FACULTY OF
LAW AND CRIMINOLOGY

# OUR PAST BENEATH THE WAVES

## The Legal Protection of Underwater Cultural Heritage from an International, North Sea and Belgian Perspective

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“A nation that forgets its past has no future”
- Winston Churchill –

# Acknowledgements

When commencing this PhD a number of years ago the world of underwater cultural heritage was for the most part unknown to me. I had no idea that millions of shipwrecks, buildings, structures and other artefacts were lying scattered across our oceans and I was clueless on the often complicated legal framework that surrounds it. Today, however, upon completing my dissertation I believe that I can proudly say that I have become an expert in this field. This once so unknown underwater world has revealed many of its secrets to me over the last years. The journey to reach this point was at times very hard and frustrating, but has also given me great joy and taught me many new skills as a researcher, author, public speaker… that I will be able to use for the rest of my life.

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# Abstract in English

Key words: underwater cultural heritage, UNESCO, UNCLOS, North Sea, Belgium, law of salvage and finds, shipwrecks, maritime (war) graves, Council of Europe, Valletta Convention, European Union.

Our cultural heritage can teach us a great deal about our past and how our society came to be. It is an important factor creating economic growth through, *inter alia*, tourism and enhances social cohesion. Cultural heritage gives a sense of cultural identity. While most heritage sites are very well-known and frequented by tourists on a daily basis, this dissertation addresses a type of heritage the extent and importance of which is often underestimated or even unknown to the wider public, namely underwater cultural heritage (UCH). These UCH sites, of which some have been recovered over the years, but many still lie scattered across the oceans, offer important insights in past human life. A wide variety in types of UCH can be found ranging from shipwrecks and wrecks of aircraft over submerged structures, buildings and ports to even prehistoric objects and landscapes. While highly valuable from an archaeological, historical and cultural point of view, these heritage sites are often under a threat of being damaged or looted. Therefore, it is crucial that a solid legal framework exists for their protection. The aim of this dissertation is to assess the Belgian legal framework for the protection of UCH, which was adopted as recently as in 2014 and to formulate suggestions for the Belgian legislator to improve and further this legislation in light of the international obligations accepted by Belgium. To come to these suggestions this dissertation looks into the protection of UCH at several legislative levels. Firstly the international legal framework is discussed paying particular regard to the UNESCO Convention for the protection of UCH of 2001 which up till today remains the only legal international instrument fully dedicated to UCH. This Convention sets out the rules and principles for dealing with UCH located in the different maritime zones and consolidates a set of internationally accepted archaeological standards with which activities directed at UCH must comply. Belgium ratified this Convention in 2013 and aims to fully implement it in its national legislation. Secondly, the role of the European Union is looked into which, while having very limited competences in the field of UCH management, can still be of great use as a funding, cooperation and coordination platform. Subsequently, the most important instruments in the field of heritage protection adopted by the Council of Europe, including the 1992 Valletta Convention, are discussed. Finally, the national approach for protecting and managing UCH of four States bordering the North Sea, namely France, the Netherlands, the United Kingdom and Germany, is assessed in detail as well as their relation with and views on the UNESCO Convention. All the observations are combined in the end to conduct a critical review of the Belgian legal framework for UCH protection. This allows this dissertation to answer the question to what extent the Belgian UCH-Act is already in conformity

with the UNESCO Convention and how this Act can be further developed in order for it to fully implement this convention and function at its full extent.

## Abstract in het nederlands

Kernwoorden: onderwater cultureel erfgoed, UNESCO, VN-zeerechtverdrag, Noordzee, België, bergings- en vondstenrecht, scheepswrakken, maritieme (oorlogs-) graven, Raad van Europa, Verdrag van Valletta, Europese Unie.

Ons cultureel erfgoed kan ons veel leren over ons verleden en het ontstaan van onze maatschappij. Het vormt een belangrijk element in het creëren van economische groei via, *inter alia*, toerisme en vergroot de sociale cohesie. Cultureel erfgoed versterkt onze culturele identiteit. Terwijl de meeste erfgoed sites welgekend zijn en op dagelijkse basis worden bezocht door toeristen, behandelt dit doctoraat een type erfgoed waarvan de omvang en het belang vaak onderschat wordt of zelfs onbekend is bij het brede publiek, namelijk onderwater cultureel erfgoed (OCE). Deze OCE-sites, waarvan een deel reeds in het verleden werd boven water gehaald, maar waarvan ook nog een groot deel verspreid ligt over de oceanen, kan ons belangrijke inzichten bieden in het verleden van het menselijk bestaan. Een grote variatie aan types OCE kan worden teruggevonden, gaande van scheepswrakken en wrakken van vliegtuigen over verzonken structuren, gebouwen en havens tot zelfs prehistorische voorwerpen en landschappen. Terwijl deze sites van groot belang zijn vanuit een archeologisch, historisch of cultureel standpunt, worden ze toch regelmatig beschadigd of geplunderd. Om die reden is het cruciaal dat een sterk wettelijk kader bestaat voor hun bescherming. De doelstelling van dit doctoraat is om een analyse te maken van het Belgisch wettelijk kader voor de bescherming van OCE, hetwelk pas in 2014 is aangenomen, en om suggesties te formuleren gericht aan de Belgische wetgever voor de verbetering en verdere uitwerking ervan in overeenstemming met de internationale verplichtingen die België heeft aanvaard. Om tot deze suggesties te komen, bekijkt dit doctoraat de bescherming van OCE op verschillende wetgevende niveaus. Als eerste wordt het internationaal juridisch kader besproken met speciale aandacht voor het UNESCO Verdrag voor de bescherming van OCE van 2001, welk tot op vandaag het enige internationaalrechtelijk instrument volledig gewijd aan OCE is. Dit Verdrag zet de regels en beginselen uiteen voor de bescherming van OCE in de verschillende maritieme zones en consolideert een set internationaal aanvaarde archeologische standaarden waaraan activiteiten gericht naar OCE moeten voldoen. België ratificeerde het Verdrag in 2013 en streeft ernaar om de bepalingen hiervan volledig in nationaal recht te implementeren. Als tweede punt gaat dit doctoraat dieper in op de rol die de Europese Unie (EU) kan spelen. Terwijl de EU slechts beperkte bevoegdheden heeft aangaande OCE beheer, kan het wel een grote rol vervullen als financierings-, samenwerkings- en coördinerend platform. Vervolgens worden de voornaamste

instrumenten voor erfgoed bescherming aangenomen binnen de Raad van Europa besproken, waaronder het Verdrag van Valletta van 1992. Tot slot wordt de nationale aanpak aangaande de bescherming en het beheer van OCE in vier Staten die grenzen aan de Noordzee, namelijk Frankrijk, Nederland, het Verenigd Koninkrijk en Duitsland in detail onder de loep genomen alsook hun positie ten opzichte van en meningen over het UNESCO Verdrag. Al deze observaties worden op het einde gebundeld met als doel het Belgisch wettelijk kader voor OCE bescherming kritisch te analyseren. Dit laat het doctoraat toe de vraag te beantwoorden in welke mate de OCE-wet reeds conform het UNESCO Verdrag is alsook hoe deze wet verder kan worden ontwikkeld om het Verdrag volledig te implementeren en zodat het maximaal potentieel uit de wet wordt gehaald.

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# List of abbreviations

| | |
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| 1961 Decree | Décret No. 61-1547 du 26 décembre 1961 fixant le régime des épaves maritimes |
| 1961 Monuments Act | Monumentenwet van 22 juni 1961 |
| 1985 Draft Convention | Draft Convention on the Underwater Cultural Heritage of the European Council |
| 1985 EU Convention | European Convention on Offences Relating to Cultural Property |
| 1988 Monuments Act | Monumentenwet van 23 december 1988 tot vervanging van de Monumentenwet |
| 1989 Act | Loi n° 89-874 du 1 décembre 1989 relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation des fouilles archéologiques |
| 1991 Decree | Décret n°91-1226 du 5 décembre 1991 pris pour l'application de la loi n° 89-874 du 1er décembre 1989 relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation des fouilles archéologiques |
| 2016 Act | Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la creation, à l'architecture et au patrimoine |
| ACIPIL | Commissie van Advies inzake Volkenrechtelijke Vraagstukken (Advisory Committee on Issues of Public International Law) |
| AMAAA | Ancient Monuments and Archaeological Areas Act |
| AMCA | Wet van 21 december 2006 tot wijziging van de Monumentenwet 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Valletta (Wet op de archeologische monumentenzorg) |
| ASA | Abandoned Shipwreck Act |
| Basis law | Grundgesetz für die Bundesrepublik Deutschland |
| BMM | Belgisch Mathematisch Model (Belgian Mathematical Model) |
| BPNS | Belgian Part of the North Sea |
| BSAC | South Sea British Sub-Aqua Club |
| Cadw | Welsh Government's Historic Environment Service |

| | |
|---|---|
| CCoEA | Centraal College van Deskundigen Archeologie (Central College of Experts in Archaeology) |
| CMI | Comité Maritime International |
| DCOOA | Dealing with Cultural Objects (Offences) Act |
| Decision Heritage Act Archaeology | Besluit van 8 april 2016, houdende regels voor archeologische opgravingen |
| DDCMS | Department for Digital, Culture, Media and Sport |
| DRASM | Direction des Recherches Archéologiques Sous-Marines (Department of Underwater Archaeological Research) |
| DRASSM | Department des Recherches Archéologiques Sous-Marines (Department of Underwater Archaeological Research) |
| EEZ | Exclusive Economic Zone |
| EIR | Environmental Impact Report |
| Environment Act | Wet van 23 maart 2016 houdende regels over het beschermen en benutten van de fysieke leefomgeving (Omgevingswet) |
| EIA | Environmental Impact Assessment |
| EU | European Union |
| FHA | Agentschap Onroerend Erfgoed (Flanders Heritage Agency) |
| FMHA | Bundesamt für Seeschifffahrt und Hydrographie (German Federal Maritime and Hydrographic Agency) |
| FSIA | Foreign Sovereign Immunities Act |
| Heritage Act | Wet van 9 december 2015 houdende bundeling en aanpassing van regels op het terrein van cultureel erfgoed (Erfgoedwet) |
| HIA | Heritage Impact Assessment |
| Historic MPA | Historic Marine Protected Area |
| HMS | Her Majesty's Ship |
| ICOMOS | International Council on Monuments and Sites |
| ILA | International Law Association |
| ILA Draft | Resolution 8 on Cultural Heritage Law adopted by the International Law Association at its sixty-sixth Conference in Buenos Aires in 1994 |
| ILC | International Law Commission |
| IMO | International Maritime Organisation |
| ISA | International Seabed Authority |
| JNAPC | Joint Nautical Archaeology Policy Committee |
| LCT(A)2428 | Wreck of the Royal Naval Armoured Tank Landing Craft 2428 |

| | |
|---|---|
| LCT427 | Wreck of His Majesty's Landing Craft (Tank) 427 |
| L-S Act | Niedersächsisches Denkmalschutzgesetz vom 30 Mai 1978 |
| L-S | Niedersachsen (Lower-Saxony) |
| Marine Environment Act | Wet van 20 januari 1999 ter bescherming van het mariene milieu [en ter organisatie van de mariene ruimtelijke planning] in de zeegebieden onder de rechtsbevoegdheid van België |
| MCA | Bien Culturel Maritime (Maritime Cultural Asset) |
| MCAA | Marine and Coastal Access Act |
| Ministerial Decree on Individual Measures | Ministerieel besluit van 4 oktober 2016 betreffende individuele maatregelen ter bescherming van het cultureel erfgoed onder water |
| MLWM | Mean Low Water Mark |
| MMO | Marine Management Organisation |
| MOD | Ministry of Defence |
| MPAs | Denkmalschutzbehörde (Monument Protection Authorities) |
| MSA | Merchant Shipping Act |
| MSP | Marine Spatial Plan |
| NCAR | Conseil National de la Recherche Archéologique (National Council for Archaeological Research) |
| NICH | Rijksdienst voor het Cultureel Erfgoed (National Institute for Cultural Heritage) |
| Nm | Nautical Mile |
| NMSA | National Marine Sanctuaries Act |
| OME | Odyssey Marine Exploration |
| PMRA | Protection of Military Remains Act |
| ProSea | Professional Shipwreck and Explorers Association |
| PWA | Protection of Wrecks Act |
| PMD | Domaine Public Maritime (Public Maritime Domain) |
| Receiver | Receiver of Wreck |
| Recommendation 848 | Recommendation 848 on the Underwater Cultural Heritage of the Council of Europe |
| Reform Act 1980 | Bijz. Wet van 8 augustus 1980 tot hervorming der instellingen |
| RLP | Recovery Limited Partnership |
| RMS | Royal Mail Ship |
| RMST | RMS Titanic Inc. |

| | |
|---|---|
| Royal Decree Environmental Impact Assessment | Koninklijk besluit van 9 september 2003 houdende de regels betreffende de milieu-effectenbeoordeling in toepassing van de wet van 20 januari 1999 ter bescherming van het mariene-milieu in de zeegebieden onder de rechtsbevoegdheid van België |
| Royal Decree on Regulatory Measures | Koninklijk besluit van 21 September 2016 betreffende de reglementaire maatregelen ter bescherming van het cultureel erfgoed onder water |
| Royal Decree UCH-Act | Koninklijk besluit van 25 April 2014 betreffende de bescherming van het cultureel erfgoed onder water |
| S&MO | MOD Salvage & Marine Operations Direction |
| Salvage Convention | The International Convention on Salvage of 28 April 1989 |
| SeArch | Archeologisch Erfgoed in de Noordzee (Archaeological Heritage in the North Sea) |
| S-H | Schleswig-Holstein |
| S-H Act | Gesetz zum Schutz der Denkmale Schleswig-Holstein vom 30 Dezember 2014 |
| SMCA | Sunken Military Craft Act |
| SMS | Seiner Majestät Schiff (His Majesty's Ship) |
| SSA | Sea Search Armada |
| SS | Steamship |
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |
| U | Unterseeboot (Submarine) |
| UCH | Underwater Cultural Heritage |
| UCH-Act | Wet van 4 April 2014 betreffende Bescherming van het Cultureel Erfgoed Onder Water |
| UK | United Kingdom |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNESCO Convention 1970 | UNESCO Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970 |
| UNESCO Convention | The UNESCO Paris Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001 |
| US | United States |

| | |
|---|---|
| USS | United States Ship |
| Valletta Convention | The European Valletta Convention on the Protection of the Archaeological Heritage of 16 January 1992 |
| VOC | Voormalige Oost Indische Company (former East India Company) |
| Wreck Act | Wet betreffende de vondst en de bescherming van wrakken van 9 april 2007 |
| WW | World War |

# General introduction

Cultural heritage reflects our past and our history. It helps give people a cultural identity and a sense of coherence. Those people and their nations attach a great deal of importance to respecting and protecting that heritage in order for this and future generations to learn from and enjoy. Famous buildings, sites, pieces of art, constructions, war memorabilia… are preserved all over the world to be visited by tourists, studied by archaeologists and historians and enjoyed by the public at large. While most people are familiar with the cultural heritage that surrounds us and that is visible on a daily basis, this dissertation addresses a type of heritage that is far less known, namely underwater cultural heritage (UCH).[1] While it is of course true that a number of UCH-sites have become part of our common history just as much as any site on land could ever be, such as the wreck of the Titanic, and that certain artefacts that were discovered in the marine area are on display in museums worldwide for anyone to enjoy, the extent of the number of UCH-sites still present in the marine area is often underestimated by the general public or even unknown to it. Nevertheless, numerous discovered and undiscovered sites that are of considerable historical or cultural value are hidden beneath the waves of our oceans.

The United Nations Educational, Scientific and Cultural Organisation (UNESCO) estimates that there are about three million ancient shipwrecks located underwater worldwide.[2] These are the wrecks of warships that sank during wartime, the wrecks of nineteenth and twentieth century passenger or fishing ships that perished due to bad weather conditions or navigational hazards, the wrecks of East India Company vessels, Viking longboats…

Shipwrecks are, however, not the only type of heritage that can be found at the bottom of the ocean. Hundreds of sunken cities, of which 150 in the Mediterranean alone, have been discovered worldwide.[3] Other structures, such as for example ancient fishing installations and ports which became submerged over the course of time, can be discovered on the seabed as well and are part of the UCH. Some of the most impressive examples of submerged cities and other structures include Port Royal located in Jamaica and Cleopatra's Palace in Alexandria.

As a final example of UCH the category of prehistoric objects and landscapes should be mentioned. During the last ice age the sea level was much lower than it is today, which resulted in large parts

[1] While heritage located within a State's internal waters is part of the UCH as well, this dissertation is mainly focussed on UCH located seaward of the baseline.
[2] UNESCO, *Underwater Cultural Heritage – Learn about the Convention*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/learn-about-the-convention/ (consulted 1 October 2018).
[3] *Ibid*.

of the current seabed to be above water. These areas were inhabited by our ancestors. When the temperatures started to rise and the ice began to melt, these areas were flooded and became submerged. Today, we can still find remains on the seabed from the many years that these areas were inhabited such as ancient burial sites, prehistoric utensils and ancient murals.

All this heritage offers valuable information about the past of mankind and is of crucial importance for archaeologists and historians. Unfortunately, these sites are facing many threats resulting from divers or salvors purposefully looting or salvaging them or from activities taking place in the vicinity of UCH-sites that incidentally cause damage to them.[4] In order to protect and preserve this heritage, a strong legislative framework is indispensable. For heritage on land, States can regulate the protection for the most part unilaterally in their national legislation. While there are of course a number of international obligations that must be complied with when managing cultural heritage on land, such as the regulation of the import and export of such heritage, much can be regulated and decided by the individual State. For UCH, the opposite is for a large part true. While States can, for the most part, regulate the protection of UCH within their internal waters and territorial sea, beyond these zones it becomes increasingly difficult or even impossible for States to unilaterally adopt protective measures for UCH-sites. Therefore, in the field of UCH protection, international conventions, agreements and cooperation are crucial.

The first international instrument to deal with the protection of UCH was the United Nations Convention on the Law of the Sea adopted in 1982 (UNCLOS). This Convention includes two provisions addressing the protection of UCH, namely articles 149 and 303. While UNCLOS has been widely ratified, giving it an almost worldwide application, these two provisions are generally considered to be inadequate in order to provide full protection for UCH as is discussed in detail in chapter one of this dissertation. In order to fill the legal vacuum that was left post UNCLOS, at the beginning of this century for the very first time a convention was adopted fully dedicated to the protection of UCH. This Convention was adopted within UNESCO in 2001 (UNESCO Convention) and sets out the generally accepted archaeological principles that must be respected when conducting activities directed at UCH. Furthermore, one of its greatest merits is that it creates a legal regime based on consultations and cooperation for heritage located outside States' territorial jurisdiction. While the number of States that ratified the UNESCO Convention at this point remains fairly limited, it is clear that this Convention has urged a number of States to reconsider their own national legislation for the protection of UCH assessing their compatibility with the principles set

[4] While the marine area mostly offers a fairly stable environment for the preservation of UCH due to its low oxygen levels, natural factors such as corrosion, climate change and the mere passage of time can of course still threaten the heritage. These natural threats will, however, not be discussed separately throughout this dissertation but are of course elements that should be taken into account be legislators and heritage authorities worldwide when deciding on how to protect UCH.

out by the UNESCO Convention. Furthermore, a number of important maritime powers, such as the Netherlands and Germany have stated that they will ratify the UNESCO Convention in the near future.[5] This Convention might thus become of considerable value and importance in the near future. As more States become a party to the Convention, other States will feel the pressure to do the same. This might at one point for the first time result in a comprehensive legal framework for the protection of UCH to be applicable in large parts of the world.

Research Question, Content and Methodology

The main objective and central question of this dissertation is "How does the Belgian legal framework for the protection of UCH function and how can this framework be improved and further developed in accordance with the internationally set standards in the UNESCO Convention, which Belgium ratified in 2013?" In order to answer this question this dissertation applies a tiered approach moving from the international level over the regional level to the national level.

Chapter one of this dissertation consists of two main parts. The first part addresses the international legal framework for the protection of UCH. After providing a brief general overview of the maritime zones and the competence division applicable within them as determined by UNCLOS, articles 149 and 303 UNCLOS are assessed in detail. The specific provisions of these articles as well as reasons why they are generally considered to be inadequate to guarantee the full protection of UCH are looked into. Secondly, account is taken of two very special instruments, namely the law of salvage and finds. While these instruments were not created for the purpose of dealing with UCH, they have had and continue to have a considerable impact on its safeguarding. In what ways these instruments have affected UCH over the years and how the protection of heritage can be reconciled with them is assessed in the third section of chapter one. Thirdly, the main element of the first part of chapter one is the discussion of the 2001 UNESCO Convention. After briefly referring to the negotiation process, the main principles and provisions of this Convention are assessed critically and commented on. Subsequently, the changes and evolutions that took place since its entry into force in terms of ratification and further suggestions for implementation are looked into. Finally, consideration is also given to the work that has been conducted by the organs of this Convention, namely the Meeting of States Parties and the Scientific and Technical Advisory Committee.
The second part of the first chapter aims to discuss UCH protection at the regional European level of which Belgium forms a part. Firstly, the question as to the role that the European Union (EU) can play in protecting UCH is addressed. This question is answered by determining the competence of the EU in this matter, the initiatives created for aiding EU member States in the protection of

[5] This will be assessed in detail in chapter tree of this dissertation.

cultural heritage and the way in which the EU institutions take account of UCH protection in their policies and legislative documents. Finally, the last section in the first chapter relates to the work of the Council of Europe and more specifically to a number of instruments that were drafted by the Council such as the 1985 Draft European Convention and the 1992 Valletta Convention which are both of importance from an UCH point of view.

