the management of underwater cultural heritage in the UK.

### **Notifying States with Verifiable Link of Seizure of Underwater Cultural Heritage (Article 18(3))**

This clause does not present a difficulty in principle, but formal administrative arrangements would need to be introduced for informing states with a verifiable link of the seizure of underwater cultural heritage, taking account of the devolved character of its management in the UK.

It should be noted that the obligation to notify states with verifiable links does not appear to be limited to States Parties to the 2001 Convention, i.e. it potentially applies to all states with a verifiable link.

### **Notifying Directorate-General of discoveries / activities in UK EEZ / Continental Shelf (Article 9(3)), the Area (Article 11(2)), and of the Seizure of Underwater Cultural Heritage (Article 18(3))**

Several clauses introduce an obligation to notify the Director-General of UNESCO of specific occurrences. Although they are likely to require formal administrative arrangements, none of the requirements seems likely to present a significant hurdle.

In the event that the UK were to introduce a mechanism that followed option (ii) of Art 9(1)(b), requiring reports by UK nationals / masters to be made to UK authorities rather than to the authorities of the Coastal State, then this clause would require a mechanism for UK authorities to notify the Director-General of reports they receive.

Article 11(2) requires a mechanism for UK authorities to notify the Director-General (and the Secretary-General of the International Seabed Authority) of reports they receive of discoveries or activities in the Area.

Article 18(3) requires the Directorate-General to be notified of seizures of underwater cultural heritage.

Communication with the Director-General would need to take account of the devolved character of the management of underwater cultural heritage in the UK.

### **Reallocation of Resources**

Resources may need to be reallocated in order to comply with the following provisions:

Article 2(6)      Long-term Preservation

Article 18(2) Recording, Protecting and Stabilising seized Underwater Cultural Heritage

Article 18(4) Disposition for Public Benefit of Seized Underwater Cultural Heritage.

### **Long-term Preservation (Article 2(6))**

Although there are examples of very good provision being made for the long-term preservation of recovered underwater cultural heritage and associated archives, the UK does not have comprehensive provision overall that would satisfy this clause. Weaknesses in provision for long-term preservation have already been identified as a problem for the management of underwater cultural heritage domestically, requiring clarification of roles and responsibilities and support for the development of suitable repositories<sup>195</sup>.

It is worth noting that adherence to the 2001 Convention should help reduce pressure on the UK in respect of long-term preservation because of the 2001 Convention's emphasis on preservation *in situ* as the first option. The requirements in the Rules to develop a project design in advance of intrusive activities, which must address conservation and archiving, should also alleviate this pressure by encouraging proper consideration of these matters before recovery takes place.

### **Recording, Protecting and Stabilising Seized Underwater Cultural Heritage (Article 18(2))**

There is currently no particular mechanism or provision to record, protect and stabilise underwater cultural heritage that is seized. However, underwater cultural heritage that has been seized in previous domestic cases has been subject to first-aid conservation.

This clause does not present a difficulty in principle, but formal administrative arrangements and reallocation of contingency resources may be necessary in order to demonstrate compliance.

### **Disposition for Public Benefit of Seized Underwater Cultural Heritage (Article 18(4))**

As above, there is no particular mechanism or provision in the UK for the disposition of seized underwater cultural heritage that takes into account the factors listed in Article 18(4)<sup>196</sup>. However, the Receiver of Wreck is committed to trying to keep collections of archaeologically and historically significant material together and on display in a public museum, preferably in a location close to the find site<sup>197</sup>, and the UK can cite many examples of good practice in the disposition of underwater cultural heritage for the public benefit. Consequently, this clause does not present a difficulty in principle. Formal administrative arrangements and some reallocation of contingency resources may be necessary in order to demonstrate compliance with this clause.

## **Conclusion**

The majority of the substantive clauses of the 2001 Convention present no difficulty to the UK, and the UK has world-leading experience in some particular areas. Clauses that present challenges to the UK in terms of the interpretation of international law are addressed in Papers 2 and 3. Nonetheless,

some clauses of the 2001 Convention would require the UK to introduce new measures in policy and administration, and potentially in law, and to reallocate resources.

Areas of the 2001 Convention which may appear problematic are already addressed by the UK's commitment to implement the Rules annexed to the it, though further steps may be required to ensure that this commitment is thoroughly understood and given effect throughout Government. As noted above, the MCAA 2009 / *Marine (Scotland) Act* 2010 and the DCOO 2003 already provide a statutory basis for implementing many clauses of the 2001 Convention, especially in the EEZ / Continental Shelf, extra-territorially (e.g. in the EEZ / Continental Shelf of other countries) and in denying support to others carrying out activities not in conformity with the Convention.

Areas that are likely to require further consideration are the regulation of salvage such that it meets the criteria of Article 4, or the removal of the application of salvage to underwater cultural heritage altogether; and the extension of mechanisms for reporting underwater cultural heritage especially in the UK EEZ / Continental Shelf and the Area.

Areas such as provision for human remains and for the long-term preservation of archaeological archives are problematic in the management of underwater cultural heritage domestically in the UK and will have to be addressed irrespective of the 2001 Convention.

Furthermore, the Convention introduces the need for a series of formal administrative mechanisms to notify and in some cases consult with other States Parties (Flag States / States with Verifiable Links), and to notify the Directorate-General of UNESCO and the Secretary-General of the International Seabed Authority. Such notification and consultation may well be taking place case-by-case; it would be helpful (and probably more cost-efficient) for such notification and consultation to be placed on a systematic basis taking into account the devolved character of the management of underwater cultural heritage in the UK Marine Area.

Finally, there is a need to reallocate resources to provide contingency arrangements for recording, protecting, stabilising and disposing of any underwater cultural heritage that is seized.

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<sup>181</sup> In brief, DCOOA 2003 provides that cultural objects are 'tainted' if their removal or excavation constituted an offence in the jurisdiction within which it took place; it is an offence to 'deal in' (i.e. acquire, dispose of, import or export) tainted objects. DCOOA 2003 applies expressly to vessels, to sites below water, and to areas outside the UK. See DCMS Cultural Property Unit January 2004 Dealing in Tainted Cultural Objects – Guidance on the Dealing in Cultural Objects (Offences) Act 2003 and DCMS October 2005 Combating Illicit Trade: Due diligence guidelines for museums, libraries and archives on collecting and borrowing cultural material.

<sup>182</sup> IMO 1989 Art 30(1)(d).

<sup>183</sup> See Paper 3.

<sup>184</sup> See, for example, Brown, D. 2011 Archaeological Archives: a guide to best practice in creation, compilation, transfer and curation. Archaeological Archives Forum.

<sup>185</sup> See Paper 3.

<sup>186</sup> For example, Marine Aggregate Industry Protocol for Reporting Finds of Archaeological Interest; Offshore Renewables Protocol for Archaeological Discoveries (ORPAD); Fishing Industry Protocol for Archaeological Discoveries (FIPAD) (Sussex pilot).

<sup>187</sup> There is a view that Article 9(1)(b) contains 'constructive ambiguities' such that it can be read as obliging the Coastal State to require the 'visiting' national or vessel to report discoveries / activities (see Dromgoole 2013 pp. 299-300; O'Keefe 2002 p. 83). This interpretation is difficult to reconcile with the phrasing 'another State Party' / 'that other State Party' or, indeed, with the decision to frame reporting on the EEZ / Continental Shelf in terms of nationals and vessels in Article 9(1)(a). Moreover, interpreting Article 9(1)(b) as creating an obligation on Coastal States would imply Coastal State jurisdiction beyond the Territorial Sea at least for the purposes of reporting, which would be inconsistent with the primacy of the LOSC set out in Article 3. Consequently, Article 9(1)(b) is regarded here as an obligation only on the State Party of the national/ vessel 'visiting' the EEZ/Continental Shelf of another State Party, not as an obligation on the State Party that is being 'visited'. That is to say, the 2001 Convention does not oblige the UK to introduce a mechanism to require reporting by non-UK nationals/vessels on the UK Continental Shelf. As discussed in the previous section, however, some of the UK's existing provisions for reporting already have the effect of applying to non-UK nationals and vessels visiting the UK Continental Shelf.

<sup>188</sup> <http://www.fco.gov.uk/resources/en/pdf/2855621/support-for-british-nationals-abroad.pdf>

<sup>189</sup> For example, MCAA 2009 s. 66(2); s. 66(5); s. 66(12).

<sup>190</sup> PMRA 1986 s. 3.

<sup>191</sup> Burial Act 1857 s. 25.

<sup>192</sup> <http://www.english-heritage.org.uk/publications/human-bones-from-archaeological-sites/>; <http://www.historic-scotland.gov.uk/human-remains.pdf>; <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/GuidanceHumanRemains11Oct.pdf>.

<sup>193</sup> Secretary of State for Defence, September 2010 Policy Statement on Safety, Health, Environmental Protection and Sustainable Development in the Ministry of Defence.

<sup>194</sup> <http://www.royalnavy.mod.uk/About-the-Royal-Navy/Organisation/Life-in-the-Royal-Navy/Environmental-Protection>.

<sup>195</sup> See [http://www.hwtma.org.uk/uploads/documents/Publications/Maritime%20Archives%20Element%20One%20Report\\_FINAL\\_April\\_09\\_low\\_res.pdf](http://www.hwtma.org.uk/uploads/documents/Publications/Maritime%20Archives%20Element%20One%20Report_FINAL_April_09_low_res.pdf); [http://www.hwtma.org.uk/uploads/documents/Publications/archives\\_e2\\_report\\_sept\\_09.pdf](http://www.hwtma.org.uk/uploads/documents/Publications/archives_e2_report_sept_09.pdf); [http://www.hwtma.org.uk/uploads/documents/Publications/Archives\\_E3\\_Report\\_Oct\\_09.pdf](http://www.hwtma.org.uk/uploads/documents/Publications/Archives_E3_Report_Oct_09.pdf); [http://www.hwtma.org.uk/uploads/documents/Archaeological%20Projects/MATCE%20Project%20Report\\_FINAL\\_V2\\_LOW.pdf](http://www.hwtma.org.uk/uploads/documents/Archaeological%20Projects/MATCE%20Project%20Report_FINAL_V2_LOW.pdf).

<sup>196</sup> Factors to be taken into account in ensuring disposition of seized underwater cultural heritage for public benefit under Article 18(4):

- The need for conservation and research;
- The need for reassembly of a dispersed collection;
- The need for public access, exhibition and education;
- The interests of any State with a verifiable link.

<sup>197</sup> See [http://www.dft.gov.uk/mca/mcga07-home/emergencyresponse/mcga-receiverofwreck/mcga-dops\\_row\\_remit.htm](http://www.dft.gov.uk/mca/mcga07-home/emergencyresponse/mcga-receiverofwreck/mcga-dops_row_remit.htm).



## **Appendix 1.1: UK Explanation of Vote on the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*, 31 October 2001**

As a nation with a long maritime history, the United Kingdom attaches great importance to the preservation of Underwater Cultural Heritage. There are many historic wrecks lying on the seabed in the waters off our shores and there are wrecks of British origins all over the world. Many of those wrecks contain the remains of British seafarers. We are, therefore, committed to a global Convention for the Protection of Underwater Cultural Heritage and entered negotiations to create one in a very positive spirit. Much good progress has been made and the UK can support most of the articles in the current draft of the Convention, particularly the provisions in the Annex. It was with great regret, therefore, that the UK was unable to vote in support of the text before us today. Our reasons will be familiar to those who have taken part in the expert group meetings at which we have tried to explain our concerns.

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

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

We very much regret that the artificial deadline created by this Conference has prevented the Parties to this negotiation from agreeing a text to meet these concerns. In last meeting of experts in July much progress was made on the difficult issue of jurisdiction and we recognise the enormous efforts made by many delegations to achieve a compromise. We believe that given more time and reflection, a way could have been found to meet our remaining concerns. We note that the United Kingdom is far from alone in having serious reservations about the text. We believe that it is very regrettable that the

member States of UNESCO are about to approve a Convention at this General Conference that will not prove capable of attracting universal support.

## Appendix 2.1: Royal Navy Loss List (1605 - 1945)

- At least 3486 Royal Navy casualties occurred across the world between 1605 and 1945.
- Of the UK's State vessel wrecks in coastal jurisdictions other than its own, more than a quarter are within the jurisdiction of States that have either already ratified the 2001 Convention or are considering ratification. A mutual duty of co-operation in respect of these wrecks would be created with these States were the UK to ratify the Convention.
- 21% of Royal Navy losses occurred in the Area. The co-operative protective regime the Convention establishes in the Area, which is based on their status as sunken State vessels, is likely to provide better protection for Royal Navy wrecks than the current reliance on protection based on sovereign immunity.
- Two thirds of the naval casualties on the Loss List are relatively recent having occurred during World Wars I and II. By the end of 2018 a total of 1060 World War I losses will be eligible for protection under the Convention. These sites would suffer no reduction in protection but, in fact, should receive enhanced protection, were the UK to ratify the Convention.

### Introduction

How many wrecks of historical British warships and State vessels are there around the world? According to the Royal Navy Loss List - a list of the global extent and distribution of wrecks of potentially sovereign immune, British Naval vessels lost between 1605 and 1945 - at least 3486.

This Royal Navy Loss List was developed as an evidence base to underpin Paper 2 above which discusses the UK Government's objection to the 2001 Convention on the grounds of its potential adverse impact upon the sovereign immunity of such wrecks.

The aim of creating the Loss List was to ascertain as accurately as possible from a review of published, secondary sources, the number and location of Royal Navy vessel losses since the early 17<sup>th</sup> century, when the modern Royal Navy was originally formed, and up to the end of World War II, which represents the last major period of warship losses by the UK.

In addition to supporting this review of the potential impacts of ratifying the 2001 Convention, the Loss List was also seen as a tool to provide useful context for future decisions in the UK about the management and safeguarding of such wrecks, whether the Convention is ratified or not. In particular, such a list would be useful to the UK Ministry of Defence with their remit for managing and safeguarding the UK's sunken State vessels, both now and in the future.

Furthermore, whereas the Convention only applies to wrecks more than 100 years old, the Loss List includes naval losses from both World Wars, which increasingly require positive management decisions, again regardless of whether the UK ratifies the Convention, most immediately in the context of the centenary commemorations of World War I commencing in 2014<sup>198</sup>.

## Method and Development

The Royal Navy Loss List was developed by the Maritime Archaeology Sea Trust (MAST) through Bournemouth University and under the supervision of David Parham.

The Loss List was compiled from a range of secondary, published sources<sup>199</sup>, which were transcribed and thoroughly compared with one another to produce a consolidated list of Royal Navy losses. The constraints and particular needs of the project meant that neither the National Record of the Historic Environment nor the Ministry of Defence were approached for their respective records of Royal Navy losses. The Royal Navy Loss List therefore makes no claim to present the definitive total of Royal Navy losses, but instead provides a largely accurate total, sufficient to meet the requirements of this Impact Review.

The accuracy of the Loss List was determined by the sources, which contained fairly limited and often variable information in respect of the location, manner and details of the vessel losses. Where a source specifically stated 'on' a coast or gave a specific location for a loss, it was assumed that the wreck is located in the Territorial Sea of the modern Coastal State in question. Where the descriptor 'off' was used, or where no specific location on a country's coast was given, the wreck in question was assumed to be outside that Coastal State's Territorial Sea, but within its EEZ or on its Continental Shelf. In many cases this was difficult to determine and in these instances a loss location was assigned on the basis of the available evidence. Where a location could not be assigned the wreck was characterised as 'location unknown'. Wrecks were deemed to be in international waters when it was not possible to assign a Coastal State without doubt or where the description of loss suggests they were lost outside Coastal State jurisdictions.

Vessels excluded from the Loss List are those that were recorded as having been rebuilt, converted for other use as breakwaters, etc., and those that were hulked.

## Analysis and Discussion

A detailed breakdown by both country and century of loss in respect of the 3486 wrecks recorded in the Loss List can be found in Appendix 2.2. but a summary of the regional spread of losses around the world, according to three broad time periods (17<sup>th</sup> - early 20<sup>th</sup> century, World War I and World War II), the percentage of the total number of losses that occur within each region, and the number of current signatories to the 2001 Convention per region is presented in Table 2.1.1 below.

Region	1605-1914	1914-1918	1918-1945	Total (by Region)	% of Total	UNESCO Ratifications
<b>Europe</b> (including Iceland, Germany and Greece)	606	722	633	<b>1961</b>	56.3%	13
<b>Africa south of the Sahara</b> (including the Cape Verde Islands)	27	2	17	<b>46</b>	1.3%	5
<b>International Waters</b>	168	210	342	<b>720</b>	20.7%	-
<b>Asia</b> (including China, Middle East, India and Sri Lanka)	20	4	12	<b>36</b>	1.0%	3

Region	1605-1914	1914-1918	1918-1945	Total (by Region)	% of Total	UNESCO Ratifications
<b>Mediterranean</b> (including Black Sea and North Africa)	23	97	123	<b>243</b>	7.0%	3
<b>Australasia</b> (Australia, NZ, Papua New Guinea and the Pacific Islands)	11	2	0	<b>13</b>	0.4%	0
<b>Baltic</b> (including Russia and Denmark)	26	17	55	<b>98</b>	2.8%	1
<b>North America</b> (USA and Canada)	114	1	1	<b>116</b>	3.3%	0
<b>South and Latin America</b> (including Mexico and the Caribbean)	148	4	7	<b>159</b>	4.6%	15
<b>Southeast Asia</b> (including Thailand, Burma, and the East Indies)	24	0	69	<b>93</b>	2.7%	1
<b>Unknown</b>	0	1	0	<b>1</b>	0.02%	
<b>Total (per Period)</b>	<b>1167</b>	<b>1060</b>	<b>1259</b>	<b>3486</b>		

**Table 2.1.1: Summary of worldwide regional distribution of Royal Navy losses**

Table 2.1.2 below presents an alternative breakdown of Royal Navy losses which reflective of the geopolitics of sunken State vessels relevant to the 2001 Convention:

Numbers by Location	1605-1914		1914-1918		1918-1945		Total	
United Kingdom (EEZ)	19	1.6%	81	7.6%	36	2.9%	<b>136</b>	<b>3.9%</b>
British Isles (including Crown Dependencies)	273	23.4%	481	45.4%	324	25.7%	<b>1078</b>	<b>30.9%</b>
International waters (the Area)	168	14.4%	210	19.8%	342	27.2%	<b>720</b>	<b>20.7%</b>
UNESCO Convention (Ratified)	306	26.2%	75	7.1%	236	18.7%	<b>617</b>	<b>17.7%</b>
UNESCO Convention (Ratification being considered)*	121	10.4%	108	10.2%	96	7.6%	<b>325</b>	<b>9.3%</b>
Remainder of World	280	24.0%	105	9.9%	225	17.9%	<b>610</b>	<b>17.5%</b>
<b>Total</b>	<b>1167</b>	<b>100%</b>	<b>1060</b>	<b>100%</b>	<b>1259</b>	<b>100%</b>	<b>3486</b>	<b>100%</b>

**Table 2.1.2: Distribution of Royal Navy losses according to categories relevant to the 2001 Convention**

(\*See Appendix 2.2 for a list of States known to be considering ratification (based on pers. comm. UNESCO Secretariat, April 2013))

It is clear from Table 2.1.2 that 17.7% of Royal Navy losses occurred within the jurisdictions of States that have already ratified the 2001 Convention and that a further 9.3% are within the jurisdictions of States which are known to be considering ratification. This means that more than a quarter of all Royal Navy losses are located within coastal jurisdiction of States, which, if the UK ratified the 2001 Convention, would be under a duty, assuming all eventually ratify, of co-operation with UK over management of those wrecks. This would be a significant potential benefit to the UK were it to ratify the 2001 Convention.