The second chapter does not focus on a specific legislative level, but rather on one specific topic, namely the legal protection of sunken warships and other State craft. A number of reasons can be cited why this specific category of UCH is elaborated more in detail in a separate chapter. Firstly, which rules should be applied to the wrecks of sunken State craft proved to be highly contentious during the negotiations on the UNESCO Convention and continues to be so today. The main issue in this regard is the uncertainty of which rights flag States have over their sunken State craft located in the territorial sea of a third State. Because of this sensitivity, it was felt necessary to assess this matter more in depth in this dissertation. A second reason why a separate chapter is devoted to the topic of sunken State craft lies with the main objective of this dissertation, namely to assess the Belgian legal framework for UCH protection. As Belgium was one of the central States during both WW I and II and neighbours a number of historically powerful maritime powers such as the United Kingdom and Germany, a fairly large section of wrecks located in the Belgian part of the sea are State craft. Additionally, these maritime powers are very adamant about how their sunken State craft should be treated following international law. Therefore, it was felt that an in depth assessment of the legal protection of State craft from an UCH point of view is a crucial aspect of this dissertation. The second chapter in this regard discusses the principle of sovereign immunity and the ownership rights of States over their sunken State craft. An analysis is, *inter alia*, made of State practice including national legislation and case law, and the position of State craft within the UNESCO Convention. In this chapter also particular regard is paid to the matter of 'maritime (war) graves'. As sunken State craft, especially warships, often sank with the loss of the lives of those on board resulting in those wrecks to be the final resting place of those men, the manner in which account is taken of this particular sensitivity needs to looked into.

The third chapter focusses on the protection of UCH in national legislation. More specifically, an assessment is made of the legislative framework of four States bordering the North Sea, namely France, the Netherlands, the United Kingdom and Germany. The objective of this chapter is to get an overview of the legal protection of UCH in (most of) the North Sea area. To this end, chapter three discusses for each of the four States their national legislation pertaining to UCH in order to determine what types of heritage it is that they protect, in which maritime zones and in what way. Furthermore, each State section contains a part on the position of that State with regard to the UNESCO Convention to either determine to what extent their national legislation is in conformity with the provisions of the Convention when they already ratified it or to determine which issues

the State has with this Convention and the likeliness that it will at one point proceed to ratification. A double purpose can be served by the analysis made in this chapter. Firstly, it helps to gain insight in the manner in and extent to which further regional cooperation between the North Sea States is possible for protecting and managing UCH. Such cooperation could help further the protection mechanism created by the UNESCO Convention. Secondly, lessons can be learned from the way in which these States manage and protect UCH in order to help Belgium with the further development and improvement of its own legislation on this topic.

Finally, the fourth chapter discusses the Belgian legal framework for the protection of UCH. This chapter commences by elaborating on the specific Belgian competence division between the federal level and that of the Communities and Regions, which has a clear effect on the Belgian legal framework for UCH protection. Subsequently, after briefly mentioning the previous initiatives in this field, the Belgian Act for the Protection of Underwater Cultural Heritage (UCH-Act) is scrutinised and commented in detail. The way in which this Act has functioned since its entry into force and the heritage that is protected by it are discussed in detail as well. While assessing the provisions and mechanisms of the UCH-Act serious thought is given to the extent in which these implement the UNESCO Convention as this is one of the main objectives of the UCH-Act. Based on the previous chapters relating to international law for UCH protection and the legislation applicable in other North Sea States, combined with the critical observations made by the author after scrutinising the Belgian legal framework, suggestions are formulated throughout this chapter that can help the Belgian legislator and policy maker to fully implement the UNESCO Convention in national legislation as well as allow them to further and improve the practical applicability of this UCH-Act.

This dissertation applies the following methodology:

- Describing and analysing the legal framework for the protection of UCH at the international, regional and national level highlighting the gaps and ambiguities in these instruments.
- Describing and analysing case law and State practice relevant in the framework of UCH protection.
- Collecting, interpreting and analysing jurisprudence in the field of UCH protection.
- Attending, presenting at and organising conferences, workshops or other forms of gatherings.
- Describing and analysing the policy framework surrounding the assessed pieces of national legislation by studying policy documents, reports, brochures, reviews, assessments and other documents from the respective national competent authorities for UCH management.

- Cooperating with and consulting Belgian actors in the field of UCH protection and management, *inter alia*, via the so-called SeArch research project.
- Meeting with national experts in the field of UCH protection to discuss certain aspects of the national legislation pertaining to UCH in their respective countries.
- Formulating suggestions directed at the Belgian legislator and policy maker by assessing the best way in which to fully implement the UNESCO Convention, by using the conclusions made in previous chapters and by assessing which issues have arose since the entry into force of the Act.

As a general mark it can be stated that the extent to which the points of view and research of other authors is cited decreases throughout the dissertation. While many legal scholars conducted research on the international legal framework for UCH protection as set out in chapter one and two, no legal scholar has fully assessed the Belgian legislation on the protection of UCH as can be read in chapter four. The views and suggestions expressed in chapter four, as well as for a part in chapter three, are those of the author.

# Chapter one: the international and regional framework for the protection of underwater cultural heritage

## 1. Introduction

At the international level, instruments have been drafted in order to ensure the protection and proper management of underwater cultural heritage (UCH). The first international instrument to deal with the protection of UCH was the United Nations Convention on the Law of the Sea of 1982 (UNCLOS).[6] This Convention is often described as the constitution of the oceans as it consolidates all major rules for the use and protection of sea areas around the world. It is therefore not surprising that UNCLOS addresses UCH as well, be it, however, to a limited extent. The regime set forth under UNCLOS for UCH protection will be addressed and criticised under this chapter.

The second part of this chapter consists of an exposition on the law of salvage and finds. It is often felt that these, of origin common law, instruments potentially endanger UCH. The relationship between the law of salvage and finds and the protection of UCH has in fact caused discussions and controversy over the years. Therefore the law of salvage and finds are addressed in most international instruments applicable to UCH. In order to fully grasp the effects that these instruments have on UCH and the attempts that were made over the years to limit those effects, an assessment is made.

Thirdly, the most important instrument addressing UCH management, namely the 2001 UNESCO Convention on the protection of Underwater Cultural Heritage (UNESCO Convention), is discussed in detail.[7] A critical assessment of the regime created in this Convention is provided under this chapter. This assessment clarifies the merits of the Convention, as well as the issues that were identified by a number of States relating to its provisions as it was created.

As a final part under this chapter a closer look is taken at the regional level. Firstly, the role that the European Union (EU) has in the protection of UCH is discussed. The way in which the EU institutions have taken UCH into account in their policies, as well as the initiatives that might potentially aid the protection of UCH are taken into account for this purpose. Finally, as the last part of this chapter, the contribution of the Council of Europe to the efficient management and protection of UCH is elaborated. In this regard, the most important instruments that need to be discussed are the Valletta Convention on the Protection of the Archaeological Heritage (Valletta

[6] The United Nations Montego Convention on the Law of the Sea of 10 December 1982, *UNTS* vol. 1833, 3. (UNCLOS)
[7] The UNESCO Paris Convention on the Protection of the Underwater Cultural Heritage of 2 November 2001, 41 *ILM* 37. (UNESCO Convention)

Convention) and the initiatives pre-dating this Convention.[8] These are assessed in detail in the final part of this chapter.

## 2. The United Nations Convention on the Law of the Sea 1982

### 2.1. Introduction

UNCLOS is often considered to be the constitution for the oceans and is therefore the most important Convention addressing issues in the marine field.[9] UNCLOS was signed in Montego Bay, Jamaica on 10 December 1982 and entered into force on 16 November 1994. Belgium signed the Convention on 5 December 1984 and ratified it on 13 November 1998. Anno 2017, this Convention has 168 parties,[10] which include all the States bordering the North Sea,[11] as well as the EU, but not the US. [12]

One of the fundamental accomplishments of UNCLOS is the further consolidation of the maritime zones (including the territorial sea, continental shelf and high seas), their boundaries and the introduction of two new zones, namely the exclusive economic zone (EEZ) and the Area.[13] The jurisdiction of (coastal) States differs in each maritime zone. This is true for all maritime competences, including the protection and management of UCH. A first step towards comprehending the current international regime that was established for UCH management is thus to assess the jurisdiction awarded to States over UCH in the different maritime zones.

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[8] The European Valletta Convention on the Protection of the Archaeological Heritage of 16 January 1992, *CETS*, no. 143. (Valletta Convention)

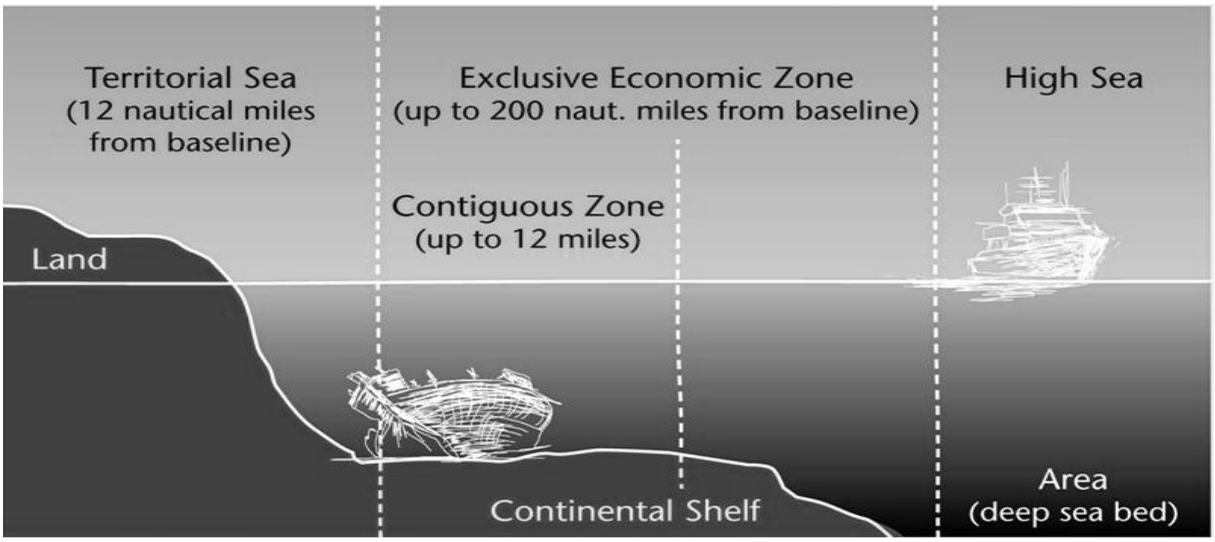
[9] In total three United Nations Conferences on the law of the Sea took place. The first was UNCLOS I which was held in 1958 and resulted in the adoption of the four so-called 1958 Geneva Conventions: The Convention on the Territorial Sea and the Contiguous zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf. The second Conference, UNCLOS II was organised in 1960 and did not result in an international agreement. Finally, from 1973 to 1982, the third conference, UNCLOS III, addressed a number of issues that were brought up during the previous conferences, such as a uniform breadth of the territorial sea, and led to the adoption of UNCLOS. T. TREVES*, Audiovisual Library of International Law – 1958 Geneva Conventions on the Law of the Sea*, http://legal.un.orgmaritime/avl/ha/gclos/gclos.html (consulted 29 August 2017).

[10] United Nations Series Treaties, *Status on the United Nations Convention on the Law of the Sea*, https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&clang=_en#1 (consulted 31 July 2018).

[11] These States are Belgium, the Netherlands, France, Germany, The United Kingdom (UK), Denmark and Norway.

[12] UN Oceans and Law of the Sea, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 29 October 2013*, www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (consulted 31 July 208).

[13] L.B. SOHN, K.G JURAS, J.E. NOYES and E. FRANCKX, *Law of the Sea in a nutshell*, Saint-Paul (Minnesota), West Publishing, 2010, 247. (SOHN *et al*. 2010)




Source:http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/context/

## 2.2. The maritime zones in the United Nations Convention on the Law of the Sea

### 2.2.1. Internal waters and the territorial sea

The territorial sea has a breadth not exceeding 12 nautical miles (nm) measured from the baseline, which can be a normal or a straight baseline.[14] The presence of ports, low-tide elevations and roadsteads can have an effect on the baseline and subsequently on the outer boundary of the territorial sea.[15] Rules are set out under UNCLOS determining how the baseline should be drawn in case of rivers and bays.[16] The coastal State enjoys sovereignty in its territorial sea, the air, seabed and subsoil thereof in the same way as it does on land.[17] This sovereignty is only limited by the right of innocent passage for ships flying a foreign flag and the special passage rights through straits and archipelagic waters.[18]

Internal waters are the waters on the landward side of the baseline of the territorial sea.[19] States have full sovereignty in these waters. When a straight baseline is drawn resulting in areas being enclosed as internal waters where they would not have been previously considered as such, a right

[14] Articles 3, 5 and 7 UNCLOS.
[15] Articles 11-13 UNCLOS.
[16] Articles 9-10 UNCLOS.
[17] SOHN *et al*. 2010, 209.
[18] The right of innocent passage is set out in articles 17-32 UNCLOS for the territorial sea, in article 45 UNCLOS for straits and in article 52 UNCLOS for archipelagic waters.
[19] Article 8(1) UNCLOS.

of innocent passage exists in those waters.[20] As a general rule, however, no right of innocent passage exists in a State's internal waters under UNCLOS.

As the coastal State has sovereignty in both its internal waters and territorial sea, it has sovereignty over all UCH located in these zones as well. This entails that the coastal State can manage this UCH in any way it sees fit, within the limits of the international obligations that have been accepted by that State.

### 2.2.2. Contiguous zone

In the zone contiguous to the territorial sea, the so-called contiguous zone, a State may exercise competences in order to "*prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea*" as well as punish any infringement of these laws and regulations that was committed in the territory of that State or in its territorial sea.[21] This zone may not extend beyond 24 nm measured from the baseline from which the territorial sea is measured.[22] The coastal State does not enjoy sovereignty in this zone, but enjoys jurisdiction for the limited purposes as specified above.[23]

### 2.2.3. Exclusive Economic Zone

The EEZ is a zone adjacent to the territorial sea and can have a breadth up to 200 nm measured from the baseline.[24] In the EEZ States do not enjoy sovereignty, but have "*sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil*".[25] The natural resources are divided in two categories: living and non-living resources. Living resources include all types of fish, crustaceans, sea mammals, corals, underwater plants and fungi. Non-living resources include minerals, gas, oil and sand. As UCH is not considered to be a natural resource, coastal States do not have jurisdiction over it in their EEZs.

Based on the sovereign rights that a coastal State has in its EEZ it is, however, possible to exercise indirect jurisdiction over UCH in certain circumstances. Shipwreck sites, for example, attract all kinds of living resources, such as animals and plants that attach themselves to the wreck and fish that congregate around the wreck sites. Therefore, these sites may form an artificial reef and

[20] Article 8(2) UNCLOS.
[21] Article 33(1) UNCLOS.
[22] Article 33(2) UNCLOS.
[23] SOHN *et al*. 2010, 236.
[24] Article 57 UNCLOS.
[25] Article 56 UNCLOS.

become a very attractive habitat for all kinds of fauna and flora.[26] Interference with the wreck can disturb or harm the living resources that have made this wreck into their habitat. As States have the right to explore and exploit their natural living resources, and consequently to protect them as well as their habitat, this can result in a State indirectly being allowed to protect a shipwreck, or any other structure for that matter, in its EEZ.[27] The best example of State practice in this regard is probably the United States' National Marine Sanctuaries Act of 1972 (1972 NMSA).[28] Under this Act specific areas in the EEZ can be designated as 'national marine sanctuaries' in order to protect the marine environment.[29] A specific set of regulations is made for each designated sanctuary in order to protect its resources which may include historical, cultural or archaeological resources.[30] According to Varmer, two activities are prohibited under all sanctuary regulations that can directly or indirectly protect UCH, namely the removal of, or injury to, sanctuary resources and alterations to the seabed.[31] An example of such a site is the Monitor National Marine Sanctuary named after the wreck of the USS Monitor located in the Sanctuary.[32]

In its EEZ the coastal State has the exclusive right to construct, authorise and regulate the construction, operation and use of artificial islands, installations and structures.[33] This entails that when activities directed at UCH take place in the EEZ of a State that involve the construction of installations or structures, that coastal State can regulate or prohibit this and this way indirectly protect the UCH.

All States have the right of navigation and the right to lay submarine cables and pipelines in the EEZ of another State.[34] This right has to be exercised in such a way that it is compatible with the

[26] From 2013-2016 an interdisciplinary project ran in Belgium, the so called SeArch-project. Within the framework of this project research was conducted on archaeological heritage in the North Sea. In light of this, a report was drafted in 2017 elaborating on the protection of shipwrecks as a habitat or because of their biodiversity value. For more information on this issue consult: M. RABAUT, T. DERUDDER and F. MAES, *Marine Spatial Planning Legislation for and Approach Towards New Spatial Planning of the North Sea*, SeArch project, WP2.2.5. and WP2.3.2., 2017, www.sea-arch.be. (RABAUT *et al.* 2017)

[27] Under several international conventions such as the Convention on Biological Diversity of 5 June 1992, *UNTS,* vol. 1760, 79 and the Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971, *UNTS*, vol. 996, 245; and under several European Conventions, such as the Convention on the Conservation of European Wildlife and Natural Habitats of 1979, *CETS*, no. 104, States have a duty to protect specific types of habitats.

[28] S. DROMGOOLE, *Underwater Cultural Heritage and International Law*, New York, Cambridge University Press, 2013, 267-269. (DROMGOOLE 2013); National Marine Sanctuaries Act 1972, 16 U.S.C. §§1431 *et seq*. (NMSA 1972)

[29] Section 303(a) and (k) NMSA 1972.

[30] Section 302(8) and 304 NMSA 1972.

[31] O. VARMER, "United States" in S. DROMGOOLE (ed.) *The protection of the Underwater Cultural Heritage: National Perspectives in the Light of the UNESCO Convention 2001*, Leiden and Boston, Martinus Nijhoff Publishers, 2006, (351) 363. (VARMER 2006).

[32] This was the first designated national marine sanctuary, which was designated on 30 January 1975. NOAA, *National Marine Sanctuaries*, http://sanctuaries.noaa.gov/ (consulted 5 April 2017).

[33] Article 60 UNCLOS.

[34] Article 58(1) UNCLOS.

other provisions of UNCLOS,[35] including article 303 concerning the protection of UCH as discussed below.[36] Consent of the coastal State is required for determining which route the pipelines will follow.[37]

### 2.2.4. Continental shelf

The continental shelf is the natural prolongation of the land territory of the coastal State to the outer edge of the continental margin, or to a distance of 200 nm from the baseline.[38] In this zone the coastal State has the exclusive sovereign right to explore and exploit its natural resources, which consist of "*mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species*".[39] Once again, UCH is not considered as being part of a State's natural resources on its continental shelf and consequently States have no jurisdiction over UCH on their continental shelf.[40]

All States have the right to lay submarine pipelines and cables on the continental shelf of another State.[41] This right is, however, subjected to the right of the coastal State to take "*reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines*".[42] The consent from the coastal State is therefore required for determining the location where the pipelines can be placed.[43] This provision is another example of how coastal States can indirectly protect UCH. By not allowing pipelines to be placed near UCH sites on its continental shelf, the coastal State can protect them from harm or damage that might be caused by the placement of such pipelines. Under UNCLOS no similar provision exists for cables, but in practice projects for laying cables are as well presented to the coastal State in order to obtain its consent. When assessing such projects, the coastal State will take into consideration the routes of the existing cables and pipelines on the continental shelf.[44]

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[35] Article 58(3) UNCLOS.
[36] See *infra* section 2.3.3.
[37] E. SOMERS, *Inleiding tot het Internationaal Zeerecht*, Mechelen, Kluwer, 2010, 135-136. (SOMERS 2010)
[38] The precise rules on determining the breadth of the continental shelf are somewhat more complicated. See article 76 UNCLOS for the exact rules. The North Sea is not extensive enough to allow all States to have their full continental shelf. The boundaries of the continental shelves were fixed through mutual agreements as provided in article 83 UNCLOS on the "*Delimitation of the continental shelf between States with opposite or adjacent coasts*".
[39] Article 77 UNCLOS.
[40] As was said above in section 2.2.3., States potentially have indirect jurisdiction over a wreck site due to the species that live on it. In this case the wreck site could potentially be protected as a habitat or because of its value from a biodiversity perspective. RABAUT *et al* 2017.
[41] Article 79(1) UNCLOS.
[42] Article 79(2) UNCLOS.
[43] Article 79(3) UNCLOS.
[44] SOMERS 2010, 185.