## Distribution of Losses

The Loss List indicates that more than a third of all Royal Navy losses (1214) occurred within the UK's Territorial Sea, EEZ and Continental Shelf and that a further 44.5% (1552 wrecks) are located within the Territorial Seas, EEZs or Continental Shelves of 84 other Coastal States around the world. The

vast majority - 79% - of Royal Navy wrecks are thus located within the Territorial Seas, EEZ or on the Continental Shelf of a Coastal State (including the UK and its overseas territories).

The remaining 720 (almost 20%) of the total number of casualties in the Loss List are believed to be in the Area, beyond the EEZ or Continental Shelf of any Coastal State, and there is one wreck whose area of loss is not known.

After the UK, the second largest number of Royal Navy wrecks (247) is located in French waters. Other individual countries with significant numbers (more than 1%) of Royal Navy wrecks in their jurisdictions are:

Country	Number of Wrecks	% of Total	UNESCO Ratification?
Italy	111	3.2%	Ratified
Ireland	98	2.8%	Considering
Netherlands	80	2.3%	Considering
Greece	76	2.2%	-
Canada	61	1.7%	-
Malta	60	1.7%	-
Norway	57	1.6%	-
United States	55	1.6%	-
Libya	48	1.4%	Ratified
Spain	48	1.4%	Ratified
Jamaica	42	1.2%	Ratified
Egypt	39	1.1%	-
Belgium	38	1.1%	Ratified

**Table 2.1.3: List of countries with more than 1% of the total of Royal Navy wrecks within their maritime jurisdictions**

Of these fourteen States, six have already ratified the Convention, and Ireland and the Netherlands are understood to be considering ratification<sup>200</sup>.

## Period of Loss:

### 1605-1914

There were 1167 Royal Navy casualties in the 309 years from 1605 to the outbreak of World War I in 1914. Appendix 2.2 indicates that these losses occurred in the Territorial Sea, EEZs or Continental Shelves of more than 80 countries worldwide, although the precise locations of the great majority of these wrecks are not known.

This period is dominated by wooden sailing vessels but latterly covers the transition from wood to steel ship construction and sail to steam propulsion, making it of great historical interest. Practically all of these wrecks are now over 100 years old, can be defined as underwater cultural heritage and would thus fall within the protective regime of the 2001 Convention.

What the Loss List illustrates is that 39.4% of the losses during this period are either in waters over which the UK has control, or where there is no Coastal State control (i.e. international waters - the

Area). A further 36.6% of wrecks are in the Territorial Sea of States that have already ratified the 2001 Convention or have indicated they are likely to do so. This leaves only 24% (or 280 losses) in the jurisdictions of States that may not currently recognise the 2001 Convention.

Numbers by Location	Wrecks	%
UK controlled waters	292	25.0%
International waters (no State)	168	14.4%
UNESCO Ratified	306	26.2%
UNESCO being considered	121	10.4%
<b>Sub Total</b>	<b>887</b>	<b>76.0%</b>
Rest of World	280	24.0%
<b>Total</b>	<b>1167</b>	<b>100.0%</b>

**Table 2.1.4: Distribution of Royal Navy losses: 1605-1914**

Based on the conclusions of Paper 2 above, it is likely that the great majority (76%) of these, historical, pre-World War I naval wrecks would receive enhanced protection were the UK to ratify the 2001 Convention, rather than suffer a reduction in protection.

The 280 'unprotected' wrecks in the rest of the world is a modest number, the future management and safeguarding of which can be dealt with on an *ad hoc* basis, as and when sites are discovered and there are proposals made to intervene in these sites. The increased worldwide awareness, since the entry into force of the Convention, of the need to protect historic wrecks, and the application by many States of the rules of the Annex in respect of activities directed at sites within their jurisdictions, regardless of whether they have ratified the Convention, suggests that it is unlikely that these 'unprotected' wrecks, will be subject to inappropriate activities. Furthermore, because the number of States which have ratified the 2001 Convention is increasing every year, the number of UK State vessels which fall outside the potential protection of the Convention will reduce with time, as will any potential risk to these sites.

### **1914-1918**

The bulk of the UK's naval casualties (2319 or 66%) occurred during the two World Wars: 1060 losses in World War I and 1259 in World War II.

Although none of these wrecks - in many instances the last resting place of Royal Navy sailors - currently fall within the purview of the 2001 Convention, by the end of 2014 some 40 World War I sites will be more than 100 years old. These sites will meet the definition of underwater cultural heritage and will therefore be eligible for protection under the 2001 Convention. By the end of 2015 a further 163 wrecks will be 100 years old, and by 2018 all 1060 Royal Navy World War I losses will fall within the ambit of the 2001 Convention.

The Loss List indicates that 73.8% of World War I casualties are located in waters over which either the UK has control, or where there is no Coastal State control (i.e. international waters). Of the

remaining 288 losses from this period, only 9.9% (or 105 wrecks) lie in the waters of States that that have either not yet ratified the 2001 Convention or are not currently considering ratification.

Furthermore, the vast majority of this latter group of sites - 81% (or 86 of the 105 wrecks) - lie in the waters of a handful of States (Algeria (17), Egypt (18), Malta (20), Turkey (23) and Russia (8)). The management of this relatively small collection of sites could thus be dealt with on a case by case basis, if these wrecks are discovered and activities affecting them are proposed.

In a similar way to the earlier period discussed above, the conclusion can thus be drawn that were the UK were to ratify the 2001 Convention, the substantial majority of World War I naval losses are likely to receive enhanced protection under the co-operative regime introduced by the Convention in respect of State vessels.

Numbers by Location	Wrecks	%
UK controlled waters	562	53.0%
International waters (no State)	210	19.8%
UNESCO Ratified	75	7.1%
UNESCO being considered	108	10.2%
<b>Sub Total</b>	<b>955</b>	<b>90.1%</b>
Rest of World	105	9.9%
<b>Total</b>	<b>1060</b>	<b>100.0%</b>

**Table 2.1.5: Distribution of Royal Navy losses: 1914-1918**

### **1918–1945**

This period effectively covers the Royal Navy losses of World War II from 1939 to 1945, although two casualties from between the wars are also included in the Loss List. With the exception of the inter-war losses, the wrecks from this period will not qualify for protection under the 2001 Convention until at least 2039. When they do, however, it is likely that as in the case of earlier Royal Navy losses, the Convention will enhance rather than reduce their protection, for the reasons discussed in Paper 2.

Almost a third of World War II losses (28.6%) are located in UK controlled waters, a further 27.2% are in international waters and 18.7% are in the waters of States that have ratified the Convention. Only 25.5% (321 wrecks) are in the waters of States that that have either not yet ratified the 2001 Convention or have indicated that they are considering ratification.

As was the case with this category of World War I wrecks, the vast majority of this latter category of losses - 171, or 76% - lie in the waters of a few States, including Algeria (11), China (15) Egypt (14), Indonesia (16), Malta (40), Norway (51) and Singapore (24) and their future management could be handled on a case by case basis, as described above.

At the current rate of ratification it is also reasonable to assume that by 2039 many of the States where these World War II wrecks lie will also have ratified the 2001 Convention and currently perceived risks to these sites will, by then, have been substantially reduced.

Numbers by Location	Wrecks	%
UK controlled waters	360	28.6%
International waters (no State)	342	27.2%
UNESCO Ratified	236	18.7%
UNESCO being considered	96	7.6%
<b>Sub Total</b>	<b>1034</b>	<b>82.1%</b>
Rest of World	225	17.9%
<b>Total</b>	<b>1259</b>	<b>100.0%</b>

**Table 2.1.6: Distribution of Royal Navy losses: 1918-1945**

### Losses in International Waters (the Area)

As noted already, the Loss List records 720 casualties in international waters (the Area). An analysis of these records, on the basis that wrecks were deemed to be in international waters when it was not possible to assign them to a Coastal State without doubt, or where the description of loss suggests they were lost outside Coastal State jurisdictions, allows this broad categorisation to be refined as follows:

Region	Number of losses	Percentage per region
Mediterranean (incl. the Adriatic, Aegean and Black Seas)	131	18.2%
Arctic	16	2.2%
Baltic Sea	5	0.7%
Atlantic	157	21.8%
North Sea	149	20.7%
West Indies / Caribbean	34	4.7%
Indian Ocean	21	2.9%
Pacific	3	0.4%
East Indies (incl. South China and Java Seas)	14	1.9%
North American Great Lakes	4	0.6%
Unknown	186	25.8%
<b>Total</b>	<b>720</b>	

**Table 2.1.7: Losses in international waters by sea area**

Appendix 2.3 provides a more detailed breakdown of the numbers given in the table above.