On its continental shelf, the coastal State has the exclusive right to regulate and authorise any drilling activities for all purposes.[45] By prohibiting drilling activities in a certain zone, the coastal State can once again indirectly protect the UCH located in that zone on its continental shelf.
The coastal State also has the exclusive right to regulate and authorise the construction of artificial islands, installations and structures on its continental shelf.[46]

### 2.2.5. The high seas

In the 1958 High Seas Convention, the high seas are defined as "*all parts of the sea that are not included in the territorial sea or in the internal waters of a State*".[47] During the negotiations on UNCLOS some dispute arose as to whether the high seas included the newly created EEZ.[48] UNCLOS does not explicitly specify whether the EEZ is part of the high seas nor does it define the high seas as such. [49] It is, however, stated that the provisions in the section relating to the high seas apply to "*all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State*."[50]

In the high seas all States have the right to exercise the freedoms of the high seas which include the freedom of navigation, the freedom of overflight, the freedom of fishing, the freedom of lying submarine cables and pipelines, the freedom to construct artificial islands, installations and structures and the freedom of scientific research. These freedoms must be exercised with due regard for the interests of other States when exercising the freedoms of the high seas as well as with due regard for any rights with respect to activities conducted in the Area under UNCLOS. [51][52]

### 2.2.6. The Area

The Area is defined as "*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction*".[53] The main focus of UNCLOS with regard to the Area lays with the non-living

[45] Article 81 UNCLOS.
[46] Article 80 UNCLOS.
[47] The UN Geneva High Seas Convention of 29 April 1958,*UNTS*, vol. 450, 11, article 1.
[48] To protect their historical high seas freedoms in the EEZ, many maritime States, including the US, took the position that the EEZ was part of the high seas in which the coastal State has a number of special rights. Other States however provided that the EEZ is a special zone belonging to the coastal State that is subjected to certain high seas' freedoms such as the freedom of navigation. SOHN *et al*. 2010, 14.
[49] SOHN *et al*. 2010, 14-15.
[50] Article 86 UNCLOS.
[51] Activities in the Area are "*all activities of exploration for, and exploitation of, the resources of the Area*" Article 1(3) UNCLOS.
[52] Article 87 UNCLOS.
[53] Article 1(1) UNCLOS.

resources, and more specifically the mineral resources.[54] The Area and its resources are considered to be common heritage of mankind.[55] This entails that the rights over the resources of the Area belong to mankind on whose behalf the International Seabed Authority (ISA) will act.[56] The ISA was established under part XI UNCLOS.[57] Through this authority States Parties organise and control activities taking place in the Area and administer its resources.[58] The ISA has issued regulations dealing with the prospection and exploration of polymetallic nodules[59], polymetallic sulphides[60] and Cobalt-rich crusts[61] in the Area. Point 8 of all of these regulations states that a prospector shall immediately notify the Secretary-General of the ISA in writing when an object of a factual or potential archaeological or historical nature is found in the Area and that he shall pass on the location of this object. The Secretary-General of the ISA must transmit this information to the Director-General of UNESCO.[62] During the preparatory work of the Seabed Committee of UNCLOS proposals were submitted by Greece and Turkey to protect cultural relics discovered on the deep seabed as part of the common heritage of mankind and to designate the ISA as the competent authority for their protection. These proposals were, however, not included in the final version of

[54] SOHN *et al*. 2010, 334.
[55] 'Resources' in this context must be read as including "*all solid, liquid or gaseous mineral resources in situ in the Area at or beneath the seabed, including polymetallic nodules*". Article 133(a) UNCLOS.
[56] Article 137(2) UNCLOS.
[57] The International Seabed Authority was established under section 4 of Part XI UNCLOS where its modalities, function and practical organisation are set out as well.
[58] Article 257(1) UNCLOS.
[59] International Seabed Authority Assembly, *Decision regarding the amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area (originally adopted 13 July 2000)*, Nineteenth Session, 142nd meeting, Kingston Jamaica, 25 July 2013, ISBA/19/A/9; for the text of the regulations see International Seabed Authority Council, *Decision relating to amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters*, Nineteenth decision, 190th meeting, Kingston Jamaica, 22 July 2013, ISBA/19/C/17 . (Regulations polymetallic nodules)
[60] International Seabed Authority Assembly, *Decision relating to the regulations on prospecting and exploration for polymetallic sulphides in the Area*, Sixteenth Session, 130th meeting, Kingston Jamaica, 7 May 2010, ISBA/16/A/12/Rev.1. (Regulations polymetallic sulphides)
[61] International Seabed Authority Assembly, *Decision relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area*, Eighteenth Session, 138th meeting, Kingston Jamaica, 27 July 2012, ISBA/18/A/11. (Regulations Cobalt-rich Ferromanganese Crusts*)*
[62] Point 8 of the regulations on polymetallic nodules, polymetallic sulphides and cobalt-rich ferromanganese crusts. These regulations each include a second provision dealing with human remains as well as historical and archaeological objects and sites. The following is provided: "*The contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of any human remains of an archaeological or historical nature, or any object or site of a similar nature and its location, including the preservation and protection measures taken. The Secretary-General shall transmit such information to the Director-General of the United Nations Educational, Scientific and Cultural Organization and any other competent international organization. Following the finding of any such human remains, object or site in the exploration area, and in order to avoid disturbing such human remains object or site, no further prospecting or exploration shall take place, within a reasonable radius, until such time as the Council decides otherwise after taking account of the views of the Director-General of the United Nations Educational, Scientific and Cultural Organization or any other competent international organization*" Article 35 Regulations polymetallic nodules, article 37 Regulations polymetallic sulphides and article 37 Regulations cobalt-rich ferromanganese crusts.

the Convention.[63] Through its regulations, the ISA at the moment has a mere informative role in the protection of UCH. This role is reinforced and slightly extended by the UNESCO Convention.[64]

Other provisions relating to the Area under UNCLOS deal with *inter alia* marine scientific research which must be carried out for the benefit of humanity,[65] the transfer of technology[66] and the protection of the marine environment.[67] The Area must exclusively be used for peaceful purposes.[68]

Special provision is made for the protection of UCH in the Area in article 149 UNCLOS. This article provides that "*All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.*"[69] The meaning and effects of this provision will be discussed below.[70]

## 2.3. The protection of underwater cultural heritage in UNCLOS

### 2.3.1. History

The first time worth noting that an international forum referred to UCH was in 1956 in the preparatory report for UNCLOS I. This document was drafted by the UN's International Law Commission (ILC)[71] and includes 73 draft articles accompanied by a commentary to each of them. In this report the ILC recognised that coastal States may exercise control and jurisdiction over their continental shelf as long as they do so for the sole purpose of exploiting their resources. Any claim to sovereignty or jurisdiction over the superjacent waters was, however, rejected.[72] Article 68 of

[63] M. RAU, "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea" in J.A. FROWEIN and R. WOLFRUM (eds.), *Max Planck Yearbook of United Nations Law*, Alphen aan den Rijn (Netherlands), Kluwer Law International, 2002, (387) 398. (RAU 2002)
[64] See *infra* section 4.5.4.
[65] Article 143(1) UNCLOS.
[66] Article 141 UNCLOS.
[67] Article 145 UNCLOS.
[68] Article 141 UNCLOS.
[69] Article 149 UNCLOS.
[70] See *infra* section 2.3.2.
[71] The ILC was established by the General Assembly of the United Nations in 1947 to fulfil the mandate given to the Assembly in article 13(1)(a) of the Charter of the United Nations to "*initiate studies and make recommendations for the purpose of [...] encouraging the progressive development of international law and its codification*." International Law Commission, *Home*, http://legal.un.org/ilc/ (consulted 10 April 2017).
[72] International Law Commission, Report on the Work of its Eighth Session, 23 April- 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159), Doc A/CN.4/104, *Yearbook of the International Law Commission* 1956 Vol.II, 295-296. (ILC report 1956)

the preparatory report provided that a coastal State exercises sovereign rights over its continental shelf for the exploration and exploitation of its natural resources. In the commentary accompanying this article it was made clear that such rights do not "*cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil*".[73] This evidences that the ILC did not consider shipwrecks as a part of the natural resources present on the continental shelf and that a State can therefore not exercise sovereign rights over such wrecks. Draft article 68 was later included in the Geneva Convention on the Continental Shelf where it became article 2(1).[74] Following the ILC commentary, it was soon generally accepted that shipwrecks are not included in the notion 'natural resources'.

In 1973, the third conference on the law of the sea, UNCLOS III, commenced. The conference held 11 sessions between 1973 and 1982 in which 160 States participated. During the first session it was decided that three main committees would be set up dealing with different aspects of the law of the sea. The conference allocated the international regime of the sea-bed and ocean floor beyond national jurisdiction to the first committee; matters relating to the territorial sea, contiguous zone, continental shelf, EEZ and high seas to the second committee; and the preservation of the marine environment to the third committee.[75] Initially, UCH was dealt with in the first committee. Towards the end of the negotiations, however, it was felt that this issue should be addressed in more general terms in order to deal with the pressing matter of controlling activities closer to the shores. The topic of UCH was therefore raised in the second committee as well. In the end, the UNCLOS III negotiations resulted in two separately negotiated provisions dealing with UCH to be introduced under UNCLOS: articles 149 and 303.[76]

### 2.3.2. Article 149 Convention Law of the Sea

Article 149 can be found in Part XI of UNCLOS, which establishes the regime for the Area. This article provides that "*All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole…".* When doing so, particular regard shall be paid to the preferential rights of the State of origin, cultural origin or historical and archaeological origin.[77]

Article 149 as a whole is rather vague and holds insufficient details to ensure its practical application. The material scope of the provision is insufficiently defined as it merely refers to "*all*

[73] ILC report 1956, 297-298.
[74] The UN Geneva Convention on the Continental Shelf of 29 April 1958, *UNTS* vol. 499, 311..
[75] The United Nations Diplomatic Conferences, *Third United Nations Conference on the Law of the Sea, 1973-1982*, http://legal.un.org/diplomaticconferences/1973_los/ (consulted 8 August 2018).
[76] DROMGOOLE 2013, 29-30.
[77] Article 149 UNCLOS.

*objects of an archaeological and historical nature*". This phrasing is very wide and does not give any indication on what type of objects should be included nor does it elaborate on what is meant by the archaeological and historical nature of such objects. This leaves a number of questions open for discussion: Is it necessary that objects meet a certain age criterion in order to fall under this provision? Does article 149 apply to, for example, submerged landscapes, submerged caves, human remains or, in general, traces of human existence as it is difficult to encompass these forms of heritage within the notion 'object'? Article 149 UNCLOS leaves these issues open for discussion.

It should be noted that article 149 UNCLOS uses the wording 'objects of an archaeological and historical *nature*' rather than 'of an archaeological and historical *interest*'. Almost every object that has been submerged for over a number of years will be of a historical nature. This says nothing about the historical interest or importance of that object. It can therefore be considered that article 149 UNCLOS potentially applies to a large number of objects. Since no further interpretation is provided under UNCLOS, it was left up to States Parties to interpret and apply this provision in practice.

Article 149 calls for the preservation or disposal of objects for the 'benefit of humanity as a whole'. What exactly is meant by the 'benefit of humanity' and how this should be achieved remains unclear. It could perhaps be assumed that this at least entails that such objects cannot be destroyed or used for mere private gain. In any case, particular regard must be paid to the preferential rights of the State of origin, cultural origin or historical and archaeological origin. The extent of these rights nor any of the practicalities on how they should be established are specified under UNCLOS. Furthermore, article 149 does not explain how such rights of (a) State(s) of origin are to be reconciled with the idea of preserving or disposing objects for the 'benefit of mankind as a whole'.[78]

Based on the text of article 149 UNCLOS and its negotiation history two remarks can be given with certainty. The first is that objects of an archaeological or historical nature are not considered to be part of the resources of the Area as these are limited to mineral resources.[79] This entails that these objects are not part of the common heritage of mankind even though they have to be preserved or disposed of for the benefit of mankind as a whole. Secondly, following the fact that these archaeological or historical objects are not considered as resources of the Area, they do not, as such, fall under the competence of the ISA. As UNCLOS does not appoint another organ as the

[78] T. SCOVAZZI, "The Regime of Underwater Cultural Heritage Before the 2001 UNESCO Convention – A Contradictory and Counterproductive Regime" in R. GARABELLO and T. SCOVAZZI (eds.), *The protection of the underwater cultural heritage: before and after the 2001 UNESCO Convention*, Leiden, Brill Academic Publishers, 2003, (3) 6. (SCOVAZZI 2003)
[79] Article 133(a) UNCLOS.

competent authority for dealing with objects of an archaeological or historical nature found in the Area, it appears that in the UNCLOS regime no competent authority exists for managing and protecting such objects.[80] In other words, there is no authority that could further interpret article 149 nor exercise control over its application by States Parties.[81]

### 2.3.3. Article 303 Convention on the Law of the Sea

The second provision dealing with the protection of UCH is article 303 UNCLOS. This provision can be found in part XVI of the Convention, which contains the general provisions applicable throughout the entire Convention.

#### 2.3.3.1. Objects of an archaeological and historical nature in article 303(1) and (3)

Under article 303(1) States have a "*duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.*"[82] Since no further clarification is given on which States are bound by this duty, it may be assumed that this provision applies to all States, whether coastal or landlocked, that have ratified UNCLOS.[83]

Article 303 UNCLOS does not further elaborate on what is encompassed by the 'duty to protect'. As, however, this wording is susceptible to different interpretations, it is crucial to know what this duty exactly entails. A number of legal scholars have given their views on the content of this protection duty of article 303 UNCLOS. O'Keefe and Nafzinger put forward that the duty to protect includes *inter alia* maintaining known sites, excavation in accordance with generally accepted

[80] DROMGOOLE 2013, 31-32.

[81] The text of article 149 was based on proposals made by Greece and Turkey in 1972 and 1973. L.B. SOHN, "The Greek Contribution to the Development of the International Law of the Sea" in T.C. KARIOTIS (ed.), *Greece and the Law of the Sea*, The Hague, Kluwer Law International, 1997, 3-20. The text that is included in article 149 UNCLOS was altered substantially during the negotiations. In the negotiation text of 1975 article 19, which dealt with archaeological and historical objects, included a paragraph stating that the recovery and disposal of wrecks and their content that are more than 50 years old and were found in the Area are subjected to regulation by the International Seabed Authority. United Nations, *Informal single negotiating text*, 1975, UN Doc A/CONF.62/WP.8/Part I, Official Records of the Third United Nations Conference on the Law of the Sea, Volume IV, 137-152. Under this negotiating text the International Seabed Authority was appointed as the competent authority for dealing with wreck that are over 50 years old and located in the Area which is an important part of the UCH in that maritime zone. No such paragraph was included in the final text of UNCLOS, however, resulting in no competent authority to be designated for UCH in the Area.

[82] The phrase 'objects of an archaeological or historical nature' is once again used as was the case in article 149 UNCLOS. The same criticisms relating to this phrase as were described *supra* in section 2.3.2. on the assessment of article 149 UNCLOS apply here as well. Article 303(1) UNCLOS.

[83] E. BOESTEN, *Archaeological and/or Historical Valuable Shipwrecks in International Waters, Public International Law and what it offers*, The Hague, T.M.C. Asser press, 2002, 57. (BOESTEN 2002)

standards, conserving and displaying recovered material and spreading information.[84] Strati provides that this obligation should be given the broadest possible interpretation in order to include all activities relating to objects of an archaeological and historical nature. She, therefore, believes that the duty to protect includes the reporting of archaeological and historical finds to the competent authorities, the obligation to take all the necessary interim measures to preserve cultural heritage -even if this includes the suspension of construction works-, the preservation of remains *in situ* avoiding unnecessary excavation, and the conservation, proper presentation and restoration of any recovered objects.[85] Migliorino states that in any case the destruction or damaging of an object of archaeological and historical nature would violate this obligation.[86] It would appear, especially in light of later developments in the field of UCH protection, that this duty should be interpreted in the widest sense possible taking into account that it does not allow States to extend their jurisdiction beyond what was determined under UNCLOS.[87]

The second part of article 303(1) contains an obligation to cooperate. Again no further specifications on this duty are provided under UNCLOS leaving room for interpretation. Strati considers that a similar extensive interpretation should be used as for the duty to protect. According to her the duty to cooperate includes, *inter alia*, exchanging scientific information, undertaking joint archaeological projects and coordinating the fight against illicit trade in artefacts.[88] Boesten believes that the obligation to cooperate should be interpreted in light of its objective, namely achieving that objects of an archaeological or historical nature are protected. Therefore, cooperation should take place with all those that can help achieve this objective. This entails that cooperation is not necessarily limited to cooperation between States but that cooperation can be established with for example museums, diver organisations or other non-governmental institutions.[89] Even though the exact scope of this duty to cooperate is unclear, Risvas provides that "*a State which persistently disregards any request by other States to negotiate on forms or ways of co-operation aiming at the protection of underwater cultural heritage could […] be held responsible for an internationally wrongful act*".[90]

[84] P. O' KEEFE and J. NAFZIGER, "The Draft Convention on the Protection of the Underwater Cultural Heritage", *ODIL* 1994, (391) 393.
[85] A. STRATI, *The protection of the underwater cultural heritage: an emerging objective of the contemporary law of the sea*, The Hague, Kluwer law international, 1995, 124. (STRATI 1995)
[86] L. MIGLIORINO, "In Situ Protection of the Underwater Cultural Heritage under International Treaties and National Legislation", *IJMCL* 1995 (483) 486. (MIGLIORINO 1995)
[87] C. FORREST, *International Law and the Protection of Cultural Heritage*, Oxon, Routledge, 2010, 326. (FORREST 2010)
[88] STRATI 1995, 125.
[89] BOESTEN 2002, 59.
[90] M. RISVAS, "The duty to cooperate and the protection of underwater cultural heritage", *CJICL* 2013, (562) 568. (RISVAS 2013)

Article 303 goes on by providing that "*the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practice*" shall not be affected by anything in the article. As for the rights of identifiable owners, article 303 maintains the *status quo* that existed at that point leaving it up to States to regulate this in their national legislation.[91] States must take into account, both in domestic and in international law, the well-established principle that there can be no interference with property rights without compensation. It may be assumed that when a State believes that an object needs to be protected while still having an owner, this issue will be solved through an agreement between both parties. This leaves, however, the question whether it would be possible for a State to protect an object when the owner does not wish interference with its property rights. Boesten believes that the answer to this question is negative as article 303(3) clearly states that the rights of identifiable owners cannot be affected by the duty imposed on States to protect objects of an archaeological and historical nature. Consent thus appears to be required.[92]

The second part of article 303(3) UNCLOS gives an overarching status to the law of salvage and any other admiralty rules entailing that when a conflict arises between the protection of heritage as defined in article 303 and the application of the law of salvage, the latter will prevail. In many States the concept of salvage is in no way linked to ancient sunken ships, but merely serves to save a ship from imminent marine peril on behalf of its owners. Nevertheless, in a few common law States this concept has been widened through the domestic courts allowing for the law of salvage and finds to be applied to ancient sunken shipwrecks and their cargo as well. As will be explained further in this dissertation,[93] the law of salvage as well as other rules of admiralty law have been considered by many to be unsuitable for dealing with UCH as their main driving force is economic profit rather than the protection of the historical, cultural or archaeological value of objects. A wide application of the salvage concept can thus potentially allow article 303(3) to undermine the (limited) protective regime that was established under UNCLOS.[94]

#### 2.3.3.2. Objects of an archaeological and historical nature in the contiguous zone

For the contiguous zone, a separate provision is included in article 303(2) UNCLOS. In its contiguous zone, a coastal State may, in order to control traffic in objects of an archaeological and historical nature, "*in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.*"[95]

[91] FORREST 2010, 328.
[92] BOESTEN 2002, 60
[93] See *infra* section 3.4.
[94] SCOVAZZI 2003, 9.
[95] Article 303(2) UNCLOS.

Article 303(2) is linked to article 33 UNCLOS and departs from a double presumption concerning UCH found and recovered from the contiguous zone.[96]

The first part of the presumption provides that where an offence, being the removal of objects of an archaeological or historical nature without the coastal State's approval, is committed in the contiguous zone, it may be presumed that these objects were removed from the territory or the territorial sea of the coastal State.[97] To have any significance, this presumption must be non-rebuttable. If this were not the case, anyone involved in the recovery of such objects in the contiguous zone would simply have to prove that the object in fact does not originate from the coastal State's territory or territorial sea to evade the jurisdiction of the coastal State.[98] Not only would this be unjustifiable in light of the preparatory works of this provision but it would minimize the significance and effectiveness of article 303(2).[99]

The second presumption links article 303(2) to article 33 UNCLOS and introduces the fiction that removing objects of an archaeological and historical nature from the seabed in the contiguous zone constitutes a breach of the coastal State's customs, fiscal, immigration and sanitary laws.[100] Following article 33 UNCLOS, a State is competent to take action in its contiguous zone to prevent an infringement within its territory or territorial sea of its customs, fiscal, immigration and sanitary laws, as well as to punish those that commit such an infringement. Article 33 does not allow the coastal State to create laws or regulations that are applicable to the contiguous zone itself. In other words article 33 does not afford any legislative power, but is limited to providing a State with enforcement jurisdiction.[101] The question then of course arises whether article 303(2) also merely affords enforcement jurisdiction or whether it gives the coastal State legislative jurisdiction as well. During the negotiations a number of States were in favor of granting a limited number of rights to the coastal State over the archaeological objects found in its contiguous zone, while others were in favor of creating a full-fledged archaeological zone. The language used in article 303(2) is in fact a constructive ambiguity designed to accommodate these two different viewpoints expressed by States during the negotiations. In legal jurisprudence a number of authors addressed this

[96] STRATI 1995, 166.
[97] STRATI 1995, 194.
[98] FORREST 2010, 326.
[99] STRATI 1995, 166-167.
[100] STRATI 1995, 166. In practice it is very unlikely that the removal of archaeological or historical objects from the seabed will constitute a breach of a State's customs, fiscal, immigration and sanitary legislation. Only when the heritage has been removed and is imported to or exported from a State, customs and fiscal legislation might be relevant. DROMGOOLE 2013, 251.
[101] DROMGOOLE 2013, 250.

ambiguity and provided their views on the matter. Two schools of thought can be distinguished in this regard.

The first, more restrictive viewpoint, which departs from a grammatical interpretation of article 303(2) UNCLOS, allows coastal States to control the removal of objects of an archaeological and historical nature from their contiguous zone as if this is an infringement of their customs, fiscal, immigration and sanitary laws which apply in their territory.[102] This control should, however, be considered as the enforcement of laws that are applicable in the territory of the coastal State and should not be exercised by legislation in respect of the contiguous zone itself.[103] Oxman supports this view by stating that the result of the presumption in article 303(2) is that in its contiguous zone a coastal State has the control, but not the jurisdiction over maritime archaeology.[104] Rau as well believes that article 303(2) establishes a mere *fictio juris*, providing States with the right to exercise the power of control as set out in article 33 UNCLOS. Article 303(2) should therefore not be interpreted as affording legislative jurisdiction to coastal States over archaeological objects found in the 12 nm of the contiguous zone.[105]

Even under this restrictive viewpoint a crucial difference between article 303(2) and article 33 needs to be noted. Article 33 allows coastal States to prevent and punish infringements that took place in the territorial sea. Article 303(2), on the other hand, permits States to take action relating to activities that take place in the contiguous zone itself.[106]

A number of commentators have taken a more liberal viewpoint in this matter believing that article 303(2) affords States legislative competence over objects of an archaeological and historical nature in their contiguous zone.[107] Strati believes that the combination of article 303(1) obliging States to protect objects of an archaeological and historical nature combined with the jurisdictional mechanism of article 303(2) allows coastal States to extend their heritage laws to the contiguous zone. This permits States to establish in addition a 12 nm 'archaeological zone' beyond their territorial sea. According to Strati, the application of a State's heritage legislation in this 'archaeological zone' does not depend on whether the coastal State has declared a contiguous zone. One of the underlying reasons for this is that article 303 is located in the chapter containing

[102] STRATI 1995, 167.
[103] DROMGOOLE 2013, 251.
[104] B. OXMAN, "Marine Archaeology and the International Law of the Sea", *Columbia-Volunteer Lawyers Association Journal of Law and the Arts* 1988, (353) 364. (OXMAN 1988)
[105] RAU 2002, 399.
[106] DROMGOOLE 2013, 251-252.
[107] This more liberal approach is often found in State practice. For example The Netherlands, Belgium, Spain, Italy and France all assert some sort of legislative competence over UCH in their contiguous zone. DROMGOOLE 2013, 254.

the general provisions, rather than in that dealing with the contiguous zone. These two zones, namely the contiguous zone and archaeological zone, have a different legal nature: the archaeological zone is a full-jurisdictional zone while in the contiguous zone the coastal State enjoys limited enforcement jurisdiction.[108] Aznar, another commentator adhering to the liberal view, reasons that if a State has no legislative jurisdiction, this would contradict the text of article 303(2), since it explicitly refers to the possibility for a coastal State to give its approval. Allowing States the competence to give their approval, necessarily implies the need for a "*legislative term of reference*". Therefore article 303(2) affords coastal States both legislative and enforcement power.[109] Dromgoole, as well, proclaims that it is difficult to see how article 303(2) can be implemented without an appropriate legislative framework. The legislation dealing with customs, fiscal, immigration and sanitary matters is clearly inappropriate for this purpose. The application in the contiguous zone of the coastal State's heritage laws would serve the purpose of protecting the heritage much better. Article 303(2), however, only affords limited jurisdiction, as a State can only take action in case of the removal of objects. The full application of a State's heritage laws in the contiguous zone would therefore go too far. The creation of a permit system regulating recovery on the other hand, would appear to be permissible.[110] However, since States have a general duty to protect under art. 303(1), they should be allowed to take legislative measures to protect heritage in their contiguous zone, which can go beyond measures relating to the removal of such heritage. While it is true that every State Party is under this general duty to protect, as discussed, there is a lot of uncertainty on the scope of this duty. In any case, in order for article 303(2) to have any practical effects, it does seem that this provision affords States (limited) legislative jurisdiction over objects of an archaeological and historical nature in their contiguous zone.

Another question that arises regarding article 303(2) is how it relates to article 303(3), and more specifically to the application of the law of salvage and other admiralty rules. In the law of salvage, no requirement exists for a salvor to obtain permission from an authority in the coastal State prior to a salvage operation in that State's contiguous zone. On the other hand, article 303(2) allows the coastal State to regulate the removal of cultural heritage within its contiguous zone. This may include imposing a requirement of obtaining consent prior to removing UCH from the seabed of the contiguous zone. Such a requirement does not easily fit within the law of salvage regime. A conflict arises here between the right of coastal States to regulate the removal of UCH from their

[108] STRATI 1995, 167-170. Alexander is another supporter of this liberal view and states that a coastal State's custom and fiscal law must include its cultural heritage regulations as well. B.E. ALEXANDER, "Treasure salvage beyond the territorial sea : an assessment and recommendations", *JMLC* 1989*,* (1) 8. (ALEXANDER 1989)
[109] M. AZNAR-GOMEZ, "The Contiguous zone as an Archaeological Maritime Zone", *IJMCL* 2014, 1-51. (AZNAR-GOMEZ 2014)
[110] DROMGOOLE 2013, 252.

contiguous zone and the priority given to the law of salvage and other rules of admiralty in article 303(3) UNCLOS.[111]

#### 2.3.3.3. Territorial application of article 303 UNCLOS

One of the main points of discussion relating to article 303 UNCLOS is its territorial scope of application. As article 303 is located in part XVI of the Convention which contains the general provisions, it could be assumed that this provision in its entirety applies to all maritime zones. However, because of the fact that article 303(2) is linked to article 33 UNCLOS which deals with the contiguous zone, a number of commentators are of the opinion that article 303 as a whole only applies to a coastal State's contiguous zone.[112] Another group of commentators[113] disagrees with this point of view by stating that while paragraph 2 can only be applied to a coastal State's contiguous zone, paragraphs 1, 3 and 4 are applicable in all the maritime zones.[114]

A number of arguments can be given in favor of the first viewpoint. If article 303(1) applies in all maritime zones, this would imply that States are given legislative jurisdiction in order to protect UCH in maritime zones where they do not have such jurisdiction according to UNCLOS. Such an interpretation could lead to an extension of State jurisdiction, which, according to the drafting history of article 303, was not the objective.[115] This leaves, however, the question why the heading of article 303 refers to objects found 'at sea', without further defining what is meant by 'at sea'. Boesten believes that this wording could imply a duty for States to prevent their nationals from engaging in any activities that could damage or jeopardise UCH as well as a duty to create an effective system of enforcement and punishment. This interpretation would avoid the feared problem of creeping jurisdiction.[116]

A logical question that needs to be addressed when considering that article 303 only applies to the contiguous zone is why it was then included in the general provisions of UNCLOS? A first reason for this is that the negotiations on the contiguous zone were already completed and closed at the time article 303 was drafted and would need to be reopened.[117] The fact that this provision is included in the general provisions thus has more a practical rather than a substantive reason. A

[111] FORREST 2010, 328.
[112] C.F. NEWTON, "Finder Keepers? The titanic and the 1982 law of the sea convention", *HICLR* 1986, 159-197 (NEWTON 1986); MIGLIORINO 1995, 485; BOESTEN 2002, 58-59.
[113] DROMGOOLE 2013, 33-34; OXMAN 1988, 362; STRATI 1995, 124-125 and 224-225; D.R. WATTERS, "The law of the sea and underwater cultural resources", *American Antiquity* 1983, (808) 813.
[114] FORREST 2010, 324.
[115] BOESTEN 2002, 58.
[116] BOESTEN 2002, 58-59.
[117] FORREST 2010, 324.

second reason that has been cited is that the drafters wished to remove the discussion on heritage from the negotiations on the EEZ and the continental shelf to avoid the danger of creeping jurisdiction.[118]

A final argument in favor of the first viewpoint relates to the relation between article 303 and article 149 UNCLOS. When article 303 were to be applied to all maritime zones, including the Area, paragraphs 1,3 and 4 of this provision would overlap with the rules set out in article 149. This would result in issues, for example, relating to the reconciliation of the preferential rights of certain States in article 149 with the priority of ownership rights and the law of salvage in article 303(3).[119] In any case, according to Newton, the intention of the delegates was to apply article 149 strictly and exclusively to the Area, excluding all other provisions.[120] As a consequence article 303 cannot be applied in the high seas. Newton believes that the Convention divided the sea into two zones with regard to archaeological and historical objects: article 149 applying to the Area and article 303 applying to the contiguous zone.[121]

The second view adhered by commentators is that article 303, with the exception of paragraph 2, applies in all maritime zones. One of the main arguments for this is that to interpret article 303 in another way, would entail that no provisions were adopted under UNCLOS for objects of an archaeological and historical nature located in the EEZ and on the continental shelf.[122] Especially since UCH in the Area was explicitly addressed, it seems unlikely that the Convention would leave the zone between the contiguous zone and the Area unprotected.

Other arguments include of course the fact that the heading of article 303 provides that it applies to *"archaeological and historical objects found at sea"* without any further specification of the phrase 'at sea' and that article 303 is located in Part XVI of UNCLOS, containing the general provisions.[123]

The commentators acknowledge that interpreting the territorial scope of article 303 in a broad sense does create an overlap with article 149 UNCLOS when dealing with objects found in the Area. One way to solve this problem is by using the principle *lex specialis derogat legi generali*. This

[118] BOESTEN 2002, p. 58.
[119] FORREST 2010, 324.
[120] NEWTON 1986, 187.
[121] NEWTON 1986, 176. L. MIGLIORINO 1995, 485.
[122] FORREST 2010, 325.
[123] DROMGOOLE 2013, 33-34.

would result in article 149 to be preferred as *lex specialis* over article 303 as *lex generali* for objects discovered in the Area.[124]

The uncertainty of the territorial scope of article 303 is a fundamental problem and remains unresolved up till today.

#### 2.3.3.4. A way forward in article 303(4) UNCLOS

Paragraph 4 of article 303 has been described as its saving grace as it leaves the way open for more specific agreements on UCH protection and management to be concluded.[125] The objective of article 303(4) was to harmonise the rules of the law of the sea relating to maritime archaeology with the content of the, at that time emerging, laws on archaeology and artefacts of cultural value.[126] This paragraph asserts that article 303 does not take precedence over nor contravenes with any previously formulated laws. UNCLOS seems to encourage the drafting of more specific agreements in order to better protect UCH, in order to fill the gaps and eliminate the ambiguity that this Convention has created.[127]

## 2.4. Conclusion

UNCLOS offers two provisions dealing with the protection of UCH. However, these provisions are very limited and have been heavily criticised because of their vagueness, incompleteness and contradictions. For article 149 UNCLOS the main issue is the fact that no competent authority has been designated to oversee and put into practice the protection that it provides. It is felt that this deprives the provision of "*all real significance*".[128]

Article 303 UNCLOS is considered by many as being too general and vague. The use of a constructive ambiguity in article 303(2) is, as Dromgoole describes it, "*a self-evident flaw*".[129] Article 303(3) can be seen as an invitation for looting and creates uncertainty on the application of the other paragraphs of article 303.

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[124] FORREST 2010, 325. The fact that article 149 UNCLOS should be considered as *lex specialis* was provided by authors such as Rau and Risvas as well. RAU 2002, 428; RISVAS 2013, 572.
[125] FORREST 2010, 328.
[126] OXMAN 1988, 364.
[127] SCOVAZZI 2003, 10.
[128] L. CAFLISH, "Submarine Antiquities and the International Law of the Sea", *Netherlands yearbook of International* Law 1982, (3) 29. (CAFLISH 1982)
[129] DROMGOOLE 2013, 35.

The drafters of article 303 have paid insufficient attention to the protection of heritage in the EEZ and on the continental shelf, leaving a geographical gap. Even when assuming that article 303(1) and (3) do apply to all maritime zones, no real protection is offered to objects of an archaeological or historical nature located in the EEZ or on the continental shelf. While there is a general duty to protect archaeological and historical objects this is, however, largely undermined by awarding priority to the law of salvage and other rules of admiralty. As there is no clear and comprehensive protection regime in the EEZ and on the continental shelf, deliberate interference with UCH in this zone will be governed for the most part by the freedoms of the high seas. The only State that has jurisdiction to exercise control over activities directed at submerged heritage will be the flag State of the ship engaged in the activity or the State of nationality of the person conducting such an activity.[130]

Even though articles 149 and 303 do not establish a clear binding regime for the protection of UCH, it must not be forgotten that at that time they represented the only substantive international law applicable to such heritage.[131] These two provisions set out a number of generally applicable rules that due to the high number of ratifications of UNCLOS bind most States worldwide. These rules, admittedly being vague and ambiguous, include that UCH should be protected in various maritime zones beyond the jurisdiction of the coastal State, that in the Area this must be done for the benefit of mankind taking into consideration certain States' preferential rights and that there is a duty to cooperate between States.[132] Additionally, article 303(4) UNCLOS provided the possibility for these principles to be elaborated further and a comprehensive regime for the protection of UCH to be created.

## 3. The law of salvage and finds

### 3.1. Introduction

The law of salvage and the law of finds have been developed over a very long period of time mainly within the admiralty courts in common law jurisdictions. These laws traditionally apply to the salvage of shipwrecks and their cargo that are in marine peril at sea. However, because of the wide interpretation that has been given to the concept 'marine peril' by courts, the law of salvage and finds have been applied to recover historical or archaeological valuable shipwrecks that sank many years ago and have thus been submerged for a long period of time. With the upcoming of maritime archaeology, a lot of criticism was given to this approach. It is generally accepted by those involved

[130] DROMGOOLE 2013, 35-36.
[131] For a summary of the positive and negative aspects of including article 303 under UNCLOS see STRATI 1995, 330-334.
[132] FORREST 2010, 329.

in the protection and management of UCH that the law of salvage and finds are not suitable instruments to apply to UCH.[133] This was once again stressed with the introduction of the UNESCO Convention where article 4 provides for a very limited and modified application of the law of salvage and finds to UCH. One of the main issues is that the law of salvage and finds encourage the recovery of UCH, which contradicts the well-established archaeological principle that *in situ* preservation should be considered as the first option.[134] The law of finds is traditionally considered to be even less appropriate to deal with UCH than the law of salvage as it can result in the finder becoming the owner of the UCH, which creates a strong incentive for treasure seekers. Proposals have been made to exclude UCH from the application of the law of salvage and finds, but these have met a lot of resistance.[135]

This section commences by discussing the law of salvage and finds as legal instruments. Secondly, the question of how the protection of UCH fits within these admiralty law instruments is addressed by discussing the relevant case law in the United States (US), which is home to some of the biggest salvage companies in the world. Thirdly, the matter of why the law of salvage and finds are considered to be unsuitable instruments for dealing with UCH will be addressed. Finally, this chapter will discuss the place of UCH within the International Convention on Salvage 1989[136] (Salvage Convention) as well as the place of the law of salvage and finds in the UNESCO Convention.

## 3.2. The law of salvage

### 3.2.1. Conditions for the application of the law of salvage

The law of salvage is an instrument commonly used by admiralty courts in common law jurisdictions for recovering maritime properties, especially shipwrecks and their cargo, that are in danger at sea[137]. In order for the law of salvage to apply, it is required that the wreck or cargo still has an identifiable owner. The act of salvage is then considered as a service rendered to that owner. As the actions of the salvor can be time-consuming, costly and potentially dangerous, it is common that he is rewarded for this.[138]

[133] DROMGOOLE 2013, 167.
[134] See *infra* section 4.2.3.
[135] DROMGOOLE 2013, 167.
[136] The International Convention on Salvage of 28 April 1989, *UNTS*, Vol. 1953, 165. (Salvage Convention) This Convention entered into force on 14 July 1996.
[137] In this context, 'sea' refers to all navigable waters, or for the English common law 'tidal waters'. DROMGOOLE 2013, 168.
[138] DROMGOOLE 2013, 168-169.

In order to have a valid salvage claim, three conditions must be met: 1. the salvaged property must have been in marine peril; 2. the salvage service must have been rendered voluntarily, entailing that the salvage operation cannot be the result of a pre-existing duty or special contract; and 3. the salvage service must be successful, in whole or in part, or must have contributed to such success.[139]

Under traditional salvage law, the salvor must be able to demonstrate that a vessel is in marine peril, implying that it is at a risk of loss, destruction or deterioration. Traditionally, these are vessels that are in distress because they have been caught in bad weather conditions or have suffered some structural or engine failure which puts them at risk of running aground or vessels that have recently sunk. At first sight it would seem that for archaeological or historical shipwrecks this precondition of 'being in marine peril' is hard to fulfil as they have already experienced the consequences of marine peril when they were lost many years ago. Nevertheless, these wrecks can still be under a threat of physical destruction as the wreck begins to disintegrate due to the forces of nature or degeneration over time.[140] Additionally, they can be threatened by human activities that incidentally affect these wrecks, such as the use of fishing nets, the placing of cables and pipelines and dredging or by activities that are directed at such wrecks including their destruction by inexperienced or competing salvors. Nevertheless, at a certain point in time these remains might reach a state of equilibrium and will become part of the marine environment, entailing that little to no further degradation of the remains will occur. In these circumstances it can be argued that the remains are no longer in marine peril and that, therefore, the law of salvage cannot be applied to them. In practice, however, the concept of marine peril has been interpreted very broadly surpassing the mere threat of physical destruction and including a failure to reap the economic value of a wreck and especially its cargo.[141] Furthermore, Forrest points out that as long as a wreck remains submerged it is lost to social or academic use.[142] The best examples of the wide interpretation of the notion 'marine peril' can be found in US litigation.

In 1978, in *Treasure Salvors I* the Fifth Circuit Court of Appeals had to decide whether the historical wreck 'Nuestra Señora de Atocha', which at the time had been submerged for over 350 years, was in marine peril to resolve the question of whether the law of salvage could be applied to it.[143] The

[139] *The Sabine*, 101 US 384 (U.S., Supreme Court, Oct. 1879).
[140] FORREST 2010, 300-301.
[141] As the existence of marine peril is one of the preconditions for the law of salvage to apply, it does not come as a surprise that those wishing to preserve the application of the law of salvage to UCH favour a broad interpretation in which marine peril is not limited to physical threats, but includes the loss of economic value as well. FORREST 2010, 303.
[142] FORREST 2010, 301.
[143] The Nuestra Señora Atocha was a Spanish vessel that sank of the Marquesas Keys in 1622. *Treasure Salvors I v. The Unidentified, wrecked and abandoned vessel believed to be the Nuestra Señora Atocha*, 569 F.2d 330 (5th Cir. 1978). (*Treasure Salvors I*)

Court provided that in this context marine peril should be interpreted in a wide sense including more than for example the threat of a storm, fire or piracy to a vessel that is navigating.[144] The Court stated that even after the location of the sunken vessel was discovered "*it is still in peril of being lost through the actions of the elements*."[145] In the 1982 *Cobb Coin* case[146] the District Court in Florida expressed a similar view providing that marine peril exists even when the location of a wreck is known as it is still at risk of being lost because of the actions of elements or pirates.[147] In other cases, however, the courts were stricter in applying the notion of 'marine peril' to ancient shipwrecks. In the 1984 *Chance* case,[148] the District Court in Georgia heard an expert testimony that explained how after an initial stage in which a sunken vessel rapidly deteriorates, it reaches a state of equilibrium until it is once again disturbed. Taking artefacts from a site, exposes the timber to effects from the marine environment which could increase the process of deterioration. Based on the fact that the removed artefacts were subject to a greater rate of deterioration than if they had been left submerged, the District Court denied the claim to a salvage award.[149] In the 1985 *Klein* case,[150] the Eleventh Circuit Court of Appeals pointed out that "*the plaintiff's unauthorized disturbance of one of the oldest shipwrecks in the Park and his unscientific removal of the artifacts did more to create a marine peril than to prevent one*."[151]

The second requirement for the law of salvage to apply is that the salvage service is rendered voluntarily. While it is common that a contract is concluded for most modern commercial salvage operations, the salvor, whether or not under a contract, must be a volunteer. In other words no

[144] It is not required that the marine peril is imminent and absolute, but "*the property must be in danger, either presently or reasonably to be apprehended*". *Treasure Salvors I*, 569 F.2d 337, note 13 quoting Norris.
[145] *Treasure Salvors I*, 569 F.2d337. Under *Platoro Ltd., Inc. v. The Unidentified Remains of a Vessel*, 614 F.2d (1051) 1055-1056 (5th Cir. 1980) (*Platoro*), reference was made to *Treasure Salvors I* and the same reasoning was applied with regard to the remains of a number of Spanish vessels that sank off the Texan coast in 1555.
[146] *Cobb Coin Company, Inc. v. The Unidentified, Wrecked and abandoned Sailing Vessel*, 549 F. Supp. 540, (S.D. Fla. 31 Aug. 1982) (*Cobb Coin*) dealt with the salvage of an eighteenth century Spanish treasure galleon which was wrecked along with ten other ships of the Spanish Plate Fleet in 1715 because of a hurricane. The wreck is located off the coast of Florida. *Cobb Coin*, 549 F. Supp. 544.
[147] *Cobb Coin,* 549 F. Supp. 540, 557. The District Court in Florida further clarified this by providing the following: "*These artifacts were recovered from under many […] feet of ocean sand through the plaintiff's skilled and laborious efforts. Had they not been saved, they likely would still be lying on the ocean bottom subject to further rearrangement and, perhaps, loss from weather conditions. Further, if not recovered, they would be threatened by pirates who might have disturbed the site and removed the articles without the supervision of the Admiralty Court.*" *Cobb Coin,* 549 F. Supp. 561.
[148] *Chance v. certain artifacts found and salvaged from the Nashville*, 606 F.Supp.801 (S.D Ga. 16 Aug. 1984) (*Chance*). The *Chance* case dealt with the wreck of the Nashville, a side-wheel steamer. In 1863 this ship ran aground in the Ogeechee river and was taken under attack by the USS Montauk after which it exploded and sank. It should be noted that the wreck of the Nashville was located at the bottom of a river, rather than at the bottom of the sea.
[149] *Chance*, 606 F. Supp. 808-809
[150] *Klein v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985)(*Klein*) dealt with the remains of a vessel over 200 years old located within Biscayne National Park. *Klein*, 758 F.2d 1511.
[151] *Klein,* 758 F.2d 1515.