Both the Mediterranean and North Sea can be described as enclosed seas and it is thus likely that most Royal Navy wrecks in these areas will, in reality, be located in the Territorial Sea or EEZ of one of the surrounding Coastal States. On the basis of the records used to create the Loss List, however, this was not possible to determine, and further work would be needed to establish the location of these wrecks more precisely.

This aside, the regional distribution of losses in international waters shown in Table 2.1.7 above reflects historical trends and Royal Navy areas of activities. There are relatively large numbers of casualties recorded in the Mediterranean area, the Atlantic Ocean and the North Sea, the bulk of which date from the two World Wars. In fact, 69% or 500 of the losses in international waters are 20<sup>th</sup> century in date.

In terms of density of losses per sea area, the North Sea outstrips the rest, again a reflection of particularly large losses during World War I (103), and to a lesser degree World War II (33).

Although many of these wrecks are currently too young to be protected by the 2001 Convention, those that are more than 100 years old would benefit from the protective regime it provides for underwater cultural heritage in the Area and within the next five years a further 210 Royal Navy wrecks in international waters alone will pass the 100 years threshold and could be protected by the 2001 Convention.

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<sup>198</sup> Particularly in respect of the presence and treatment of human remains on these sites (see Dunkley, M., 2011, Catastrophic burials: the study of human remains from sunken warships, Conservation Bulletin, Issue 66, p.20-22, English Heritage) and also in respect of issues related to potential pollution arising from these wrecks (see report for the MoD and Marine and Coastguard Agency by ABPmer: Potentially Polluting Wrecks in the UK Pollution Control Zone (Research Project 567), 2007. [http://www.dft.gov.uk/mca/r1335\\_final\\_10may07\\_v10\\_1.pdf](http://www.dft.gov.uk/mca/r1335_final_10may07_v10_1.pdf))

<sup>199</sup> Gossett, W.P. 1986. Lost Ships of the Royal Navy 1794–1900. Mansell Publishing Ltd; HMSO. 1988. British Ships lost at Sea 1914-18 & 1939-45; Lavery, B. 1983. The Ship of the Line, Volume I, The development of the battlefleet 1650-1850. Conway Maritime Press; Lloyds of London. 1989. Lloyds War Losses: The Second World War Volume I. London; Lloyds of London. 1990. Lloyds War Losses: The First World War. London; Lloyds of London. 1991. Lloyds War Losses; The Second World War Volume II. London; Lyon, D. 1993. The Sailing Navy List 1688-1860. Conway Maritime Press; Lyon, D. And Winfield, R. 2004. The Sail and Steam Navy List 1815-1889. Chatham Publishing; Winfield, R. 2005. British Warships in the Age of Sail 1793-1817. Seaforth Publishing; and Winfield, R. 2009. British Warships in the Age of Sail 1603-1714. Seaforth Publishing, UK.

<sup>200</sup> Sean Kirwan, National Monuments Service, Department of Arts, Heritage and the Gaeltacht (Pers. comm. via email, 14 January 2013; Vevita Eichberger-Zandee, Department for cultural Heritage, Netherlands Ministry of Education, Culture and Science (Pers. comm. via email 7 June and 29 November 2013).

## Appendix 2.2: Detailed Breakdown of Royal Navy Losses by Country and Century

(Note: The 20th century is divided into pre-World War I and World Wars I and II)

Region and State	C17th	C18th	C19th	C20th	WW1	WW2	Total	UNESCO Signatory
<b>Africa south of the Sahara (including the Cape Verde Islands)</b>								
Benin			1				1	Ratified
Cape Verde			2				2	
Guinea			2				2	
Kenya						1	1	
Madagascar			1			1	2	
Mauritius			6				6	
Mozambique						1	1	
Nigeria			1			4	5	Ratified
Senegal	1	2	3				6	
Sierra Leone						7	7	
Somalia			1				1	
South Africa		2	5		1	2	10	
Tanzania					1	1	2	
<b>Regional Total</b>	<b>1</b>	<b>4</b>	<b>22</b>	<b>0</b>	<b>2</b>	<b>17</b>	<b>46</b>	
<b>Asia (including China, Middle East, India and Sri Lanka)</b>								
India	1	8	4			1	14	
Iraq					2		2	
Israel			1		2	1	4	
Oman						1	1	
Saudi Arabia			2				2	
Sri Lanka		1	3			5	9	Considering
Yemen						4	4	
<b>Regional Total</b>	<b>1</b>	<b>9</b>	<b>10</b>	<b>0</b>	<b>4</b>	<b>12</b>	<b>36</b>	
<b>Australasia (Aus, NZ, Papua New Guinea and the Pacific Islands)</b>								
Australia		1	3		1		5	Considering
New Zealand		2	4				6	
Papua New Guinea			1		1		2	
<b>Regional Total</b>	<b>0</b>	<b>3</b>	<b>8</b>	<b>0</b>	<b>2</b>	<b>0</b>	<b>13</b>	
<b>Baltic (Inc Russia and Denmark)</b>								
Denmark		3	12				15	
Estonia			1				1	
Finland					7		7	Considering
Norway			4		2	51	57	
Russia	1		4		8	4	17	
Sweden		1					1	
<b>Regional Total</b>	<b>1</b>	<b>4</b>	<b>21</b>	<b>0</b>	<b>17</b>	<b>55</b>	<b>98</b>	
<b>Europe (including Iceland, Germany and Greece)</b>								

Region and State	C17th	C18th	C19th	C20th	WW1	WW2	Total	UNESCO Signatory
Albania					1		1	Ratified
Belgium	1	1	1		22	13	38	Ratified
British Isles (incl. Crown Dependencies)	91	89	90	3	481	324	1078	
Croatia						5	5	Ratified
France (Metropolitan France)		2		3		1	6	Ratified
France N	21	17	51		21	95	205	Ratified
France S	1	12	1			4	18	Ratified
France (French Republic)	1	6	11				18	Ratified
Germany		2	7		1	4	14	
Gibraltar		1					1	
Greece			3		27	46	76	Considering
Iceland						8	8	
Ireland	12	8	15		50	13	98	Considering
Italy	3	11	5		29	63	111	Ratified
Netherlands	33	13	14		1	19	80	Considering
Portugal		9	8		2	1	20	Ratified
Spain	6	7	28		6	1	48	Ratified
United Kingdom (EEZ)	2	5	12		81	36	136	
<b>Regional Total</b>	<b>171</b>	<b>183</b>	<b>246</b>	<b>6</b>	<b>722</b>	<b>633</b>	<b>1961</b>	
<b>International Waters</b>								
International waters	16	52	100		210	342	720	
<b>Regional Total</b>	<b>16</b>	<b>52</b>	<b>100</b>		<b>210</b>	<b>342</b>	<b>720</b>	
<b>North America (USA and Canada)</b>								
Canada	4	23	34				61	
United States	5	37	11		1	1	55	
<b>Regional Total</b>	<b>9</b>	<b>60</b>	<b>45</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>116</b>	
<b>Mediterranean (incl. Black Sea and North Africa)</b>								
Algeria		1	1		17	11	30	
Cyprus					2		2	
Egypt		2	5		18	14	39	
Lebanon						1	1	Ratified
Libya					4	44	48	Ratified
Malta					20	40	60	
Morocco	2	3	1		8		14	Ratified
Syria		1	1				2	
Tunisia		1	1		5	11	18	Ratified
Turkey			4		23	2	29	
<b>Regional Total</b>	<b>2</b>	<b>8</b>	<b>13</b>	<b>0</b>	<b>97</b>	<b>123</b>	<b>243</b>	
<b>South and Latin America (including Mexico and the Caribbean)</b>								
Antigua and Barbuda		5	2				7	Considering
Argentina		1					1	Ratified
Bahamas, The		5	14				19	
Barbados	1	2	4			1	8	Ratified