pre-existing contractual or other legal duty may exist obliging the salvor to render the salvage service. [152]

The third and final requirement is that the salvage operation must be successful. Whether or not a salvage operation should be considered as successful can depend on a number of factors and will be assessed by the court. As the law of salvage requires a salvor to save a wreck from marine peril, the rate of success is often linked to the question of whether the property was in fact saved from this marine peril without being destroyed in the process. For historical and archaeological wrecks, however, the mere fact that the wreck or its cargo are recovered without further destruction is insufficient to consider the operation as a success from a heritage preservation point of view. For archaeological or historical shipwrecks, it is likely that prior to commencing the salvage operation, the salvor will claim the recognition of his exclusive right to wreck before court.[153] Therefore, this salvor will often be under the obligation to demonstrate the likelihood of success of the future action before even commencing the salvage operation. US courts have begun to take the protection of the archaeological or historical integrity of a wreck into account either as a precondition for awarding exclusive rights over a wreck to the salvor or in order to determine the amount of the salvage.[154]

### 3.2.2. The law of salvage before courts

Salvage petitions before courts comprise of two distinct procedures. The first procedure takes place prior to the actual salvage activity and allows the salvor to become the exclusive-salvor-in-possession of the wreck. The second procedure takes place after the salvage operation was completed when the salvor comes forth to claim his reward for the successfully salvaged property. Both procedures will be addressed below.[155]

#### 3.2.2.1. Exclusive rights for the salvor

Since the recovery of a wreck can take a significant amount of time, especially when the historical or archaeological value of the wreck needs to be protected, it is essential for the salvor to be able to protect his claim over the wreck against the interference from third salvors. Therefore, the salvor can petition a court to obtain exclusive salvage rights over a certain site, or in other words,

[152] DROMGOOLE 2013, 169.
[153] The exclusive right of a salvor to a wreck is discussed more in depth below. See *infra* section 3.2.2.1.
[154] Examples of this practice are given below when addressing the exclusive salvor-in-possession status and the salvage award. See *infra* section 3.2.2.1. and 3.2.2.3.
[155] J. DUCLOS, "A Conceptual Wreck: Salvaging the Law of Finds", *JMLC* 2007, (25) 30. (DUCLOS 2007)

to become the exclusive salvor-in-possession of that site.[156] In order for the salvor to obtain this status of exclusive salvor-in-possession, he must demonstrate that he has actual or constructive possession over the site and the capability to perform the salvage operation. The court can then order an injunction providing that the salvor has the exclusive right to excavate the site, excluding all others. This right will continue for as long as the salvage operation continues.[157] US courts have considered that by granting the exclusive right of salvage to the first salvor, the latter will in some cases be more committed to the salvage, which can result in a commitment to preserve the archaeological and historical value of a wreck.[158]

When a wreck site is situated outside of a State's territorial waters, a State will not have jurisdiction over the site or the *res*. It does however have jurisdiction *in personam* over the salvors. In the United Kingdom (UK) the court's jurisdiction in this case will be limited to this *in personam* jurisdiction. In the US, on the other hand, home to most of the world's deep-water salvors, courts have developed the concept of *quasi in rem* jurisdiction.[159] This is a form of extra-territorial jurisdiction over wreck sites located in international waters based on the concept of constructive possession.[160] The doctrine of constructive possession introduced the fiction that by bringing a part of the *res*, being the wreck, within the territorial jurisdiction of the court, the whole wreck becomes subjected to that court's jurisdiction. This mechanism is based on the fiction that the wreck site and all the artefacts constitute a single *res*. The doctrine of constructive possession was established in 1987 when a US federal judge asserted jurisdiction over the SS Central-America, which sank in international waters in 1857, based on a lump of coal from the wreck site that was brought within its jurisdiction. In 1993 this doctrine was applied to the wreck of Titanic,[161] where the District Court for the Eastern District of Virginia asserted constructive *in rem* jurisdiction over the Titanic based on a wine decanter that was brought in the courtroom.[162] While this idea of a national court exercising jurisdiction over an object located outside of its jurisdiction might help regulate the salvage of wrecks located in for example the Area, such a fiction could be disputed by other salvors or States. This issue arose in 1999 in relation to the exclusive rights awarded over the

[156] Salvors are not obliged to petition the court in order to become the exclusive salvor-in-possession. It is perfectly possible for a salvor to recover a shipwreck without having exclusive rights over it. Nevertheless, courts have encouraged salvors to do so. DUCLOS 2007, 27.
[157] DUCLOS 2007, 31.
[158] This was the case for example in *Deep Sea Research, Inc. v. The Brother Jonathan*, 883 F Supp. (1343), 1363-1363 (N.D. Cal. 1995). FORREST 2010, 306.
[159] A procedure *in rem* is based on the admiralty's fiction of convenience that a ship is a person against whom a suit can be filed and judgments entered. BOESTEN 2002, 99.
[160] FORREST 2010, 306.
[161] The Titanic lies 350 nm off the coast of Newfoundland, Canada. O. VARMER, *Underwater Cultural Heritage Law Study*, U.S. Dept. of the Interior, Bureau of Ocean Energy Management, Headquarters Herndon, VA. OCS Study BOEM 2014-005, 37. (VARMER 2014)
[162] FORREST 2010, 306 and BOESTEN 2002, 100. For more on the concept of '*in rem* jurisdiction' see ALEXANDER 1989.

wreck of the Titanic. The US Fourth Circuit Court of Appeals in this case concluded that *jus gentium* authorises an admiralty court to declare salvage rights over a wreck, even though it is possible for another court in admiralty to legitimately question the exclusiveness of such an order. The Fourth Circuit Court of Appeals stated that the District Court for the Eastern District of Virginia has constructive *in rem* jurisdiction over the wreck of the Titanic by having a piece of it in its territory and that this constructive *in rem* jurisdiction continues for as long as the salvage operation.[163] Nevertheless, the Fourth Circuit Court of Appeals wanted to stress that when using the term 'constructive', in fact an imperfect *in rem* jurisdiction is meant which falls short of giving the court sovereignty over the wreck. Rather, the Fourth circuit Court of Appeals stated that this represents a 'shared sovereignty' with other States that enforce the same *jus gentium*. This mechanism allows for internationally recognised rights to be legally declared, but not to be finally enforced. In order to reach this final enforcement it is necessary that either the property or persons involved are brought before a District Court or any court of admiralty in another State.[164]

Obtaining the status of exclusive salvor-in-possession comes with the condition that the salvor in a later phase cannot claim ownership rights over the recovered artefacts following the law of finds.[165] US courts made this clear in two recent cases. In 2004, RMS Titanic Inc. (RMST), the exclusive-salvor-in possession of the Titanic, requested the District Court for the Eastern District of Virginia to award title to it over the recovered artefacts from the wreck site under the law of finds.[166] The preliminary ruling of the Virginia District Court denying this request was later confirmed by the Fourth Court of Appeals in 2006.[167] RMST cannot have benefited from the role of salvor-in-possession for a decade, holding the exclusive rights to the site, and subsequently convert its role into that of a finder in order to obtain ownership rights. Niemeyer, one of the Circuit judges, noted that "*a free finders-keepers policy is but a short step from active piracy and pillaging*" and that "*the law of finds is applied sparingly—only when no private or public interest would be adversely affected by its application*."[168] A similar case relating to the SS Central America was brought before the District Court for the Eastern District of Virginia in 2015. Recovery Limited Partnership (RLP), which is the company that holds the exclusive salvor-in-possession rights over the SS Central America, claimed that the artefacts recovered from this wreck site were derelict and abandoned and that therefore RLP is entitled to obtain ownership rights over them under the law

[163] The District Court in Virginia granted the salvor-in-possession status to the salvage company 'RMS Titanic Inc.' as well as the exclusive rights over any items salvaged from Titanic as long as RMS Titanic Inc. remained salvor-in-possession by an order made on 7 June 1994. *RMS Titanic, Inc. v. Wrecked & Abandoned Vessel*, 924 F. Supp. (714) 716 (E.D. Va. 10 May 1996). (*Titanic* 1996)

[164] *RMS Titanic, Inc. v. Haver,* 171 F.3d (943) 967-968 (4th Cir. 24 March 1999).

[165] For more on the law on salvage and finds see *infra* section 3.

[166] *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 323 F. Supp.2d 724 (E.D. Va. 2 July 2004). (*Titanic* 2004) The abbreviation RMS stands for Royal Merchant Ship.

[167] *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 435 F.3d 521 (4th Cir. 31 Jan. 2006). (*Titanic* 2006)

[168] *Titanic* 2006, 435 F.3d 533.

of finds. The Virginia District Court reasoned that it "*will not permit RLP to enjoy its right to exclude others from the salvage site while simultaneously moving for title to the recovered artifacts. Were this District Court to allow RLP, the current salvor-in-possession, to enjoy immediate title to the artefacts it has recovered since early 2014, then the Court would risk an "unsupervised rush to the site to recover anything that could be grabbed*. *[…] The public interest in historic shipwrecks would be diminished, if such an "unsupervised rush" to sunken treasure were to result."*[169]

#### 3.2.2.2. Maritime lien

As was already explained above, in the law of salvage, the salvor will not obtain the ownership rights over the salvaged goods.[170] A salvage operation is considered to be a service provided to the owner who remains the owner of all the salvaged goods. Nevertheless, once the salvage has been successful, the salvor is entitled to a salvage award. In order to ensure that the salvor is compensated for the service he has rendered, he gets a maritime lien against the property. A maritime lien is "*a privileged claim upon maritime property arising in respect of service done to it*".[171] This claim does not depend on possession. For example, even when the property is in the hands of a museum for its conservation, it will still be subject to the maritime lien of the salvor. Such a lien can be enforced either under an *in rem* action against the vessel or its cargo, or under an action *in personam* against the owner or hull insurer. An *in rem* action can only occur when a portion of the *res* is present within the court's territorial jurisdiction.[172] The ability of the salvor to take action against the wreck itself, thus *in rem*, is important from a heritage point of view as it might be difficult or even impossible to find the owner.[173]

#### 3.2.2.3. Salvage award

Once the three preconditions discussed above are met (marine peril, voluntary and successful),[174] the salvor will be entitled to a salvage award, the size of which is to be determined by the court. A salvage reward can be given in the form of a percentage of the value of the recovered material, or in some cases the salvaged material itself can be given to the salvor.[175] As a general rule, the

[169] *Recovery Ltd. Partnership v. Wrecked and Abandoned vessel, SS Central America*, 120 F. Supp.3d (500) 507, (ED. Va. 11 Aug. 2015) (*Central America* 2015). In stating this, the Court referred to *Titanic* 2004, 323 F.Supp.2d 734–735.
[170] See *supra* section 3.2.1.
[171] BOESTEN 2002, 98.
[172] *Treasure salvors Inc. v. The Unidentified, Wrecked and Abandoned Sailing vessel*, 408 F. Supp. 907 (S.D. Fla. Feb. 3, 1976); *Treasure Salvors I,* 569 F.2d 333.
[173] FORREST 2010, 304-305.
[174] Forrest adds that "*the salvage must have been conducted bona fide in the interest of the owners*." FORREST 2010, 300.
[175] FORREST 2010, 300.

salvage reward can never exceed the economic value of the recovered property.[176] In most cases, the salvaged material will be the subject of a judicial sale. The proceeds of this sale will be used to pay the salvage reward and the residue will be held on behalf of the owner.[177] In order to determine the size of the salvage reward a number of factors are taken into account, amongst which the so-called Blackwall criteria.[178] Whether or not the salvor was able to preserve the archaeological value of a wreck and its cargo is not included amongst these criteria. US courts have, however, in various degrees begun to take into account the extent in which salvors attempted to preserve the archaeological integrity of the wreck when determining the size of the reward or even when determining whether or not a salvage reward should be granted.[179] In both the 1982 *Cobb Coin* and the 1985 *Klein* case the preservation and protection of the archaeological character of the shipwreck and its artefacts was taken into account when determining the salvage award. In *Cobb Coin* the District Court in Florida stated "*in order to state a claim for salvage award on an ancient vessel of historical and archaeological significance, it is an essential element that the salvors document to the admiralty Court's satisfaction that it has preserved the archaeological provenance of a shipwreck*".[180] In *Klein* the Eleventh Circuit Court of Appeals refused to grant a salvage reward in part because "*The articles removed from the shipwreck site were not marked or identified so as to preserve their archeological provenience*".[181] Two other famous shipwrecks for which the historical and archaeological significance was taken into account are the SS Central America (*Columbus-America* cases)[182] and the Titanic[183], both lying in international waters. In the *Columbus-America* case of 1992 the Fourth Circuit Court of Appeals introduced a seventh criterion to add to the six so-called Blackwall factors, namely: "*the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salved*"[184] In 2015, the

[176] FORREST 2010, 308.
[177] DROMGOOLE 2013, 170.
[178] These criteria are the following: the labour that was expended by the salvors; the promptness, skill and energy of the salvors; the value of the property employed by the salvors and the danger to which it was exposed; the risk that was incurred by the salvors; the value of the property saved, and; the degree of danger from which the property was saved. *The Blackwall*, 77 US (13) 14 (U.S. Dec. 1989).
[179] FORREST 2010, 308.
[180] *Cobb Coin*, 549 F. Supp. 559.
[181] *Klein*, 758 F.2d 1515.
[182] *Columbus-America Discovery group, Inc. v. Unidentified, Wrecked and Abandoned Sailing vessels*, 742 F. Supp. 1327 (E.D. Va. 14 Aug. 1990); reversed by *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co*., 974 F.2d 450 (4th Cir. 26 Aug. 1992), on remand to *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing vessel*, 1993 WL 580900 (E.D. Va. 18 Aug. 1993); decision rescinded by *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co*., 56 F.3d 556 (4th Cir. 14 June 1995). (*Columbus-America*)
[183] Some of the key *Titanic* cases are the following: *Titanic* 1996, 924 F. Supp. 714; *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 9 F. Supp. 2d 624 (E.D. Va. 23 June 1998); *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 286 F.3d 194 (4th Cir. 12 Apr. 2002); *Titanic* 2004, 323 F. Supp.2d 724; *Titanic* 2006, 435 F.3d 521; *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel*, 742 F. Supp. 2d 784 (E.D. Va. 12 Aug. 2010) (*Titanic* 2010); *RMS Titanic, Inc. v. Wrecked and Abandoned Vessel, its Engines, Tackle, Apparel, Appurtenances, Cargo etc*., 804 F. Supp. 2d 508 (E.D. Va. 15 Aug. 2011) (*Titanic* 2011).
[184] *Columbus-America*, 974 F.2d 468.

District Court for the Eastern District of Virginia once again used this criterion in another case dealing with the SS Central America. In this case the Court referred to the seven factors, including the one cited above, that any motion for a salvage reward should address. As for the Titanic, the District Court for the Eastern District of Virginia concluded that since the Titanic is one of the most famous shipwrecks in history, "*the archaeological preservation of the wreck itself as well as the recovered artifacts is of extreme importance to this Court*."[185] From the very beginning the salvor, RMST, assured the District Court that it did not have the intention to sell the artefacts, but wished to keep them together as a collection and to exhibit them to a paying public.[186] This commitment made by RMST along with other factors, led this Court to grant the exclusive salvage rights to RMST. In 2010, the size of the reward for RMST was set at 100% of the market value of the recovered artefacts.[187] In order to determine the size of the award, the District Court for the Eastern District of Virginia took into account the Blackwall factors as well as the seventh factor introduced by the Columbus-America case. In 2011, RMST was awarded the collection *in specie.*[188] A number of conditions were, however, connected to this including that the collection would remain intact and will forever be managed in accordance with professional standards.[189]

### 3.3. The law of finds

The principles of the law of finds are derived from English case law. While the law of salvage is part of the specialist domain of admiralty law, the law of finds falls within the general property law.[190] The law of finds is based on the ancient and honourable principle of 'finders keepers'.[191] While in the law of salvage a presumption exists that there is an owner, the law of finds applies to lost or abandoned property.[192] When a property is lost, the finder to first take possession of it may acquire a right to the property that can be held against everyone, except the original owner. When the property has been abandoned, however, the finder taking possession of the property can become its true owner. In order to acquire possession over a property, there needs to be a physical occupancy or control over the find, combined with the intention of the finder to exclude all others.[193] Abandonment can be defined as "*the voluntary relinquishment of one's rights in a*

[185] *Titanic* 1996, 924 F. Supp. 722.
[186] See for example *Titanic* 1996, 924 F. Supp. 722-723.
[187] *Titanic* 2010, 742 F. Supp. 2d, 797.
[188] *Titanic* 2011, 804 F.Supp.2d 508.
[189] DROMGOOLE 2013, 193; T. DERUDDER, "Reconciling the Law of Salvage and Finds with the Protection of Underwater Cultural Heritage: a Stumbling Block for Common Law States?", *Journal for International Trade and Transport law* 2015, (420) 439-440. (DERUDDER 2015)
[190] DROMGOOLE 2013, 171.
[191] *Martha's Vineyard v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d (1059) 1065 (1st Cir. 24 Nov. 1987)
[192] When property is lost this is often involuntary while abandonment is "*by intent and design*". *Columbus-America*, 742 F. Supp. 1335.
[193] DROMGOOLE 2013, 172.

*property*".[194] It can either occur after an express act from the owners indicating that they wish to abandon their property or it can be implied by the leaving the property without the hope of recovering it or the intention to return to it.[195] Determining whether a property has been abandoned is often a question of intent[196] which can be derived from "*the property, the time, place and circumstances, the actions and conduct of the parties, the opportunity or expectancy of recovery and all other facts and circumstances.*"[197]
In order for a court to award ownership rights to the finder, the property needs to be recovered and brought within the territorial jurisdiction of the court.

As was demonstrated for the SS Central America and the Titanic,[198] it is not possible for a finder to obtain exclusive rights over his find in order to prevent others from engaging in salvage activities directed at it. This results in salvors to operate in secret in order to avoid claims from owners and interference from other potential salvors. Because of this secrecy, courts will not be able to exercise any control over the operations nor will they be able to impose conditions relating to the preservation of the historical and archaeological integrity of the wreck. Furthermore, this secrecy will result in competent heritage authorities remaining in the dark on the discovery of potentially important historical sites.[199] Unlike in the law of salvage, the finder will be awarded ownership rights over the recovered artefacts. From a heritage point of view this might have a number of negative consequences. Awarding title over artefacts to the finder can, for example, lead to these artefacts not being kept together as a collection, to them being lost for scientific research and to them not being made publicly available as is required by the current archaeological standards.[200] Because of all of the reasons cited here, the law of finds is considered to be even more detrimental to the protection of UCH than the law of salvage. Nevertheless, the law of finds is often preferred by salvors as it allows them to obtain title over their find, rather than a reward which will consist

[194] *Zych v. Unidentified, Wrecked and Abandoned Vessel Believed to be the Lady Elgin,* 755 F. Supp. (213) 214 (N.D. Ill. 4 Jan. 1991). (*Zych*)
[195] *Columbus-America*, 742 F. Supp. 1335.
[196] "*To show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. […] Abandonment may be inferred from all of the relevant facts and circumstances. […] A finding of abandonment must be supported by strong and convincing evidence, […] but it may, and often must, be determined on the basis of circumstantial evidence*." *Zych* 755 F. Supp. 214.
[197] *Columbus-America* 742 F. Supp. 1335. The issue of abandonment of State vessels will be further discussed in chapter two dealing with sunken State craft.
[198] See *supra* section 3.2.2.1.
[199] Neither in the law of salvage nor the law of finds a reward or title is awarded for the mere discovery and reporting of finds. The finds must thereto first be recovered. These mechanisms thus promote the recovery of artefacts and UCH. Trying to avoid this negative effect, a number of States provide for the possibility to grant a reward to the finder in order to encourage him to report its find. This reward can either be in the form of a financial or recreational incentive. The latter can include allowing the finder to participate in the excavation or survey of the site. FORREST 2010, 312-313.
[200] See *infra* section 4.

of only a percentage of the value of the recovered artefacts and can be difficult to determine at times.[201]

In older court cases in the US, the court often found historical wrecks to have been abandoned and thus applied the law of finds allowing the salvor to obtain title over the wreck and its artefacts.[202] Over the last couple of decades, however, an evolution took place towards treating historical wrecks as a public resource that only should be recovered in accordance with archaeological standards rather than a vessel in marine peril. This was evidenced in for example the *Klein* and *Chance* cases as discussed above.[203] As a result of these cases, the Abandoned Shipwreck Act 1987 (ASA) was adopted in the US.[204] The ASA allows the US to assert title over abandoned shipwrecks and their cargo located in the waters of the States, which generally extend to 3nm, and US territories that are *"(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register*."[205] Title over these wrecks is transferred to the State in whose waters it is located.[206] The law of finds consequently does no longer apply to these wrecks.[207] After the enactment of the ASA, the number of litigations reduced. However, since the ASA does not define the concept 'abandoned shipwreck', courts were inclined to presume that wrecks still have an owner leaving it up to the States to prove that a wreck has been in fact been abandoned. This resulted in a change of tactics amongst salvors. Instead of invoking the law of finds, they relied on the law of salvage, hoping to receive a salvage award.[208] Shipwrecks that do not fall within the scope of ASA or any other federal legislation are still unprotected from recovery and remain the subject of admiralty law. As was said, however, a number of courts have made efforts to take the historical and archaeological integrity of wrecks into account during salvage cases. Two examples here are the cases relating to the SS Central America and the Titanic as discussed above.[209]

### 3.4. The law of salvage and finds and UCH

It is clear that even under common law jurisdictions, a tendency is arising towards protecting UCH from the law of salvage and finds in their traditional form. These instruments are in first instance

[201] BOESTEN 2002, 109.
[202] See for example *Treasure Salvors I*, 569 F.2d 336 and *Cobb Coin* 549 F. Supp. 561.
[203] *Klein*, 758 F. 2d 1511; *Chance*, 606 F. Supp. 801. See *supra* section 3.2.1.
[204] VARMER 2006, 355.
[205] Abandoned Shipwreck Act 1987, 43 U.S.C. §§ 2101 *et seq.*, section. § 2105(a). (ASA 1987)
[206] Section 2105 (a) and (c) ASA 1987.
[207] Section 2106(a) ASA 1987.
[208] VARMER 2006, 357.
[209] DROMGOOLE 2013, 189. See *supra* section 3.2.2.3.

aimed at gaining personal profit and do not as such take into account the archaeological and historical integrity of a wreck. A number of reasons why the law of salvage and finds are unsuitable for dealing with UCH were already touched upon *supra* in this chapter. A number of them, however, require some further explanation and are elaborated more in detail.

A first reason is inherent to the law of salvage and finds themselves. The fact that the size of the salvage reward is based on the commercial value of the recovered artefacts encourages salvors to only recover the economically valuable parts of the wreck and cargo. The parts of the site that have little economic value but are of great importance for archaeologists and historians, such as the hull and fixtures, are often destroyed or damaged in the process. Furthermore, while archaeological research and excavations are usually part of a slow process allowing for the recording of the context in which the artefacts were discovered, salvage operations are undertaken in a manner that is as quick and cheap as possible.
In order for the salvage reward to be paid, the recovered artefacts will often be the subject of a judicial sale, which can lead to the irreversible dispersal of the shipwreck and its artefacts. This practice runs contrary to the generally established archaeological principle that artefacts should be kept together as a collection.[210] As was explained, the application of the law of finds to abandoned or lost UCH is even more detrimental for its protection as the finder becomes the owner of the salvaged material. This can encourage treasure hunters to search for abandoned historical wrecks.[211]

A well-established archaeological principle is that artefacts should be left *in situ* as much as possible as part of a precautionary approach.[212] Under this precautionary approach, a site should not be excavated unless it is under a threat of being destroyed by human activities or the natural environment. A natural threat should not be presumed, as is generally the case in the law of salvage, but scientific proof should be available demonstrating that the condition of the site is deteriorating and that it will soon be lost forever. One of the reasons underlying this preference of *in situ* preservation is that future archaeologists are likely to have a better understanding and more advanced equipment and techniques to conduct research on the heritage. This way they can uncover facts that are not yet visible for archaeologists today. Therefore, it is crucial that a sufficiently large number of sites consisting of different types of UCH from different eras are preserved *in situ* allowing for future archaeologists to research them in their original context.[213] An *in situ* preserved UCH site offers a lot of valuable contextual information that can help

[210] DROMGOOLE 2013, 175. See *infra* section 4.2.4.
[211] DROMGOOLE 2013, 175.
[212] This preservation *in situ* as a first option is one of the general principles on which the UNESCO Convention is based. See *infra* section 4.2.3.
[213] O. VARMER, "The Case Against the "Salvage" of the Cultural Heritage", *JMLC* 1999, (279) 287-289. (VARMER 1999)

archaeologists to better understand our history and culture. This type of information is of vital importance from a historical point of view, but is of little interest to commercial users of a site.

Linked to the previous reason, it must also be pointed out that UCH sites have a unique feature that is much less likely to be found on land. UCH sites are often some sort of time-capsules representing one single period of time that have remained unaffected from human interference during many years. This provides UCH sites with a uniqueness that can only rarely be seen in heritage sites on land, which have been 'contaminated' by all types of human activities and interventions over time. By not allowing excavation, multiple research projects can be conducted on the site while still allowing it to be available for other types of use such as for education, tourism and recreation.[214] There are numerous user groups that have an interest in protecting and managing UCH sites.[215] These groups include divers, fishermen, educators, museums, the owners of the wreck, tourist companies, commercial salvors as well as their investors, and family or descendants of those who perished when the vessel sank and whose remains still lie within this wreck. For most of these groups *in situ* preservation of the UCH is beneficial.[216] Furthermore, in order to allow for public access to the UCH, recovery is not per se necessary. Numerous alternative methods can ensure outreach to the public, including education, publications, television, the internet, museums…[217]

While efforts are made by courts in common law States to protect UCH, it is clear that there are a large number of protective aspects related to the preservation of UCH that are difficult to fulfil by salvors. They would need to invoke the help of experts in the field of archaeology in order to fully comply with current archaeological standards and to preserve UCH sites in their uniqueness. This would leave very little of the original concept of the law of salvage and finds.

## 3.5. The law of salvage and finds in international conventions

### 3.5.1. The 1989 International Convention on Salvage

At the beginning of the 20th century, the Comité Maritime International (CMI) attempted to draft a set of uniform rules regulating salvage operations.[218] The result was the 1910 Brussels

[214] VARMER 1999, 288-289.
[215] It is possible for these user groups to cooperate. A number of States, including the UK, France, South Africa and the US require amateur archaeologists and treasure salvors to cooperate with professional archaeologists when recovering a historic wreck. FORREST 2010, 319.
[216] VARMER 1999, 291.
[217] VARMER 1999, 292.
[218] This is a non-governmental non-profit organisation that has the objective to contribute to the unification of maritime law. This is determined in the first article of the constitution of the Comité. Comité Maritime International,

Convention[219] which was later replaced by the 1989 Salvage Convention adopted by the International Maritime Organisation (IMO). This Convention codifies the fundamental principles of the law of salvage.[220] Both the UK and the US, as well as all other States bordering the North Sea are party to this Convention.[221]

The Salvage Convention defines salvage operations as "*any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever*."[222] The notion 'danger' is nowhere defined under this Convention. It seems that as a matter of principle the Salvage Convention can be applied to sunken vessels, including vessels that are of historical or archaeological importance, but that it is up to the national courts to define the notion 'danger' in a restrictive sense excluding all sunken property that has been on the bottom of the sea for a longer time.[223]

During the negotiations on the Salvage Convention, France proposed to explicitly exclude material of cultural interest from its scope. Although this proposal was rejected, a reservation was inserted in the Salvage Convention with respect to 'maritime cultural property'. Article 30§1(d) of this Convention allows States to reserve the right not to apply the provisions of the Salvage Convention "*when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the seabed*".[224] When a State makes a reservation under article 30§1(d), this does not automatically mean that that State has excluded UCH from the scope of the law of salvage, but it does give that State the right to do so.[225] Reservations with regard to article 30(1)(d) have been made by *inter alia* France, Germany, The Netherlands and the UK. Belgium has not made a declaration in this regard. Of the 69 States that ratified the Convention, 24 have made such a declaration. [226]

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*Constitution 2017*, available at http://comitemaritime.org/Constitution/0,2756,15632,00.html (consulted 3 August 2018).

[219] Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea of 23 September 1910, *The Consolidated Treaty Series*, Vol. 212, 198.

[220] DROMGOOLE 2013, 177.

[221] International Maritime Organization, *Status of Conventions*, www.imo.org/en/About/Conventions/StatusOfConventions/Pages/Default.aspx (consulted 3 august 2018). (IMO, Status of Conventions)

[222] Article 1(a) Salvage Convention. The Convention applies whenever a judicial or arbitral proceeding relating to the matters set out in the Convention is brought in a State Party (Article 2 Salvage Convention). The Convention does not apply "*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 unless that State decides otherwise*." Article 4 Salvage Convention

[223] DROMGOOLE 2013, 178.

[224] Article 30§1(d) Salvage Convention.

[225] DROMGOOLE 2013, 179.

[226] IMO, Status of Conventions.

O'Keefe pointed out that since the possibility to declare a reservation with regard to cultural property is included in the Salvage Convention, this demonstrates that article 303(3) UNCLOS does not prevent States from excluding UCH from the application of the salvage law regime.[227] Dromgoole as well indicated that the effect of article 303(3) UNCLOS is not as far-reaching as was anticipated by some. Article 303(3) UNCLOS merely provides that article 303(1-2) UNCLOS and article 149 UNCLOS do not in themselves interfere with the law of salvage. In other words, based on these provisions it cannot be presumed that salvage law cannot be applied to objects of an archaeological and/or historical nature. It is up to the national legal systems to decide on this issue.[228]

In response to the UNESCO initiative that resulted in the adoption of the UNESCO Convention,[229] Mr. Geoffrey Brice, an expert in salvage law at the English bar, drafted a proposal (Brice Proposal) for a protocol to the Salvage Convention. [230] The objective of this protocol was to offer a degree of protection to items of cultural importance while still respecting the 'well established law of salvage'.[231] This proposal aimed to codify the modifications to the law of salvage that were already adopted by a number of US federal courts.[232] Article 13 Salvage Convention holds the criteria that are applied for determining the salvage reward. Brice wished to add specific criteria to this provision in case the subject of the salvage operation was a historical wreck. He provided that account should be taken of the extent in which the salvor has avoided damaging the UCH and has complied with the "*reasonable requirements of the appropriate scientific, archaeological and historical bodies and organizations*" and the "*reasonable and lawful requirements of the governmental authorities having a clear and valid interest […] in the salvage operations and in the protection of the historic wreck or any part thereof*".[233] Furthermore, in case of misconduct, which includes failure to comply with the requirements mentioned above or damaging the UCH, a salvor may be deprived in whole or in part of his salvage award.[234] The International Working Group of the CMI supported the adoption of this protocol in 2001,[235] after which the initiative seemed to be forgotten. Recently, however, it once again became the focus of attention. The question was

[227] P. O'KEEFE, *Shipwrecked Heritage: a Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester, Institute of Art and Law, 2002, 19. (O'KEEFE 2002)
[228] DROMGOOLE 2013, 176-177.
[229] See *infra* section 4.1.
[230] For the text of the draft protocol based on the Brice proposal see Comite Maritime International*, "Draft protocol to the Salvage Convention 1989", CMI yearbook* 2000, 412-414. (CMI yearbook 2000)
[231] CMI yearbook 2000, 412.
[232] DROMGOOLE 2013, 207. For more on this see G. BRICE, "Salvage and the Underwater Cultural Heritage", *Mar. Policy* 1996, 337-342. For more on the US approach of reconciling the law of salvage with the protection of UCH see DERUDDER 2015.
[233] Article 4 Brice Proposal, CMI yearbook 2000, 412.
[234] Article 5 Brice proposal, CMI yearbook 2000, 412-413.
[235] E. JAPISKE, "First Report on UNESCO Draft Convention on the Protection of Underwater Cultural Heritage", *CMI Yearbook* 2001, (254) 255.

asked to the delegates to the CMI Conference whether specific provisions dealing with UCH should be included in the Salvage Convention. One solution that was put forward in this regard was the adoption of the Brice protocol.[236] In 2013 the adoption of the Brice protocol was, however, unanimously rejected during the meeting of the CMI. The French and African delegations felt that the protection of UCH could not be considered as salvage and that they would therefore not support the Brice proposal. The Brazilian, Croatian and Canadian delegations provided that a historical wreck is no longer a vessel and therefore any services rendered with regard to such wreck cannot be considered as salvage. Therefore, they felt that there is no need to include this issue in the Salvage Convention.[237]

### 3.5.2. The law of salvage in UNCLOS and the UNESCO Convention

In the 1970's and the 1980's, when UNCLOS was being negotiated, there was only a very limited understanding of UCH and what constitutes good archaeological conduct in order to protect it. Therefore, the drafters of UNCLOS saw little reason to interfere with the well–established principles of the law of salvage and other rules of admiralty. This resulted in article 303(3) to be included under this Convention. In light of current evolutions and knowledge, this provision is very unfortunate as the law of salvage and finds are considered to be unsuitable for dealing with UCH. Nevertheless, for many States that have not yet ratified the UNESCO Convention, articles 149 and 303 UNCLOS remain the only international provisions dealing with the issue of UCH. It should be noted, however, that as Dromgoole stated, article 303 UNCLOS does not prevent States from excluding UCH from the law of salvage and finds if they wish to do so.[238]

In the UNESCO Convention, it is provided that as a general rule any activities relating to UCH shall not be subjected to the law of salvage and finds. This provision is the first to internationally consolidate the vision that the law of salvage and finds are not suitable instruments for dealing with the protection of UCH. Nevertheless, the UNESCO does allow for the application of these admiralty law instruments when three conditions are fulfilled: when this "*is authorized by the competent authorities, […] and is in full conformity with this Convention, […] and ensures that any recovery of the underwater cultural heritage achieves its maximum protection*."[239] As will be demonstrated below when assessing the UNESCO Convention, these conditions are formulated in

[236] S. HETHERINGTON, "Report of the International Working Group on Review of the Salvage Convention for Consideration by Delegates to the CMI Conference: Beijing 2012", *CMI Yearbook* 2012, 157-164.
[237] S. HETHERINGTON and D. CHAMI, "Report on discussion and decisions related to the 1989 Salvage Convention", *CMI Yearbook* 2013, (230) 252.
[238] DROMGOOLE 2013, 176-177.
[239] Article 4 UNESCO Convention.

such a way that they do not preserve much of the original concept of the law of salvage and finds.[240]

### 3.6. Conclusion

For many years, the law of salvage and finds have been well-established means of dealing with vessels in marine peril. Especially in the US these concepts have been further developed in numerous court cases. By giving a broad definition to the concept 'marine peril', courts have applied these admiralty law instruments to shipwrecks that have been submerged for many years. This way they allowed salvors to recover historical and archaeological artefacts for their personal gain. UNCLOS clearly reflects this practice by allowing the law of salvage and finds to be applied to UCH. With the upcoming of maritime archaeology and the general awareness of the importance of historical and archaeological shipwrecks rising over the last couple of decades, however, the realisation came that these instruments are not suitable for dealing with this type of shipwrecks. Attempts can be seen in US case law to take the archaeological and historical integrity of a wreck into account when awarding a salvor exclusive rights over a wreck or when deciding on the amount of a salvage award. While in the Salvage Convention States were only given the option to exclude UCH from the application of the law of salvage and finds, the UNESCO Convention prohibits the application of these instruments in their traditional form to UCH. Important common law States such as the UK and the US have not yet ratified the UNESCO Convention. However, considering recent case law, reports and practice, it becomes clear that even these States that have a long history of applying salvage law believe that caution should be exercised when applying the law of salvage and finds to UCH.[241]

## 4. The UNESCO Convention on the Protection of Underwater Cultural Heritage

The UNESCO Convention is the first international instrument to deal exclusively with the protection and management of UCH. It was adopted within UNESCO, which is responsible for the coordination of international cooperation in education, science, culture and communication.[242] A number of conventions dealing with cultural heritage were already adopted under UNESCO.[243] The UNESCO

[240] See *infra* section 4.10.
[241] For information on the question whether the issue of the law of salvage would stop common law States such as the US and the UK from ratifying the UNESCO Convention see DERUDDER 2015.
[242] UNESCO, *Introducing UNESCO*, http://en.unesco.org/about-us/introducing-unesco (consulted 1 September 2017).
[243] These include the UNESCO the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, *UNTS* vol. 249, 240; the UNESCO Paris Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 14 November 1970, *UNTS* vol. 823, 231 (UNESCO Convention 1970); the UNESCO Paris Convention concerning the Protection of the World Cultural and Natural Heritage of 16 November 1972 (UNESCO World Heritage Convention 1972), *UNTS* vol. 1037, 151 and the

Convention was intended to enable States to better protect their UCH. It was adopted on 2 November 2001 in the 31th session by the UNESCO General Conference. 87 States voted in favor, 4 against and 15 abstained.[244] As a final step in the negotiating process that lasted nearly 10 years, the Director-General of UNESCO and the President of the General Conference signed the Convention on 6 November 2001.

### 4.1. Negotiating history of the UNESCO Convention

In 1993 the question was asked to the Director-General of UNESCO to consider whether it would be feasible to create an international instrument dealing with UCH. At that time, the creation of such an international instrument was considered to be an urgent matter. The reason for this urgency was on the one hand the technological progress that was being made in the recovery of shipwrecks situated in deep international waters and on the other hand the inadequacy of the existing legal regime to prevent the looting of UCH and ensure its protection and conservation. Since 1988 and parallel to this UNESCO initiative, the International Law Association[245] (ILA) had been preparing a draft convention on the issue of UCH which was adopted in Buenos Aires in 1994.[246] UNESCO took this ILA draft into consideration when conducting the requested feasibility study, which took place in 1995.[247] In this study several of the important aspects and issues relating to a convention protecting UCH were addressed such as the form, the object, the urgency, issues of jurisdiction, the place of the law of salvage and the appropriate standards for the excavation of UCH. Following this feasibility study, the decision was made to convene a group of experts to debate the main issues addressed in the study and to report on this to the following General Conference. [248] The group met in May 1996 and reached unanimity on the necessity of a new

UNESCO Paris Convention for the Safeguarding of the Intangible Cultural Heritage of 17 October 2003, *UNTS* vol. 2368, 1 (UNESCO Intangible Heritage Convention 2003).

[244] The Russian Federation, Norway, Venezuela and Turkey voted against the UNESCO Convention. R. GARABELLO, "The negotiating History of the Convention on the Protection of the Underwater Cultural Heritage" in R. GARABELLO and T. SCOVAZZI, *The Protection of the Underwater Cultural Heritage*, Leiden, Brill Academic Publishers, 2003, (89) 89. (GARABELLO 2003) Brazil, Colombia, Czech Republic, France, Germany, Greece, Iceland, Israel, the Netherlands, Paraguay, Sweden, Switzerland, UK, Uruguay and Guinea Bissau abstained from voting. GARABELLO 2003, 89.

[245] The International Law Association is a non-governmental organisation and has as its objectives "*the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law*". International Law Association, *About us,* http://www.ila-hq.org/index.php/about-us/aboutus2 (consulted 19 April 2017).

[246] This is Resolution 8 on Cultural Heritage Law adopted by the International Law Association at its sixty-sixth Conference in Buenos Aires in 1994. (ILA Draft)

[247] *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, Paris, 23 March 1995, UNESCO Doc. 146 EX/27.

[248] This group of experts consisted of persons nominated by UNESCO, the International Maritime Organisation and the United Nations Division of Oceans Affairs and Law of the Sea as well as observers sent by a number of States. GARABELLO 2003, 90-91.

international instrument.[249] The UNESCO Director-General subsequently recommended that a draft convention should be prepared and to this purpose convened a meeting of governmental experts and representatives of all competent international organisations. Over the next five years four meetings were organised by UNESCO: in June 1998, April 1999, July 2000 and a double session in March/April and July 2001.[250] During the final meeting in March/April 2001 the attention was focussed on a single negotiation text produced by the chairman. At that time three issues still remained on which agreement needed to be reached: coastal State jurisdiction in the EEZ and on the continental shelf, the application of the law of salvage and the status of sunken warships. Despite the extension of the meeting in July 2001 and the efforts that were made to accommodate the concerns of flag States, no compromises could be found for the wording of the provisions relating to coastal State jurisdiction in the EEZ and on the continental shelf and sunken warships. Because of these issues no consensus could be reached and the Chairman's Single Negotiating Text, with a number of amendments, was put to a vote.[251] The States Parties approved the draft on 8 July 2001 by vote. The US,[252] the Russian Federation and Norway considered the Convention to be "*a radical and unjustified departure from the delicate balance established by the United Nations Convention on the Law of the Sea*".[253] Amongst the States that abstained from voting the opinions on the Convention were divided. While Greece considered the jurisdictional regime for UCH to be insufficient to ensure effective protection and wanted coastal State jurisdiction to be strengthened, most other States that abstained from voting believed the Convention to be too revolutionary and incompatible with UNCLOS.

The approved draft was forwarded to the 31st General Conference where it was, after many States made declarations, first approved in Commission IV on Culture before being adopted in the plenary on 2 November. This Convention was the fourth international instrument adopted by UNESCO to deal with cultural heritage and the first that specifically dealt with UCH.[254] This UNESCO Convention finally entered into force on 2 January 2009 after the required 20 States had ratified it.

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[249] *Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, Paris, 22-24 May 1996, UNESCO Doc. CLT-96/CONF.605/6. (Report UNESCO CLT-96/CONF.605/6) Other issues proved to be more contentious.

[250] It is interesting to note that participation of States went up during the negotiations. Where only 56 were represented in the first meeting, this number rose to close to 90 in the fourth session. GARABELLO 2003, 91.

[251] DROMGOOLE, 2013, 55 and O'KEEFE 2002, 30.

[252] The US attended the negotiations as an observer without voting rights as it was not a member of UNESCO at that time. GARABELLO 2003, 92.

[253] GARABELLO 2003, 92. See statements on Vote during Commission IV on Culture, 29 October 2001, 31st Session of the General Conference, UNESCO made by Norway and Russia. Reproduced in R. GARABELLO and T. SCOVAZZI, *The protection of the underwater cultural heritage: before and after the 2001 UnNESCO Convention*, Leiden, BRILL Academic Publishers, 2003, 248-249. Turkey and Venezuela voted against the Convention because of its dispute settlement regime which is similar to that under UNCLOS, to which they are not a party.

[254] GARABELLO 2003, 89-92.

## 4.2. General principles for the protection of underwater cultural heritage

The Convention sets out the legal regime for the protection of UCH in 35 articles and an Annex. This Annex contains the 'Rules concerning activities directed at underwater cultural heritage' which reflect the internationally accepted archaeological standards that must be complied with when conducting activities directed at UCH. Negotiating these Rules was no sinecure. The main issue was whether they had to be an integral part of the Convention or be annexed to it. In the end the latter option was chosen.