Region and State	C17th	C18th	C19th	C20th	WW1	WW2	Total	UNESCO Signatory
Belize			1				1	
Bermuda		3	4				7	
Brazil			2		1		3	
British Virgin Islands		1					1	
Chile		2	1		3		6	
Colombia		1	2				3	
Cuba	3	4	9				16	Ratified
Dominica		1					1	
Dominican Republic		3	1				4	
Guyana		1	3				4	
Haiti	3	6	2				11	Ratified
Honduras		2	3				5	Ratified
Jamaica	4	17	19			2	42	Ratified
Mexico		1	5				6	Ratified
Saint Kitts and Nevis	1	1	1				3	Ratified
Saint Lucia		4					4	Ratified
Trinidad and Tobago						3	3	Ratified
Uruguay			1				1	Considering
Venezuela			2			1	3	
<b>Regional Total</b>	<b>12</b>	<b>60</b>	<b>76</b>	<b>0</b>	<b>4</b>	<b>7</b>	<b>159</b>	
<b>Southeast Asia (including Thailand, Burma, and the East Indies)</b>								
Burma						2	2	
China		1	11	1		15	28	
Indonesia		1	3			16	20	
Japan		1	2				3	
Malaysia						9	9	
Philippines		2	2				4	Considering
Singapore						24	24	
Thailand						3	3	
<b>Regional Total</b>	<b>0</b>	<b>5</b>	<b>18</b>	<b>1</b>	<b>0</b>	<b>69</b>	<b>93</b>	
<b>Unknown</b>					1		1	
<b>Regional Total</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>1</b>	<b>0</b>	<b>1</b>	
<b>Total</b>	<b>213</b>	<b>388</b>	<b>559</b>	<b>7</b>	<b>1060</b>	<b>1259</b>	<b>3486</b>	



## Appendix 2.3: Breakdown of Royal Navy Losses in International Waters by Sea / Ocean

Region	Area	Number of losses
<b>Mediterranean</b>	General	25
	Central	10
	Eastern	29
	Western	14
	Gibraltar (near)	3
	Gibraltar Straits	4
	Algeria (off)	1
	Greece (off)	1
	Italy (off)	3
	Malta (off)	1
	Spain (off)	3
	Adriatic (General)	28
	Adriatic (North)	1
	Aegean Sea	7
	Black Sea	1
<b>Sub-total</b>		<b>131</b>
<b>Arctic</b>	General	2
	Canada	2
	Barents Sea	9
	Barents Sea (off Russia)	1
	Greenland Sea	2
<b>Sub-total</b>		<b>16</b>
<b>Baltic</b>	General	3
	Sweden (off)	1
	Germany (off)	1
<b>Sub-total</b>		<b>5</b>
<b>Atlantic</b>	General	37
	Mid	1
	South	3
	North	95
	Western	7
	Canada (off)	1
	Brazil (off)	1
	Uruguay (off)	1
	West Africa	10
	Nigeria (off)	1
<b>Sub-total</b>		<b>157</b>
<b>North Sea</b>	General	141
	Netherlands (off)	3
	Netherlands / Belgium (off)	1
	English Channel	4
<b>Sub-total</b>		<b>149</b>
<b>West Indies</b>	General	<b>34</b>
<b>Indian Ocean</b>	General	10
	Kenya / Tanzania (between)	1
	India / Sri Lanka (between)	1
	Malacca Straits (in)	1
	South Africa (off)	1
	Mozambique Channel (in)	2
	Persian Gulf	1
	Red Sea	3
	Suez Canal	1
<b>Sub-total</b>		<b>21</b>
<b>Pacific</b>	General	1
	Southern	2
<b>Sub-total</b>		<b>3</b>
<b>East Indies</b>	General	6
	South China Sea	3
	Java Sea	5

<b>Region</b>	<b>Area</b>	<b>Number of losses</b>
<b>Sub-total</b>		<b>14</b>
<b>North America</b>	Great Lakes	<b>4</b>
<b>Unknown</b>		<b>186</b>
<b>Total</b>		<b>720</b>

## Appendix 4.1: Review of the Substantive Clauses of the 2001 Convention

Article	Convention Heading	Clause	UK Provision
<b>Statements</b>			
1.1(a)	Definitions	[For the purposes of this Convention:] “Underwater cultural heritage” means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.	The UK adheres to broad definitions of the ‘historic environment’ and ‘heritage assets’ in policy that would encompass this definition of underwater cultural heritage.
1.1(b)	Definitions	Pipelines and cables placed on the seabed shall not be considered as underwater cultural heritage.	This reservation is unlikely to cause concern to the UK, though it should be noted that some disused cables and pipelines may be regarded as having historic significance (e.g. early transatlantic cables; sections of WWII PLUTO – Pipe Line Under The Ocean)
1.1(c)	Definitions	Installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage.	This reservation is unlikely to cause concern to the UK, though some installations on the seabed that are still in use are regarded as having historic significance (e.g. inhabited C19th forts such as Spitbank and Bull Sand; inhabited WWII forts such as ‘Sealand’).
2.1	Objectives and general principles	This Convention aims to ensure and strengthen the protection of underwater cultural heritage.	The UK has stated that it attaches great importance to the preservation of underwater cultural heritage.
3	Relationship between this Convention and the United Nations Convention on the Law of the Sea	Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea.	See Paper 1
3bis	Relationship between this Convention and the United Nations Convention on the Law of the Sea	This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.	See Paper 1
6.3	Bilateral, regional or other multilateral agreements	This Convention shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention.	This reservation is unlikely to cause concern to the UK.

Article	Convention Heading	Clause	UK Provision
11.1	Reporting and notification in the Area	States Parties have a responsibility to protect underwater cultural heritage in the Area in conformity with this Convention and Article 149 of the United Nations Convention on the Law of the Sea.	This clause appears to be a restatement of the general duty to protect underwater cultural heritage set out in LOSC Article 303 but with specific reference to The Area. Conformity with LOSC Article 149 is reinforced. This clause seems unlikely to cause concern to the UK.
13	Sovereign immunity	Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention.  [But NB 13bis]	This clause provides that sovereign immunity vessels do not have to abide by obligations in respect of reporting discoveries of underwater cultural heritage. As it reinforces the doctrine of sovereign immunity with respect to provisions of the 2001 Convention, it seems likely to be welcomed by the UK.
<b>Statements – Permissive</b>			
7.1	Underwater cultural heritage in internal waters, archipelagic waters and territorial sea	States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.	This clause is a statement of existing international law with respect to underwater cultural heritage and waters in which coastal states have sovereignty. It is unlikely to cause concern to the UK.
8	Underwater cultural heritage in the contiguous zone	Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone.	This clause states more clearly the provision made in LOSC Article 303(2) for coastal states to presume that unauthorised removal of underwater cultural heritage from the Contiguous Zone would infringe the coastal states laws and regulations in their Territory / Territorial Sea. As accordance with LOSC Article 303(2) is restated it seems unlikely to cause concern to the UK.
10.2	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.	See Paper 1. Although this might be interpreted as a new power it is framed to require consistency with LOSC. The right to prohibit or authorise activities directed at underwater cultural heritage on the CS / EEZ is circumscribed by existing international law relating to sovereign rights and jurisdiction, including LOSC.
12.3	Protection of underwater cultural heritage in the Area	All States Parties may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.	This clause is set out as an apparently broad permissive right to prevent immediate danger to underwater cultural heritage in The Area, which might be seen as a specific means of giving effect to the general obligation in LOSC Article 303(1) to protect objects of an archaeological and historical nature at sea. It is circumscribed by the need to be in conformity with the 2001 Convention, which invokes the various reinforcements to LOSC that the 2001 Convention provides. It is further circumscribed by measures being 'practicable'. It seems unlikely that this clause would cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
c	Declaration as to inland waters	When ratifying, accepting, approving or acceding to this Convention or at any time thereafter, any State or territory may declare that the Rules shall apply to inland waters not of a maritime character.	This clause allows States Parties to declare that they will apply the Rules to non-tidal inland waters – e.g. freshwater rivers and lakes. The UK may or may not wish to take up this option; the clause is unlikely to cause difficulty.
29	Limitations to geographical scope	At the time of ratifying, accepting, approving or acceding to this Convention, a State or territory may make a declaration to the depositary that this Convention shall not be applicable to specific parts of its territory, internal waters, archipelagic waters or territorial sea, and shall identify therein the reasons for such declaration.	This clause enables States Parties to limit the spatial application of the Convention within the zones in which it has sovereignty (i.e. out to the limit of the Territorial Sea), subject to it identifying the reasons for the limits it declares. The UK may or may not wish to take up this option; the clause is unlikely to cause difficulty. Caveats requiring States Parties to promote circumstances in which the limitations can be removed are considered below.
9.5	Reporting and notification in the exclusive economic zone and on the continental shelf	[Where underwater cultural heritage in the EEZ / on the CS has been notified] Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned	This clause provides a clear right to State Parties to declare an interest in being consulted in respect of the protection of underwater cultural heritage in the CS / EEZ of other State Parties. The declaration of such interest has to be based on a verifiable link. With respect to other countries declaring an interest in underwater cultural heritage on the UK CS / EEZ this is unlikely to be problematic as the UK's general practice is to engage with the heritage agencies of countries that have a specific interest in underwater cultural heritage within UK waters. With respect to the CS / EEZ of other countries, this clause offers the UK a tangible role in discussions about the protection of underwater cultural heritage in which the UK has an interest, encompassing all forms of shipping built, owned or crewed from the UK, not just sovereign immune vessels.
11.4	Reporting and notification in the Area	[Where underwater cultural heritage in the Area has been notified] Any State Party may declare to the Director-General its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link to the underwater cultural heritage concerned, particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin.	As with Article 9.5, this clause provides a clear right to State Parties to declare an interest in respect of the protection of underwater cultural heritage in the Area. This clause offers the UK a tangible role in discussions about the protection of underwater cultural heritage in which the UK has an interest in The Area, encompassing all forms of shipping built, owned or crewed from the UK, not just SI vessels.
<b>Statement – Prohibitive</b>			
2.11	Objectives and general principles	No act or activity undertaken on the basis of this Convention shall constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction.	This clause provides an important assurance that underwater cultural heritage cannot be used as a basis for national sovereignty or jurisdiction. It is likely to be welcomed by the UK.
2.8	Objectives and general principles	Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft.	See Paper 2

Article	Convention Heading	Clause	UK Provision
4	Relationship to law of salvage and law of finds	Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.	See Paper4
<b>Statements – Other Agreements</b>			
6.1	Bilateral, regional or other multilateral agreements	States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage.	This clause provides only 'encouragement' to other agreements, and effectively safeguards such agreements as the UK has already entered into. It is unlikely to cause difficulty to the UK.
6.1bis	Bilateral, regional or other multilateral agreements	All such [bilateral, regional or other multilateral agreements] shall be in full conformity with the provisions of this Convention and shall not dilute its universal character.	This clause provides that new agreements will be in full conformity with the 2001 Convention, meaning that such agreements cannot alter the statement of international law within the 2001 Convention and invoking the various reinforcements to LOSC that the 2001 Convention provides. This clause is likely to be welcomed by the UK.
6.1ter	Bilateral, regional or other multilateral agreements	States may, in such [bilateral, regional or other multilateral] agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.	Although new agreements cannot change international law as set out in the 2001 Convention, this clause provides that the rules and regulations applied within the 2001 Convention framework can be 'better' than the Rules set out in the Annex. This clause is unlikely to cause difficulty to the UK.
6.2	Bilateral, regional or other multilateral agreements	The Parties to such bilateral, regional or other multilateral agreements may invite States with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned to join such agreements.	This clause is unlikely to cause difficulty to the UK.
<b>Obligations</b>			
2.10	Objectives and general principles	Responsible non-intrusive access to observe or document <i>in situ</i> underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management.	UK policy and practice favours increased public access to and engagement with all forms of cultural heritage, except where access is likely to increase deterioration or cause other problems. This clause is likely to be welcomed by the UK.
2.2	Objectives and general principles	States Parties shall cooperate in the protection of underwater cultural heritage.	This clause restates the general obligation on State parties to co-operate for the purpose of protecting objects of an archaeological nature found at sea, as set out in LOSC Article 303(1).
2.3	Objectives and general principles	States Parties shall preserve underwater cultural heritage for the benefit of humanity in conformity with the provisions of this Convention.	This clause echoes the recognition in Article 6 of the World Heritage Convention of a world heritage for whose protection it is the duty of the international community as a whole to co-operate. It is unlikely to cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
2.4	Objectives and general principles	States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.	This clause sets out a general obligation on State Parties to take all appropriate measures that are necessary to protect underwater cultural heritage. Measures are, however, circumscribed by having to conform with the 2001 Convention, to being practicable and at the State's disposal, and to being in accordance with their capabilities. Noting these caveats, this clause is unlikely to cause difficulty to the UK.
2.5	Objectives and general principles	The preservation <i>in situ</i> of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.	This clause states a presumption in favour of preservation <i>in situ</i> as the first option in considering activities directed at underwater cultural heritage. For both practical and philosophical reasons, a presumption in favour of preservation <i>in situ</i> is widely expressed in UK policy and codes of professional practice. A preference for conservation and management <i>in situ</i> is included in Article 4(ii) of the Valletta Convention 1992 to which the UK is party. Article 2(5) of the 2001 Convention also reflects closely Rule 1 in the Annex, to which the UK already subscribes. Consequently, this clause is unlikely to cause difficulty to the UK.
2.6	Objectives and general principles	Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.	See Paper 4.
2.7	Objectives and general principles	Underwater cultural heritage shall not be commercially exploited.	See Paper 4.
2.9	Objectives and general principles	States Parties shall ensure that proper respect is given to all human remains located in maritime waters.	See Paper 4.
5	Activities incidentally affecting underwater cultural heritage	Each State Party shall use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.	This clause requires State parties to prevent or mitigate the adverse effects on underwater cultural heritage of incidental activities, that is to say activities that are not driven by underwater cultural heritage but which may have consequences for underwater cultural heritage, such as marine construction, dredging or bottom trawling, for example. The obligation is limited to measures that are practicable and at the disposal of the State Party. The UK has a world lead in addressing activities incidentally affecting underwater cultural heritage and can be expected to welcome this provision.
7.2	Underwater cultural heritage in internal waters, archipelagic waters and territorial sea	Without prejudice to other international agreements and rules of international law regarding the protection of underwater cultural heritage, States Parties shall require that the Rules be applied to activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.	See Paper 3.

Article	Convention Heading	Clause	UK Provision
7.3	Underwater cultural heritage in internal waters, archipelagic waters and territorial sea	Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.	See Paper 2
8bis	Underwater cultural heritage in the contiguous zone	In so doing [regulating and authorising activities directed at underwater cultural heritage within their CZ], they shall require that the Rules be applied.	This clause provides that, insofar as a State Party is able to regulate or authorise activities directed at underwater cultural heritage within their Contiguous Zone, then such regulation / authorisation should give effect to the Rules. The UK regards the Rules as representing best practice for maritime archaeology, so this clause is unlikely to cause difficulty.
9.1	Reporting and notification in the exclusive economic zone and on the continental shelf	All States Parties have a responsibility to protect underwater cultural heritage in the exclusive economic zone and on the continental shelf in conformity with this Convention.  [Accordingly:]	This statement is consistent with the general provision set out in LOSC Article 303(1) that 'states have a duty to protect objects of an archaeological and historical nature found at sea' framed in terms of the CS / EEZ. Such responsibility has to be exercised in conformity with the 2001 Convention, which invokes international law including LOSC. This clause is unlikely to cause difficulty to the UK.
9.1(a)	Reporting and notification in the exclusive economic zone and on the continental shelf	a State Party shall require that when its national, or a vessel flying its flag, discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its continental shelf, the national or the master of the vessel shall report such discovery or activity to it;	See Paper 4.
9.1(b)	Reporting and notification in the exclusive economic zone and on the continental shelf	in the exclusive economic zone or on the continental shelf of another State Party: (i) States Parties shall require the national or the master of the vessel to report such discovery or activity to them and to that other State Party; (ii) Alternatively, a State Party shall require the national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.	See Paper 4.
9.2	Reporting and notification in the exclusive economic zone and on the continental shelf	On depositing its instrument of ratification, acceptance, approval or accession, a State Party shall declare the manner in which reports will be transmitted under paragraph 1(b) of this Article.	This obligation is consequential to Art 9(1) and in itself is not likely to cause difficulty to the UK.
9.3	Reporting and notification in the exclusive economic zone and on the continental shelf	A State Party shall notify the Director-General of discoveries or activities reported to it under paragraph 1 of this Article.	See Paper 4.

Article	Convention Heading	Clause	UK Provision
10.1	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	No authorization shall be granted for an activity directed at underwater cultural heritage located in the exclusive economic zone or on the continental shelf except in conformity with the provisions of this Article.	This clause provides that, insofar as a State Party is able to regulate or authorise activities directed at underwater cultural heritage on the CS / EEZ, then such regulation / authorisation should give effect to the Rules. The UK regards the Rules as representing best practice for maritime archaeology, so this clause is unlikely to cause difficulty.
10.3(a)	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall: (a) consult all other States Parties which have declared an interest under Article 9, paragraph 5, on how best to protect the underwater cultural heritage;	See Paper 4.
10.7	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	Subject to the provisions of paragraphs 2 and 4 of this Article, no activity [within the CS / EEZ] directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.	This clause provides very clear reinforcement of the interests of Flag States in respect to the wrecks of State vessels and aircraft. This encompasses but goes beyond sovereign immune vessels, as it includes State vessels / aircraft where SI is regarded to have lapsed (e.g. through wrecks being sold). This clause makes it clear that the agreement of the Flag State is required prior to any Coastal State activities taking place. The UK can be expected to welcome this provision.
11.1bis	Reporting and notification in the Area	Accordingly [i.e. in accordance with the responsibility of States Parties for protecting underwater cultural heritage in the Area], when a national, or a vessel flying the flag of a State Party, discovers or intends to engage in activities directed at underwater cultural heritage located in the Area, that State Party shall require its national, or the master of the vessel, to report such discovery or activity to it.	See Paper 4.
11.2	Reporting and notification in the Area	States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them.	See Paper 4.
12.1	Protection of underwater cultural heritage in the Area	No authorization shall be granted for any activity directed at underwater cultural heritage located in the Area except in conformity with the provisions of this Article.	This clause requires only that if authorisations are granted for activities directed at underwater cultural heritage in the Area, they should be in conformity with the 2001 Convention, that is to say, the Rules set out in the Annex are to apply. The UK regards the Rules as representing best practice for maritime archaeology so this clause is unlikely to cause difficulty.