Originally, the idea was to annex the International Council on Monuments and Sites' (ICOMOS) Charter on the Protection and Management of UCH to the UNESCO Draft Convention. [255] States, however, raised objections against attaching this non-binding Charter to the UNESCO Convention, since it would then become binding. As an alternative 'the Rules' as we now know them were created to be annexed to the Convention. These are nevertheless based on the original ICOMOS charter.[256] A total of 36 Rules have been annexed to the UNESCO Convention, which deal with all aspects relating to conducting activities directed at UCH, such as project design, project objective, methodology and techniques, funding, project duration, the competences and qualifications of those executing a project, conservation and site management, documentation, reporting, the curation of project archives and dissemination. These Rules are binding for all States Parties to the Convention and must be complied with when conducting activities directed at UCH.

### 4.2.1. Cooperation for the protection of underwater cultural heritage

One of the key principles of the UNESCO Convention is that States Parties must cooperate to protect UCH. This duty to cooperate was already incorporated in article 303(1) UNCLOS. However, as was explained, a lot of uncertainty exists regarding the content of this provision and its geographical application. In the UNESCO Convention, the duty to cooperate has been elaborated in far more detail and provisions facilitating such cooperation are included for each maritime zone. Article 2 of the UNESCO Convention formulates this duty to cooperate in a general way and provides that "*States Parties shall cooperate in the protection of underwater cultural heritage.*"[257] This duty to cooperate should be interpreted in the widest sense possible and applies throughout

[255] ICOMOS is a "*global non-government organisation (…) which is dedicated to promoting the application of theory, methodology, and scientific techniques to the conservation of the architectural and archaeological heritage*". ICOMOS, *Introducing ICOMOS*, www.icomos.org/index.php/en/about-icomos/mission-and-vision/mission-and-vision (consulted 23 November 2017). ICOMOS, Charter for the Protection and Management of the Archaeological Heritage, approved by the 9th General Assembly in Lausanne in 1990 available at www.icomos.org/en/practical-information/179-articles-en-francais/ressources/charters-and-standards/160-charter-for-the-protection-and-management-of-the-archaeological-heritage. (ICOMOS Charter)

[256] BOESTEN 2002, 132-133.

[257] Article 2(2) UNESCO Convention.

all provisions of the UNESCO Convention. Asides from this general provision, the UNESCO Convention includes other provisions that direct the attention to more specific areas in which cooperation is required or that even establish full-fledged cooperation mechanisms.

Article 7(3) UNESCO Convention provides that States Parties should inform the flag State Party and other States with a verifiable link of the discovery of a State vessel or aircraft in their internal waters or territorial sea with a view to cooperating on the best methods of protecting this discovery.[258] Considering that this provision uses the words 'should inform'… with a view to cooperating,[259] it does not seem that this duty is binding for States Parties. Nevertheless, consideration must be given to the overall principles of the Convention as described in article 2. Following the general duty to cooperate throughout the entire UNESCO Convention formulated in this provision, it seems highly unlikely that States Parties could justify not cooperating with the flag State of a State vessel discovered in their internal waters or territorial sea.[260]

The best example that can be given of a full cooperation mechanism established by the UNESCO Convention is that for the EEZ, continental shelf and in the Area. Within these maritime zones, coastal States only have limited jurisdiction. Because of this, cooperation in the protection of UCH is crucial. For UCH located in their EEZ or on their continental shelf, the coastal State can act as 'Coordinating State' in consulting all other States Parties that have declared an interest in the UCH on how to protect it.[261] The Coordinating State will be responsible for implementing all measures agreed on during the consultations.[262] A similar cooperation mechanism has been created for UCH in the Area where the Coordinating State will be appointed by the States Parties which have declared an interest in the UCH.[263]

The UNESCO Convention stresses the duty to cooperate and assist each other in protecting and managing UCH. Where practicable, States Parties must to cooperate in investigating, excavating, documenting, conserving, studying and presenting such heritage.[264] States should as well share

[258] Article 7(3) UNESCO Convention.
[259] The consequences of the wording 'should inform' will be discussed more in detail in the section on State vessels and aircraft, see *infra* section 4.4.1.2.
[260] RISVAS 2013, (575).
[261] Article 9(5) and 10(3) UNESCO Convention. This system of cooperation will be further elaborated in the section dealing with the legal regime for UCH protection in the EEZ and on the continental shelf, see *infra* section 4.5.3.
[262] Article 9(5) UNESCO Convention.
[263] Article 11(4) and 12(2) UNESCO Convention. This system of cooperation will be further elaborated in the section dealing with the legal regime for UCH protection in the Area, see *infra* section 4.5.4.
[264] States are recommended to prepare inventories of their UCH. They should take into account the desirability of using common standards for all national inventories of States Parties so that these are easily interchangeable and can facilitate research. States Parties should encourage all their national authorities, especially "*the coast guard, the navy, dredging services, research services and fishery monitoring services*" to cooperate and to send all the acquired information to the national competent authorities as meant in article 22 UNESCO Convention. Operational

information with other States Parties concerning UCH.[265] Provision is made for States to cooperate in the training in underwater archaeology, techniques for conserving UCH and in transferring technology relating to UCH.[266] Finally, the principle of international cooperation is repeated in Rule 8 of the Annex. According to the Manual for activities directed at UCH Rule 8 mainly targets the exchange of archaeologists and other relevant professionals, as it is believed that cooperation is beneficial especially in research and the sharing of expertise.[267]

Several organisations, meetings and programs offer the possibility to improve international cooperation, for example the Meetings of States Parties and The Scientific and Technical Advisory Body established by the UNESCO Convention,[268] the UNESCO regional meetings and training programs, ICOMOS and other, regional or national, organisations concerned with UCH and that help with setting the standards.[269]

States are encouraged to enter into bilateral or multilateral agreements to further the protection, preservation and management of UCH. Such agreements should be in conformity with the provisions of the UNESCO Convention. The parties to such agreements may invite States with a verifiable link to the UCH at stake to join in this agreement. The UNESCO Convention will not alter the rights and obligations originating from agreements relating to UCH that were concluded prior to its adoption.[270]

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Guidelines for the Convention on the Protection of the Underwater Cultural Heritage, adopted by Resolution 6/ MSP 4 and Resolution 8/ MSP 5, August 2015, CLT/HER/CHP/OG 1/REV, 10. (UNESCO Operational Guidelines) A Model Sheet for Inventories of Underwater Cultural Heritage was adopted at the fourth session of the Meeting of States Parties to encourage States Parties to develop their own registers. UNESCO, *Importance of Inventory on the Underwater Cultural Heritage*, http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/inventory/, (consulted 31 May 2017).

[265] Article 19 UNESCO Convention. States should for example encourage researchers to publish their results in accordance with Rule 36 of the Annex to the UNESCO Convention and should share information on heritage that was recovered contrary to the UNESCO Convention, which could be very helpful for States to comply with their duties in articles 14-18 UNESCO Convention. O'KEEFE 2002, 123.

[266] Article 21 UNESCO Convention.

[267] T.J. MAARLEVELD, U. GUERIN and B. EGGER, *Manual for Activities directed at Underwater Cultural Heritage*, Paris, UNESCO, 2013, 57. (MAARLEVELD, GUERIN and EGGER 2013)

[268] These organs will be discussed more in detail below. See *infra* section 4.11.

[269] MAARLEVELD, GUERIN and EGGER 2013, 57.

[270] Article 6 UNESCO Convention. In the past a number of agreements have been concluded that regulate the management and preservation of UCH. For example the *Exchange of Letters Constituting an Agreement Concerning the Regulation of the Terms of Settlement of the Salvaging of the Wreck of HMS Birkenhead*, Pretoria, 22 September 1989, 1584 *UNTS* 321 (Exchange of Letters HMS Birkenhead 1989); Memorandum of Understanding between the governments of Great Britain and Canada pertaining to the shipwrecks HMS Erebus and HMS Terror, August 1997, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/458500/MOU_FOI_0286-15.pdf (Memorandum HMS Erebus and HMS Terror 1997); Exchange of Notes between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Italy Regarding the Salvage of HMS Spartan, Rome, November 1952, 158 *UNTS* 431 (Exchange of Notes HMS Spartan 1952); Agreement Between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of

### 4.2.2. Preservation of underwater cultural heritage for the benefit of humanity

The UNESCO Convention provides that UCH has to be preserved for the benefit of humanity. The principle of preserving UCH for the benefit of humanity or mankind is not new. This was already incorporated in article 149 UNCLOS. Following the UNESCO Convention, however, this general principle applies to UCH located in all maritime zones, rather than in the Area alone. This principle entails that UCH should be protected in the interest of society and not merely serve the benefit of the discoverer or owner. This principle has some far reaching consequences as it implies that the law of salvage and finds are not appropriate for dealing with shipwrecks that fall in the UNESCO Convention.[271] Private interests in UCH are not necessarily curtailed but are considered to be subsidiary to the significance of the heritage. The UNESCO Convention itself, however, does not deal with private property. This is regulated at the national level.[272]

The preservation for the benefit of humanity is a rather abstract concept which taken by itself can cause some discussion as to its practical implementation. The UNESCO Convention does not explicitly define what is meant by 'the preservation for the benefit of humanity', but this principle in embodied in a number of the Convention's other key principles and objectives. In its general principles, the Convention provides that UCH "*shall be deposited, conserved and managed in a manner that ensures its long-term preservation*."[273] This reflects the idea that UCH should not merely serve for the benefit of this generation, but for generations to come as well. In other words, knowledge on UCH should be recorded for future generations to discover and the UCH itself should be preserved in such a way that it can be researched, accessed and enjoyed by future generations. The principle of international cooperation as explained above is also closely linked to the idea of preserving UCH for the benefit of humanity.[274] This principle stresses the importance of involving all States that have an interest in the UCH when deciding on its fate as well as the need to share information between States. The UNESCO Convention promotes public access to UCH.[275] This can

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the La Belle, March 2003, 2238 *UNTS* 413 (Agreement La Belle 2003); *Agreement between Canada, France, the United Kingdom, and the United States concerning the Shipwrecked Vessel RMS Titanic*, London, 6 November 2003, available at http://www.gc.noaa.gov/documents/titanic-agreement.pdf (*Titanic* Agreement 2003); *Agreement Between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden Regarding the M/S Estonia*, Tallinn 23 February 1995 and Stockholm 23 April 1996, available at http://treaties.fco.gov.uk/docs/pdf/1999/TS0074.pdf and; *Draft Agreement on the Protection of the Underwater Cultural Heritage in the Mediterranean Sea*, 2003, Reproduced in M. AZNAR-GOMEZ, *La protección internacional del patrimonio cultural subacuático,* Valencia, Tirant 2004, 537-549. (Draft Agreement Mediterranean 2003)

[271] The way in which the law of salvage and finds have been incorporated within the UNESCO Convention will be discussed below. See *infra* section 4.10.

[272] MAARLEVELD, GUERIN and EGGER 2013, 49.

[273] Article 2(6) UNESCO Convention.

[274] For the principle of international cooperation see *supra* section 4.2.

[275] Rule 7 Annex UNESCO Convention.

take many forms. A first manner in which public access can be ensured is of course by allowing divers to visit *in situ* preserved sites. The UNESCO Convention in this regard encourages "*responsible non-intrusive access to observe or document in situ underwater cultural heritage*"[276] with the purpose of protecting the heritage and to create public awareness and appreciation.[277] Allowing diving operations to take place on UCH sites, especially fragile and vulnerable sites, requires the weighing of a number of interests against one another. On the one hand account needs to be taken of the freedom of divers to visit sites and, of course, the economic benefits that this type of tourism brings for coastal regions[278] while on the other hand the protection of the UCH site itself needs to be considered. The UNESCO Convention recognises the risks of allowing diving on UCH and therefore provides that access is allowed except when this is incompatible with the protection and management of the site.[279]

A large number of alternatives for direct access to *in situ* preserved sites have been developed. This is necessary not only because certain sites are too fragile to visit, but especially because the vast majority of people do not know how to dive. These alternatives include *inter alia* the use of webcams, 3-dimensional reproductions of UCH sites, information panels alongside the coastline, videos and Remotely Operated Vehicles.[280] All these techniques can contribute to the spreading of information and knowledge on UCH amongst the public at large. For UCH that has been recovered, and is thus no longer preserved *in situ*, the easiest way of allowing public access is of course by displaying the heritage in a museum or exhibition. It should be noted, however, as will be explained below, that the UNESCO Convention considers *in situ* preservation of UCH as the first option for its preservation.[281]

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[276] Article 2(10) UNESCO Convention.

[277] Article 20 UNESCO Convention deals with raising public awareness and provides that "*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.*" Making people aware of the value and significance of UCH is crucial to guarantee that they will comply with the provisions of the UNESCO Convention and of national legislation for the protection of UCH.

[278] The last annual report of the World Travel and Tourism Council demonstrated that the contribution of travel and tourism to the world GDP in 2016 reached a total of 10.2% (USD7.6 trillion). This sector supports 292 million people in employment. World Travel & Tourism Council, Travel & Tourism, *Economic Impact 2017 World*, www.wttc.org/-/media/files/reports/economic-impact-research/regions-2017/world2017.pdf. UNESCO researched how public access to UCH, while still respecting its protection and preservation, can be a positive factor for development. The study concluded that it is possible to develop sustainable tourism, which generates an important and lasting financial income for local communities. UNESCO Secretariat and the Scientific and Technical Advisory Body, *The Benefit of the Protection of Underwater Cultural Heritage for Sustainable Growth, Tourism and Urban Development,* www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO_UCH_Development_Study.pdf.

[279] Article 2(10) UNESCO Convention and Rule 7 Annex UNESCO Convention. The restriction of access should remain an exception and not become the rule. Accessing a site, in a non-intrusive manner, will hardly ever be incompatible with its protection. It is, however, necessary to provide for supervision and control, which admittedly is quite a challenge for States Parties. MAARLEVELD, GUERIN and EGGER 2013, 55

[280] MAARLEVELD, GUERIN and EGGER 2013, 54.

[281] See *infra* section 4.2.3.

All of these principles contribute to the more abstract idea of preserving heritage for the benefit of humanity, as they strive to preserve UCH for the long-term and to disseminate knowledge on this heritage among people worldwide allowing them, as well as future generations, to enjoy this heritage.

### 4.2.3. *In situ* preservation as the first option

The UNESCO Convention requires that *in situ* preservation is considered as the first option for preservation before allowing or engaging in activities directed at UCH.[282] Two reasons can be cited for this. Firstly, by taking an object out of its context, a lot of information about the heritage is lost. Upon discovery, UCH sites are often some sort of 'time-capsules' that contain artefacts from one specific period in time without having been contaminated in later years. Additionally, because of the marine environment, which is low in oxygen, these 'time-capsules' are often very well preserved, be it fragile.[283] Article 1(1) of the UNESCO Convention recognises that the 'archaeological and natural context' of an object is as valuable as the object itself and forms an integral part of the UCH site. In order to preserve an entire site in the state in which it was discovered, *in situ* preservation is mostly recommended. A second reason for preferring *in situ* preservation relates to the fact that UCH is finite. It must, therefore, be considered whether it is more interesting to research a site in the present or to preserve it for future investigations. It can be expected that in the (near) future technological progress will take place, including better and more innovative techniques for archeological research. Excavating all UCH sites can result in the loss of valuable information that cannot yet be obtained at the moment but that could provide valuable insights in the future. Ideally, at least one site of every type should be preserved *in situ* for future investigations. States Parties in this regard would thus do well to apply a precautionary approach.[284]

It is important to note that considering *in situ* preservation as the first option is not the same as preferring *in situ* preservation or considering it to be the only option.[285] In certain cases excavation will be warranted and even necessary. The wording of article 2(5) UNESCO Convention reveals that this Convention takes a precautionary approach requiring that when a site is discovered an assessment is made to determine the best course of action. Any immediate assumption in favor of

[282] Article 2(5) UNESCO Convention.
[283] FORREST 2010, 340.
[284] MAARLEVELD, GUERIN and EGGER 2013, 23.
[285] During the negotiations on the UNESCO Convention, the US sought to introduce an amendment ensuring that *in situ* preservation would be considered as the first option rather than being the presumed choice. DROMGOOLE 2013 referring to W. DORSEY, Historic Salvors, Marine Archaeologists, and the UNESCO Draft Convention on the Underwater Cultural Heritage, paper delivered at Houston Marine Insurance Seminar 2000 (available at www.houstonmarineseminar.com).

excavating the site should be avoided.[286] This approach does not per se exclude the possibility of excavation. The Convention clearly anticipates that under certain circumstances excavation or recovery might be necessary as it provides for Rules to regulate activities directed at UCH in its Annex. The preamble to the Convention likewise states that if necessary for scientific or protective purposes, UCH can be carefully recovered.[287] The Annex further elucidates these 'scientific or protective purposes' and provides in Rule 1 that activities directed at UCH can be authorised "*for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage*".[288] Rule 4 determines that excavation might be possible for the purpose of scientific studies or for the protection of UCH. These guidelines on when UCH might be excavated are formulated very widely leaving a lot of discretion for national competent authorities to determine when intervention is justified in individual cases. Some further guidance is given in the operational guidelines for the implementation of the UNESCO Convention, which were adopted by the fourth and fifth session of the Meeting of States Parties.[289] These guidelines proclaim that before a decision is made on any preservation measures or activities, an assessment should be made taking into account the significance of the concerned site, the significance of the expected result of the intervention, the means available and the entirety of known heritage in the region.[290] Based on this assessment, a decision can be taken on the best way to preserve the UCH.

The Manual for activities directed at UCH recognises two types of reasons necessitating excavations: substantive reasons as set out under Rule 1 of the Annex to the UNESCO Convention[291] and external reasons. These external reasons can include development projects for which sites need to make way, the need to secure a site due to an instable environment, the fact that stabilizing a particular site would bring with it such high costs that *in situ* preservation is not at all to be preferred or the fact that a site is being looted.[292] None of these reasons, however, should automatically prevent *in situ* preservation to be considered as a first option. These external reasons should also be complemented by a substantive reason.[293] In other words, the excavation of an UCH site should always serve the UCH itself and should not merely take place for external reasons. The UNESCO Convention provides a number of rules in its Annex that facilitate this. The

[286] DROMGOOLE 2013, 314.
[287] Clause 13 preamble UNESCO Convention.
[288] Rule 1 Annex UNESCO Convention.
[289] See *infra* section 4.11.2. for more on the Meeting of States Parties to the UNESCO Convention.
[290] UNESCO Operational Guidelines, 10.
[291] To make a significant contribution to the protection of UCH, to make a significant contribution to the knowledge on UCH and to make a significant contribution to the enhancement of UCH. MAARLEVELD, GUERIN and EGGER 2013, 26.
[292] FORREST 2010 342.
[293] Project developers can be very inventive and persuasive when it comes to finding and formulating reasons for excavation by exaggerating the threats to a site. Therefore, it is important that substantive reasons complement the external reasons. MAARLEVELD, GUERIN and EGGER 2013, 26-27.

Rules provide that activities directed at UCH cannot "*adversely affect the underwater cultural heritage more than is necessary for the objectives of the project*."[294] These activities "*must use nondestructive techniques and survey methods in preference to recovery of objects*" and when excavation or recovery is necessary the methods "*must be as nondestructive as possible and contribute to the preservation of the remains*".[295] Activities directed at UCH must avoid unnecessary disturbance of human remains or venerated sites[296] and should ensure the proper recording of all historical, cultural or archaeological information.[297] A project design will need to be made prior to executing any activity directed at UCH. This design shall be submitted to the competent authority for authorisation and peer review.[298] All aspects relating to the activity must be discussed in the project design. This includes the methodology and techniques that will be used; the funding of the project; the qualifications, responsibilities and experience of all team members; the conservation programme for artefacts and the site; the policy for maintaining and managing the site; the documentation programme; any arrangements for collaboration with museums and other institutions; the deposition of archives and the programme for publication.[299]

#### 4.2.4. Prohibition of commercial exploitation of underwater cultural heritage

As a general rule, the UNESCO Convention provides that UCH "*shall not be commercially exploited*."[300] Trade in heritage is considered to be a threat to the integrity of collections, which as a whole is more significant than the individual artefacts, and to the principle that heritage is of public rather than private interest.[301] This provision in itself leaves a lot of questions unanswered. It is not clear whether this prohibition includes a prohibition to obtain revenues from exhibitions and merchandise or whether it would be allowed to sell (parts of) a collection? Fortunately, in the Annex, this prohibition is elaborated further.