Article	Convention Heading	Clause	UK Provision
12.7	Protection of underwater cultural heritage in the Area	No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State.	This clause provides very clear reinforcement of the interests of Flag States in respect to the wrecks of State vessels and aircraft in The Area. This encompasses but goes beyond sovereign immune vessels, as it includes State vessels / aircraft where sovereign immunity is regarded to have lapsed (e.g. through wrecks being sold). This clause makes it clear that the consent of the Flag State is required prior to any activities being authorised or undertaken by a State Party. The UK can be expected to welcome this provision.
13bis	Sovereign immunity	[However] States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.	See Paper 4.
14	Control of entry into the territory, dealing and possession	States Parties shall take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and / or recovered, where recovery was contrary to this Convention.	It is an offence to acquire, dispose of, import or export cultural objects that are 'tainted' under the Dealing in Cultural Objects (Offences) Act 2003. The Act applies to cultural objects that have been removed or excavated illegally anywhere in the world. It applies to sites including vessels, above or below water. Any instance globally where recovery of underwater cultural heritage contrary to the 2001 Convention constituted an offence would cause the underwater cultural heritage to be 'tainted', and anyone dealing in tainted underwater cultural heritage would be committing an offence under UK law. This clause is unlikely to cause difficulty to the UK.
15	Non-use of areas under the jurisdiction of States Parties	States Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention.	See Paper 4.
16	Measures relating to nationals and vessels	States Parties shall take all practicable measures to ensure that their nationals and vessels flying their flag do not engage in any activity directed at underwater cultural heritage in a manner not in conformity with this Convention.	See Paper 4.
17.1	Sanctions	Each State Party shall impose sanctions for violations of measures it has taken to implement this Convention.	This clause is unlikely to cause difficulty to the UK.
17.2	Sanctions	Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities.	This clause requires that sanctions are effective. It is unlikely to cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
17.3	Sanctions	States Parties shall cooperate to ensure enforcement of sanctions imposed under this Article.	This clause is unlikely to cause difficulty to the UK in general terms; it can be seen as a reinforcement of the general provision in LOSC Article 303(1) that states have a duty to co-operate for the purpose of protecting objects of an archaeological and historic al nature found at sea.
18.1	Seizure and disposition of underwater cultural heritage	Each State Party shall take measures providing for the seizure of underwater cultural heritage in its territory that has been recovered in a manner not in conformity with this Convention.	Section 4 of the Dealing in Cultural Objects (Offences) Act 2003 provides Customs and Excise Officers with enforcement powers that include search and seizure in respect of the import or export of tainted cultural objects (see DCMS 2004 p. 9). The UK police already has powers to search for and seize underwater cultural heritage where an offence has been committed (e.g. raids in Kent in April 2011).
18.2	Seizure and disposition of underwater cultural heritage	Each State Party shall record, protect and take all reasonable measures to stabilize underwater cultural heritage seized under this Convention.	See Paper 4.
18.3	Seizure and disposition of underwater cultural heritage	Each State Party shall notify the Director-General and any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under this Convention.	See Paper 4.
18.4	Seizure and disposition of underwater cultural heritage	A State Party which has seized underwater cultural heritage shall ensure that its disposition be for the public benefit, taking into account <ul style="list-style-type: none"> <li>- the need for conservation and research;</li> <li>- the need for reassembly of a dispersed collection;</li> <li>- the need for public access, exhibition and education; and</li> <li>- the interests of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.</li> </ul>	See Paper 4.
19.1	Cooperation and information-sharing	States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under this Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage.	This clause elaborates the general provision in LOSC Article 303(1) that states shall co-operate in protecting objects of an archaeological and historical nature found at sea. As well as co-operating, State Parties are to assist each other, including collaboration. The UK is a world leader in several aspects of investigating and managing underwater cultural heritage and is routinely involved in co-operating with, assisting and collaborating with other countries. This clause is unlikely to cause difficulty to the UK.
19.2	Cooperation and information-sharing	To the extent compatible with the purposes of this Convention, each State Party undertakes to share information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage.	This clause elaborates the general provision in LOSC Article 303(1) that states shall co-operate in protecting objects of an archaeological and historical nature found at sea. Information sharing is 'to the extent compatible with the purposes of this Convention'. The UK is routinely engaged in information sharing through various avenues, including conferences and publications. This clause is unlikely to cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
19.3	Cooperation and information-sharing	Information shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.	This clause introduces a caveat on information sharing (Article 19(2)) to the effect that shared information will be kept confidential within the competent authorities if disclosure might put underwater cultural heritage at risk. This clause is unlikely to cause difficulty to the UK.
19.4	Cooperation and information-sharing	Each State Party shall take all practicable measures to disseminate information, including where feasible through appropriate international databases, about underwater cultural heritage excavated or recovered contrary to this Convention or otherwise in violation of international law.	This clause is concerned with underwater cultural heritage excavated or recovered in violation of international law or contrary to the 2001 Convention. State Parties are to take all practicable measures to disseminate information about 'tainted' underwater cultural heritage, including through international databases. The clause reflects other international measures in respect of heritage crime and illicit trade and is unlikely to cause difficulty to the UK.
20	Public awareness	Each State Party shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.	The UK places high importance on communicating the value and significance of underwater cultural heritage to the public, and has undertaken numerous initiatives consistent with this clause, which is unlikely to cause difficulty.
21	Training in underwater archaeology	States Parties shall cooperate in the provision of training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage.	The UK's NAS Training Programme is internationally recognised, as are several UK Higher Education Institutions, so the UK has a very good track record in the provision of training and in cooperating internationally in this regard. Training in conservation techniques forms part of the NAS Training Programme and of programmes offered by UK HEIs. Transfer of technology – and perhaps more importantly, transfer of skills in using technology – takes place through HEIs and through the activities of UK companies providing archaeological and surveying services. This clause is unlikely to cause difficulty to the UK.
22.1	Competent authorities	In order to ensure the proper implementation of this Convention, States Parties shall establish competent authorities or reinforce the existing ones where appropriate, with the aim of providing for the establishment, maintenance and updating of an inventory of underwater cultural heritage, the effective protection, conservation, presentation and management of underwater cultural heritage, as well as research and education.	The UK already has competent authorities established in each home country, including provision for maintaining and updating inventories of underwater cultural heritage. The UK heritage agencies encompass the topics listed in this clause with respect to underwater cultural heritage. Some attention may be necessary to ensure that the remit of the competent authorities in the UK, including national inventories, fully encompasses the territorial extents to which the 2001 Convention applies. Otherwise, this clause is unlikely to cause difficulty to the UK.
22.2	Competent authorities	States Parties shall communicate to the Director-General the names and addresses of their competent authorities relating to underwater cultural heritage.	This is a consequential clause to the establishment or reinforcement of competent authorities and is unlikely to cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
29bis	Limitations to geographical scope	Such State shall, to the extent practicable and as quickly as possible, promote conditions under which this Convention will apply to the areas specified in its declaration, and to that end shall also withdraw its declaration in whole or in part as soon as that has been achieved.	Where a State Party has declared a limitation to the geographical scope over which the Convention will be applied, this provision requires that the State Party will promote conditions whereby the Convention will come to apply to the areas excepted.
<b>Co-ordinating States – Voluntary Obligations</b>			
10.3(b)	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	[Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall: ] (b) coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so, in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.	This clause provides that the coastal state is not obliged to be the Coordinating State in respect of underwater cultural heritage in its CS / EEZ, and may declare that it does not wish to have this role. In this event, other States Parties that have declared a verifiable link can select a Coordinating State amongst themselves. It is likely that the UK would wish to be the Coordinating State in respect of underwater cultural heritage in the UK's CS / EEZ.
10.5	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	The Coordinating State: (a) shall implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; (b) shall issue all necessary authorizations for such agreed measures in conformity with the Rules, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations;	This clause provides that in the CS / EEZ it is normally the Co-ordinating State that implements measures and issues authorisations. Provision is made for agreement that other consulting states will implement measures or issue authorisations. Authorisations are required to give effect to the Rules set out in the Annex. This clause is unlikely to cause difficulty to the UK.
10.6	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	In coordinating consultations, taking measures, conducting preliminary research and / or issuing authorizations pursuant to this Article, the Coordinating State shall act on behalf of the States Parties as a whole and not in its own interest. Any such action shall not in itself constitute a basis for the assertion of any preferential or jurisdictional rights not provided for in international law, including the United Nations Convention on the Law of the Sea.	This clause makes it clear that the actions of the Co-ordinating State in the CS / EEZ arise out of an international responsibility on behalf of all State Parties, rather than any jurisdiction as a Coastal State, for example. The clause forbids expressly any attempt to use the status of Co-ordinating State to assert preferential or jurisdictional rights. The UK is likely to welcome this clause.
12.4	Protection of underwater cultural heritage in the Area	The Coordinating State shall: (a) implement measures of protection which have been agreed by the consulting States, which include the Coordinating State, unless the consulting States, which include the Coordinating State, agree that another State Party shall implement those measures; and (b) issue all necessary authorizations for such agreed measures, in conformity with this Convention, unless the consulting States, which include the Coordinating State, agree that another State Party shall issue those authorizations.	This clause provides that in The Area it is normally the Co-ordinating State that implements measures and issues authorisations. Provision is made for agreement that other consulting states will implement measures or issue authorisations. Authorisations are required to give effect to the Rules set out in the Annex. This clause is unlikely to cause difficulty to the UK.
12.5bis	Protection of underwater cultural heritage in the Area	and shall issue all necessary authorizations therefore,	There is a permissive right for Co-ordinating States to conduct preliminary research in respect of underwater cultural heritage in The Area. This clause provides that it is the Co-ordinating State that will issue authorisations. This clause is unlikely to cause difficulty to the UK.

Article	Convention Heading	Clause	UK Provision
12.5ter	Protection of underwater cultural heritage in the Area	and shall promptly inform the Director-General of the results	There is a permissive right for Co-ordinating States to conduct preliminary research in respect of underwater cultural heritage in The Area. This clause provides that the Co-ordinating State shall inform the Director-General of the results. This clause is unlikely to cause difficulty to the UK.
12.6	Protection of underwater cultural heritage in the Area	In coordinating consultations, taking measures, conducting preliminary research, and / or issuing authorizations pursuant to this Article, the Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties. Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.	This clause makes it clear that the actions of the Co-ordinating State in The Area arise out of an international responsibility on behalf of all State Parties. This clause is unlikely to cause difficulty to the UK.
<b>Co-ordinating States – Statement – Permissive</b>			
10.4	Protection of underwater cultural heritage in the exclusive economic zone and on the continental shelf	Without prejudice to the duty of all States Parties to protect underwater cultural heritage by way of all practicable measures taken in accordance with international law to prevent immediate danger to the underwater cultural heritage, including looting, the Coordinating State may take all practicable measures, and / or issue any necessary authorizations in conformity with this Convention and, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activities or any other cause, including looting. In taking such measures assistance may be requested from other States Parties.	This sequence of obligations applies only to Coordinating States. There is no obligation to become a Coordinating State. Coordinating States have a role only in respect of CS / EEZs and the Area. This clause provides that the Coordinating State may take all practicable measures etc. and may request assistance. The Coordinating State is not obliged to take these measures.
12.5	Protection of underwater cultural heritage in the Area	The Coordinating State may conduct any necessary preliminary research on the underwater cultural heritage	This clause provides that the Coordinating State may conduct preliminary research with respect to underwater cultural heritage in The Area, but is under no obligation to do so.

## Appendix 4.2: List of Administrative Clauses of the 2001 Convention

Article	Convention Heading	Clause
<b>Obligations – Director-General</b>		
9.4	Reporting and notification in the exclusive economic zone and on the continental shelf	The Director-General shall promptly make available to all States Parties any information notified to him under paragraph 3 of this Article.
11.3	Reporting and notification in the Area	The Director-General shall promptly make available to all States Parties any such information supplied by States Parties.
12.2	Protection of underwater cultural heritage in the Area	The Director-General shall invite all States Parties which have declared an interest under Article 11, paragraph 4, to consult on how best to protect the underwater cultural heritage, and to appoint a State Party to coordinate such consultations as the “Coordinating State”.
12.2bis	Protection of underwater cultural heritage in the Area	The Director-General shall also invite the International Seabed Authority to participate in such consultations.
12.5quater	Protection of underwater cultural heritage in the Area	[...the Director-General...] , who in turn shall make such information available to other States Parties.
23.1	Meetings of States Parties	The Director-General shall convene a Meeting of States Parties within one year of the entry into force of this Convention and thereafter at least once every two years.
23.1bis	Meetings of States Parties	At the request of a majority of States Parties, the Director-General shall convene an Extraordinary Meeting of States Parties.
24.1	Secretariat for this Convention	The Director-General shall be responsible for the functions of the Secretariat for this Convention.
<b>Administration</b>		
24.2	Secretariat for this Convention	The duties of the Secretariat shall include: (a) organizing Meetings of States Parties as provided for in Article 23, paragraph 1; and (b) assisting States Parties in implementing the decisions of the Meetings of States Parties.
<b>Administration – Meeting of States Parties</b>		
23.2	Meetings of States Parties	The Meeting of States Parties shall decide on its functions and responsibilities.
23.3	Meetings of States Parties	The Meeting of States Parties shall adopt its own Rules of Procedure.
23.4	Meetings of States Parties	The Meeting of States Parties may establish a Scientific and Technical Advisory Body composed of experts nominated by the States Parties with due regard to the principle of equitable geographical distribution and the desirability of a gender balance.
<b>Administration – Scientific and Technical Advisory Body</b>		
23.5	Meetings of States Parties	The Scientific and Technical Advisory Body shall appropriately assist the Meeting of States Parties in questions of a scientific or technical nature regarding the implementation of the Rules.
<b>Definitions</b>		
1.2	Definitions	(a) “States Parties” means States which have consented to be bound by this Convention and for which this Convention is in force. (b) This Convention applies <i>mutatis mutandis</i> to those territories referred to in Article 26, paragraph 2(b), which become Parties to this Convention in accordance with the conditions set out in that paragraph, and to that extent “States Parties” refers to those territories.

Article	Convention Heading	Clause
1.3	Definitions	“UNESCO” means the United Nations Educational, Scientific and Cultural Organization.
1.4	Definitions	“Director-General” means the Director-General of UNESCO.
1.5	Definitions	“Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.
1.6	Definitions	“Activities directed at underwater cultural heritage” means activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage.
1.7	Definitions	“Activities incidentally affecting underwater cultural heritage” means activities which, despite not having underwater cultural heritage as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage
1.8	Definitions	“State vessels and aircraft” means warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.
1.9	Definitions	“Rules” means the Rules concerning activities directed at underwater cultural heritage, as referred to in Article 33 of this Convention.
33	The Rules	The Rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules
<b>Final Clauses</b>		
25.1	Peaceful settlement of disputes	Any dispute between two or more States Parties concerning the interpretation or application of this Convention shall be subject to negotiations in good faith or other peaceful means of settlement of their own choice.
25.2	Peaceful settlement of disputes	If those negotiations do not settle the dispute within a reasonable period of time, it may be submitted to UNESCO for mediation, by agreement between the States Parties concerned.
25.3	Peaceful settlement of disputes	If mediation is not undertaken or if there is no settlement by mediation, the provisions relating to the settlement of disputes set out in Part XV of the United Nations Convention on the Law of the Sea apply <i>mutatis mutandis</i> to any dispute between States Parties to this Convention concerning the interpretation or application of this Convention, whether or not they are also Parties to the United Nations Convention on the Law of the Sea.
25.4	Peaceful settlement of disputes	Any procedure chosen by a State Party to this Convention and to the United Nations Convention on the Law of the Sea pursuant to Article 287 of the latter shall apply to the settlement of disputes under this Article, unless that State Party, when ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, chooses another procedure pursuant to Article 287 for the purpose of the settlement of disputes arising out of this Convention.
25.5	Peaceful settlement of disputes	A State Party to this Convention which is not a Party to the United Nations Convention on the Law of the Sea, when ratifying, accepting, approving or acceding to this Convention or at any time thereafter shall be free to choose, by means of a written declaration, one or more of the means set out in Article 287, paragraph 1, of the United Nations Convention on the Law of the Sea for the purpose of settlement of disputes under this Article. Article 287 shall apply to such a declaration, as well as to any dispute to which such State is party, which is not covered by a declaration in force. For the purpose of conciliation and arbitration, in accordance with Annexes V and VII of the United Nations Convention on the Law of the Sea, such State shall be entitled to nominate conciliators and arbitrators to be included in the lists referred to in Annex V, Article 2, and Annex VII, Article 2, for the settlement of disputes arising out of this Convention.
26.1	Ratification, acceptance, approval or accession	This Convention shall be subject to ratification, acceptance or approval by Member States of UNESCO.

Article	Convention Heading	Clause
26.2	Ratification, acceptance, approval or accession	This Convention shall be subject to accession: (a) by States that are not members of UNESCO but are members of the United Nations or of a specialized agency within the United Nations system or of the International Atomic Energy Agency, as well as by States Parties to the Statute of the International Court of Justice and any other State invited to accede to this Convention by the General Conference of UNESCO; (b) by territories which enjoy full internal self-government, recognized as such by the United Nations, but have not attained full independence in accordance with General Assembly resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters.
26.3	Ratification, acceptance, approval or accession	The instruments of ratification, acceptance, approval or accession shall be deposited with the Director-General.
27	Entry into force	This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument.
30	Reservations	With the exception of Article 29, no reservations may be made to this Convention.
31.1	Amendments	A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention.
31.1bis	Amendments	The Director-General shall circulate such communication to all States Parties.
31.1ter	Amendments	If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.
31.2	Amendments	Amendments shall be adopted by a two-thirds majority of States Parties present and voting.
31.3	Amendments	Once adopted, amendments to this Convention shall be subject to ratification, acceptance, approval or accession by the States Parties.
31.4	Amendments	Amendments shall enter into force, but solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this Article by two thirds of the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that Party of its instrument of ratification, acceptance, approval or accession.
31.5	Amendments	A State or territory which becomes a Party to this Convention after the entry into force of amendments in conformity with paragraph 4 of this Article shall, failing an expression of different intention by that State or territory, be considered: (a) as a Party to this Convention as so amended; and (b) as a Party to the unamended Convention in relation to any State Party not bound by the amendment.
32.1	Denunciation	A State Party may, by written notification addressed to the Director-General, denounce this Convention.
32.2	Denunciation	The denunciation shall take effect twelve months after the date of receipt of the notification, unless the notification specifies a later date.
32.3	Denunciation	The denunciation shall not in any way affect the duty of any State Party to fulfill any obligation embodied in this Convention to which it would be subject under international law independently of this Convention.
34	Registration with the United Nations	In conformity with Article 102 of the Charter of the United Nations, this Convention shall be registered with the Secretariat of the United Nations at the request of the Director-General.
35	Authoritative texts	This Convention has been drawn up in Arabic, Chinese, English, French, Russian and Spanish, the six texts being equally authoritative.