Rule 2 of the Annex provides the following: "*The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.*"[302] This provision

[294] Rule 3 Annex UNESCO Convention.
[295] Rule 4 Annex UNESCO Convention.
[296] Rule 5 Annex UNESCO Convention.
[297] Rule 6 Annex UNESCO Convention.
[298] Rule 9 Annex UNESCO Convention.
[299] Rule 10 Annex UNESCO Convention.
[300] Article 2(7) UNESCO Convention. The preamble of the Convention already indicates that it is not allowed to commercially exploit UCH as it states that deep concerns exists on the increasing commercial exploitation of UCH and especially on "*certain activities aimed at the sale, acquisition or barter of underwater cultural heritage*". Preamble clause 8 UNESCO Convention.
[301] MAARLEVELD, GUERIN and EGGER 2013, 30.
[302] Rule 2 Annex UNESCO Convention and GARABELLO 2003, 184.

addresses both the buyers and sellers of UCH and thus places responsibility with all parties. As for the prohibition to barter, this has a historical underlying reason. A tendency existed amongst operators that used archaeological sites to collect objects to give gifts and other bribes to museums, officials and politicians to ease their operation. This kind of barter has been prohibited by the UNESCO Convention. [303]

Rule 2 of the Annex seems to suggest that when a commercial activity does not involve trading, selling, buying or bartering UCH as commercial goods, this activity can be allowed as long as it does not result in the irretrievable dispersal of the UCH. This entails that for example requesting an entrance fee for an exhibition of UCH is allowed. The same is true for all incomes originating from organised diving excursions, all types of media such as films and books on UCH and the merchandising of souvenirs based on artefacts.[304] The UNESCO Convention does not aim to prevent economic benefits emanating from visitors and sustainable tourism that are shared in an area or community.[305] On the other hand, the sale or trade of UCH, even when this would not result in its irretrievable dispersal, is not allowed.[306]

Two exceptions are provided to the general prohibition of commercial exploitation of UCH. The first exception reads as follows: This prohibition shall not be interpreted as preventing *"(a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;"*[307]

The first exception deals with professional archaeological services. It is quite standard that professional archaeologists are commissioned for archaeological services, including archaeological excavations, and are paid for providing such services. This provision thus merely codifies a common practice. Not exempting these types of activities would have been problematic as the purpose of the UNESCO Convention is certainly not to prevent professional archaeologists from conducting research on UCH and, when necessary and in conformity with the Rules in the Annex, to recover the UCH. Two conditions must be complied with though in order for these archaeological services to be allowed: 1. Their nature and purpose must be in full conformity with the UNESCO Convention, including its annex and; 2. The archaeological service must be authorised by the competent authority. As was already explained in the section on *in situ* preservation above,[308] the

[303] MAARLEVELD, GUERIN and EGGER 2013, 33.
[304] DROMGOOLE 2013, 232.
[305] MAARLEVELD, GUERIN and EGGER 2013, 36.
[306] DROMGOOLE 2013, 232.
[307] Rule 2 Annex UNESCO Convention.
[308] See *supra* section 4.2.3.

Rules in the Annex pose rather high demands to activities directed at UCH and require a full-fledged project design addressing all aspects relating to such activities.

Governments or private owners are allowed to enter into contracts with commercial operators to provide archaeological and related services. When conducting such activities, these operators as well need to fulfill the requirements set out under rule 2(a) of the Annex and thus conduct the archaeological service in full conformity with the Convention and its Annex. This entails that, as required under Rule 17 of the Annex, the operator must be able to demonstrate an adequate funding base prior to the activity.[309] Revenues that are hoped to be raised from the sale of media rights and merchandise or any other form of income as the project unfolds can, therefore, not be taken into consideration.[310] By prohibiting the commercial exploitation of UCH, a complicated search for financial means to ensure that humankind can benefit from UCH, becomes inevitable. The recovery of finds, as well as their protection, requires a huge amount of financial input which might be difficult to raise. At the 1999 UNESCO expert meeting an unofficial proposal was made by the Professional Shipwreck and Explorers Association (ProSea).[311] In this proposal it was suggested to make a distinction between 'trade goods' and UCH that needs to be kept as a unit in order to preserve knowledge. Three criteria would be used for identifying trade goods: 1) the number of duplicates that are present on the site; 2) the ease with which artefacts can be recorded or replicated and; 3) the archaeological value compared to the value of returning the objects to the stream of commerce. This proposal was not incorporated in the Convention even though it would have been a potential solution for finding the balance between raising funds through, *inter alia*, travelling exhibitions or even the sale of bulk artefacts and the protection of UCH. This distinction could serve as a starting point for rethinking the complete prohibition of commercial exploitation of shipwreck finds.[312]

The second exception to the general prohibition of commercial exploitation relates to the deposition of UCH and provides that this prohibition shall not be interpreted as preventing *"the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or*

[309] Rule 17 Annex UNESCO Convention provides that "*Except in cases of emergency to protect underwater cultural heritage, an adequate funding base shall be assured in advance of any activity, sufficient to complete all stages of the project design, including conservation, documentation and curation of recovered artefacts, and report preparation and dissemination.*"
[310] DROMGOOLE 2013, 233-234.
[311] ProSea is a non-profit organisation operating in a global network. As a centre of expertise it initiates, develops and conducts trainings about marine awareness and sustainability for professionals working at sea. ProSea, *About ProSea*, www.prosea.info/ (consulted 25 April 2017). The organisation did not have an official NGO status within UNESCO, but was present at the UNESCO meetings as it was the only organisation that represented the industry dealing with UCH in a commercial way. BOESTEN 2002, 153.
[312] BOESTEN 2002, 153.

*cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.*"[313] Several authors have an issue with the use of the word 'deposition' as it is nowhere further defined in the UNESCO Convention. When considering this provision as well as its the negotiating history, Dromgoole finds that this term is in essence the equivalent of the notion 'deaccession' which is used in the context of museum collection management. Normally, the disposal of objects by museums from their collection or 'deaccession' is strictly regulated. Rule 2(b) sets out four preconditions for this type of disposal: 1) The deposition may not "*prejudice the scientific or cultural interest or integrity of the recovered material*", 2) it cannot "*result in its irretrievable dispersal*", 3) the deposition must be "*in accordance with the provisions of Rules 33 and 34*"[314] and 4) The deposition "*is subject to the authorization of the competent authorities.*" Dromgoole believes that the second condition relating to the irretrievable dispersal of the collection might be the hardest to comply with. However, this condition could be fulfilled when all parts of the collection are traceable and can be reassembled if so desired.[315] As a deposition needs to be authorised by the competent authority, it is likely that conditions will be set providing for study and public access.[316] Forrest as well agrees that the lack of a definition for the term 'deposition' and the failure to identify the place of deposition make for ambiguities. Rule 2(b) could entail that a collection of UCH can be sold, under the conditions set in point (b) to a public or private museum for profit. Forrest, however, feels that such an interpretation is at odds with the general principle contained in article 2(7) proclaiming the overall prohibition of commercial exploitation of UCH. He even goes one step further by providing that as the general principle should dictate the interpretation of the rule, this "*leaves the exceptions in rule 2 ambiguous at best, but more probably void for their inconsistency*".[317]

### 4.2.5. Proper respect for human remains

When discovering UCH sites, it is not unlikely that these contain human remains. In the context of UCH this is most likely to occur in two situations. The first is when human remains were buried at a time during which the sea level was lower than it is today, for example, during the last ice age. When the sea level eventually rose, these graves became submerged. The prehistoric human

[313] Rule 2 Annex UNESCO Convention.
[314] Rule 33 Annex UNESCO Convention provides that the project archives, including any removed UCH, and a copy of all supporting documentation shall be kept together as a collection in as far as so that it is available for professional and public access. Rule 34 requires that project archives are managed according to international professional standards and that they are subject to authorisation of the competent authorities.
[315] Sometimes it can be the preferable option to share the responsibility for the storage, display and preservation of a collection, between different institutions such as museums, archives and repositories. MAARLEVELD, GUERIN and EGGER 2013, 35.
[316] DROMGOOLE 2013, 234-236.
[317] FORREST 2010, 345.

remains lying in those graves can today potentially still be found on or in the seabed. Even though the discovery of human remains of such an old age is rather rare, it has occurred in the past. In 2009, for example, a small skull fragment from a Neanderthal was discovered between sediments extracted from the seabed 15km off the coast of the Netherlands. It was estimated that this fragment was 60-70.000 years old.[318] Another example is the Tybrid Vig site located in Denmark. This site dates back to the late Mesolithic period. Divers discovered a number of bones and bone fragments on site, as well as the grave of a young woman and child. The grave, as well as the remains present in it, were preserved in a fairly good state.[319] The second possibility for discovering human remains is encountered more often. These are the human remains of people that were on board of a ship at the time of its sinking and that were unable to escape.[320] These wrecks often remain the final resting place of their crew and passengers until today. One of the most famous maritime graves is without a doubt the Titanic. In the 2003 Agreement on the Titanic, which is concluded between France, The UK, Canada and the US, it is provided that the Titanic will be recognised as "*a memorial to those men, women and children who perished and whose remains should be given appropriate respect*". States must hereto implement a system of authorisations, for example for entry into the hull, so that the human remains are not disturbed [321]

The general public attaches a great deal of importance to the respectful treatment of maritime graves. This was evidenced by the alleged incident concerning the HMS Edinburgh which sank in 1942. A salvage operation directed at this wreck encountered strong criticism from veteran's associations and the public in general when it was alleged that the human remains present in the wreck were desecrated during the operation. [322]

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[318] During the last ice age a big part of the North Sea was above sea level and inhabited by humans. This is now referred to as Doggerland. As the temperature started to rise after the final ice age, this land was flooded, including all the human remains that were buried there. These are now located on or in the seabed and might be discovered over the course of time. JJ. HUBLIN et al., "Out of the North Sea: The Zeeland Ridges Neandertal", *Journal of Human Evolution* 2009, 777-785.

[319] T. MALM, *Excavating submerged Stone Age sites in Denmark – the Tybrind Vig example*, www.abc.se/~pa/publ/tybrind.htm (consulted 24 July 2018), originally published in A. FISHER, *Oxbow Monograph 53*, Oakville, David Brown Book Company, 1995, 440 pp.

[320] Human remains are only found on relatively rare occasions in archaeological shipwrecks. In the event of distress, normally, the ship is abandoned by its crew. Only when sailors got caught in for example nets, under heavy equipment or in closed compartments, their remains can later be found in the shipwreck. This is more likely to occur on modern or technically advanced ships since watertight doors can easily trap persons. MAARLEVELD, GUERIN and EGGER 2013, 46. The most likely place however to find human remains underwater is in sunken warships as these often sank during an offence which either killed the men on board or resulted in the ship to sink very quickly, not giving the crew a change to escape.

[321] Article 2(a), 4(1) and Rule 2 Annex *Titanic* Agreement 2003.

[322] It was suggested that lighting sticks had been placed inside a skull during the excavation of gold from the wreck. This allegation was later proven to have been false. Nevertheless, it demonstrated that there was a need to protect human remains located in sunken wrecks. M. WILLIAMS, ""War Graves" and Salvage: Murky Waters?", *Int.M.L.* 2000, (151) 152. (WILLIAMS 2000)

The UNESCO Convention takes the issue of protecting human remains into account in several ways. Firstly, the definition of UCH explicitly includes human remains as part of the UCH.[323] One of the conditions is that these remains must have been underwater for at least 100 years.[324] When human remains fulfill this condition, they will most likely be considered as UCH and all provisions, general objectives and Rules of the Annex to the UNESCO Convention will apply to them.[325] Therefore, for human remains complying with the definition of UCH, preservation *in situ* should be considered as a first option, commercial exploitation is not allowed and the remains must be preserved for the benefit of humanity. States must cooperate for their protection and are responsible for promoting non-intrusive access to them. In other words, a high level of protection is offered to these remains. Unfortunately, one of the key issues with the UNESCO Convention is that it only protects UCH, and thus human remains, that have been underwater for at least 100 years. All warship wrecks from WWI will soon fall within the scope of the Convention, but for younger wrecks, especially those from WWII, this will take many more years, leaving them unprotected for the time being.[326] This is unfortunate as many of the shipwrecks from WWII are maritime graves as well and contain human remains. In fact it is true that the probability of discovering human remains is much higher in 'young' wrecks when compared to ancient wrecks where it is often only the memory of those that perished with the ship that remains.[327] It is also true that the longer the human remains of fallen soldiers lie underwater, the less likely it becomes that their family members and battle comrades are still alive. It are, however, often the survivors associations that demand for the recognition of, and proper respect for, the sacrifice that their loved ones made. According to Dunkley, the emotional difficulties that are linked to maritime graves mainly manifest themselves during the first three generations after the wreckage. He suggests that at least four generations should pass before the remains of our ancestors "*become*

[323] This definition of UCH in the UNESCO Convention will be discussed more extensively below. See *infra* section 4.3.1.

[324] Article 1(a)(i) UNESCO Convention.

[325] Hershey notes that the Convention is somewhat ambiguous as it does not clearly explain whether human remains are themselves UCH or whether they must be found on an UCH site. P. HERSHEY, "Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites", *J. Envtl. Law and Litigation* 2012, (363) 380. (HERSHEY 2012) As the Convention sums up the different types of UCH that fall under its scope and places 'sites' and 'human remains' at the same level, it may be presumed that human remains 'together with their archaeological and natural context' can constitute UCH by itself. In practice, however, these remains are most likely to be found within or near a shipwreck site.

[326] When the term 'younger wreck' is used throughout this dissertation, this does not necessarily refer to the actual age of a shipwreck. With the term 'younger wreck' the author means to indicate wrecks that have sunk, but that have not yet been submerged for over 100 years as is required for a wreck in order to fall within the application of the UNESCO Convention. See *infra* section 4.3.1.1..

[327] A famous exception to this is the Mary Rose, a British warship that sank in 1545, where the human remains of 179 individuals were discovered during its excavation. The Mary Rose, *Skeletons and human remains*, www.maryrose.org/ (consulted 15 February 2016).

*of archaeological interest as 'catastrophe samples'*".[328] For these reasons, it is clear that the 100-year time cut-off is inappropriate for the protection of 'maritime (war) graves'.

A second provision dealing with human remains in the UNESCO Convention is article 2(9) which provides that "*States Parties shall ensure that proper respect is given to all human remains located in maritime waters*".[329] The inclusion of this provision received almost universal support during the negotiations.[330] Since no time limit is imposed by article 2(9) and the term 'maritime waters' is not further defined, this provision leaves room for interpretation under international law. It can, therefore, be argued that the 100-year time cut-off does not apply to this provision and that it thus applies to human remains regardless of how long they have been underwater and where they are located. This could potentially offer a (limited) solution for the fact that human remains located in for example WWII wrecks are not yet considered as UCH.[331] The question then arises what 'proper respect' entails, since this is not further defined in the UNESCO Convention. According to O'Keefe, the term 'proper respect' implies "*that the remains are to be treated reverently as befitting a fellow human*".[332] It would, however, appear that the exact interpretation of 'proper respect' varies between cultures and depends on the background of those that discover the remains.[333] For example, for human remains that fall within the definition of UCH, the principle of promoting non-intrusive access to them might not by all States be considered as respectful. Similarly, in certain cultures it is believed that human remains should be excavated and buried upon their discovery resulting in this UCH not being preserved *in situ*. In Japan, for example, once a shipwreck containing human remains has been detected and observed, this is no longer a so-called 'untouched war grave' and the human remains should be recovered and buried properly. This is not prescribed by law, but is a governmental policy that is based on Japanese customs.[334] The notion of proper respect clearly leaves a lot of room for possible interpretations and will vary between different cultures. Nevertheless, this provision is not without value as it arguably widens the scope of the Convention to human remains that have not yet been underwater for 100 years, which includes human remains from the soldiers that perished during WWII. This appears to be the only way to afford any form of protection to WWII wrecks in the UNESCO Convention at this time and the human remains that are located within them.

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[328] M. DUNKLEY, "Catastrophic burials: the study of human remains from sunken warships", *Conservation Bulletin* 2011, (20) 22. (DUNKLEY 2011)
[329] Article 2(9) UNESCO Convention.
[330] O'KEEFE 2002, 53.
[331] It must be noted that for human remains that do not comply with the definition of UCH, the provisions, general principles and Annex to the Convention will not automatically apply.
[332] O'KEEFE 2002, 53.
[333] O'KEEFE 2002, 54.
[334] A. IWABUCHI, "The Shipwreck of the Takachiho, Japanese Cruiser Sunk off China in 1914" in U. GEURIN, A. REY DA SILVA and L. SIMONDS (eds.), *Proceedings of the scientific conference on the occasion of the centenary of World War I,* Bruges, 26 & 27 June 2014, (41) 46.

A final reference to human remains in the UNESCO Convention can be found in rule 5 of the Annex. This rule states that: "*Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.*"[335] The purpose of this Rule differs from the purpose of article 2(9). Article 2(9) aimed at affording proper respect to human remains, while Rule 5 is directed at persons carrying out activities directed at UCH asking them to avoid disturbance of the human remains unless this is necessary. It is very likely that this will only be necessary in case of the (partial) excavation of a site.[336] Rule 5 applies to 'activities directed at UCH', which entails that it will most likely only apply to human remains that comply with the definition of UCH and that thus have been submerged for at least 100 years. As already mentioned, shipwrecks that have been submerged for such a long period are less likely to contain human remains. If no human remains are present in the wreck, they cannot be disturbed. A provision such as Rule 5 would be of more value if it were applicable to all human remains, regardless of how long they have been submerged. Rule 5 also makes specific mention of 'venerated sites'. These are for example sites that have a spiritual attachment for certain groups of people such as aboriginals.[337] [338]

## 4.3. Material scope of application of the UNESCO Convention

The UNESCO Convention aims to protect UCH located on the seabed worldwide. The key question is then of course, what is meant by 'UCH'. Under UNCLOS, this term is not used in articles 149 and 303, which address 'objects of an archaeological and historical nature'. These objects were not further defined under UNCLOS. The UNESCO Convention on the other hand uses the term UCH and offers a definition. As will be demonstrated, reaching a consensus on this definition during the negotiations was a difficult task.

### 4.3.1. Definition of underwater cultural heritage

The UNESCO Convention gives a rather broad definition to the concept UCH, even though a number of conditions are imposed. UCH is defined as including "*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*".[339]

[335] Rule 5 Annex UNESCO Convention.
[336] O'KEEFE 2002, 162.
[337] A number of shipwrecks in Australia, for example, attract a large number of fish. For the aboriginals, that hunt these fish, these wrecks have spiritual significance. O'KEEFE 2002, 162.
[338] The protection of 'maritime war graves' will be further elaborated under chapter two of this dissertation.
[339] Article 1(1) UNESCO Convention.

The definition begins with a very broad classification, namely 'all traces of human existence'.[340] At the same time, this classification already narrows the scope of the Convention as it excludes all objects and sites that do not constitute evidence of human existence in the past such as certain paleontological material or natural features.[341] It can therefore also be argued that animal remains, when these were not used by humans in any way, do not fall within the scope of the UNESCO Convention. Asides from this, 'all traces of human existence' is a very broad qualification and includes numerous types of objects. The UNESCO Convention gives a non-exhaustive list of what these traces might be. This list includes, *inter alia*, sites, structures, artefacts, human remains, vessels and aircraft[342] as well as their cargo and objects of a prehistoric character. This list can assist administrators and courts when deciding on whether or not an item is covered by the Convention.[343]
The list specifically mentions that the archaeological and natural context of 'traces of human existence' are considered to be UCH as well.[344] By including this, the Convention emphasises that UCH should be considered in its original context rather than as an isolated object. A lot more valuable information can be gained from considering an UCH site in its entirety. This is one of the reasons underlying the principle of *in situ* preservation as a first option.

The definition contains three conditions with which the 'traces of human existence' must comply in order to be considered as UCH. These have to be met cumulatively:

1. The trace must have 'a cultural, historical or archaeological character'
2. It must have been 'partially or totally under water, periodically or continuously'
3. It must have been underwater for a period of at least 100 years[345]

[340] The wording 'traces of human existence' were copied from The European Convention on the Protection of the Archaeological Heritage 1969 (article 1) and was later used in the ILA draft (article 1(1)). Council of Europe, European Treaty Series, No. 66, London, 6 V 1969; ILA, "Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage" in ILA, *Report of the Sixty-Sixth Conference Held at Buenos Aires, Argentina*, 14 to 20 August 1994, 725.
[341] O'KEEFE 2002, 334.
[342] The fact that aircraft were included in the UNESCO Convention anno 2001 was clearly a measure for future application as at that time there were not yet any aircraft that were over 100 year old, let alone that had been submerged for over 100 years. The first 'powered, sustained and controlled flight' took place in 1903 by the Wright Brothers. O'KEEFE 2002, 44. Nowadays, the potential that sunken aircraft have to be of historical or archaeological interest is widely recognised and the interest in aviation archaeologically has increased, especially with regards to the sunken aircraft from WWI and WWII. DROMGOOLE 2013, 87-88.
[343] A. STRATI, "Protection of the Underwater Cultural Heritage: from the Shortcomings of the UN Convention on the Law of the Sea to the Compromises of the Unesco Convention" in A. STRATI, M. GAVOUNELI and N. SKOURTOS (eds.), *Unresolved issues and new challenges to the law of the sea. Time before and after*, Leiden, Martinus Nijhoff Publishers, 2006, (21) 41. (STRATI 2006)
[344] This does not do away with the fact that natural features as such do not fall within the definition of this Convention. The archaeological and natural context will only be protected in light of the human trace that was found within it.
[345] In an earlier draft of the Convention this time-criterion was linked to the requirement that the UCH had to be abandoned or lost. This was however later deleted. BOESTEN 2002, 138.

The idea that the heritage should be located underwater, as required under condition 2, seems to be logical and quite straightforward as the Convention was specifically designed to protect UCH and not heritage on land. This second condition aims to clarify that a number of marginal possibilities are included in the Convention as well, such as traces that are partially or periodically submerged. This can occur when an object is close to the shoreline, in coastal and intertidal waters, or when it is located in or on a reef.[346] Considering the impact that climate change will have on sea levels, this provision is likely to gain importance in the future.[347]

#### 4.3.1.1. Time cut-off of 100 years

The 100-year period seems to be somewhat arbitrary and is in fact based on administrative pragmatism rather than on 'archaeological, cultural or historical significance'. The 100-year threshold was felt to be appropriate for the application of the treaty regime as it would for the most part avoid issues relating to ownership rights and other private commercial interests.[348] The likelihood of a younger wrecks still having an owner is much higher than it is for an ancient wreck that has been submerged for over 100 years. This 100-year threshold was, therefore, regarded as a compromise between the interests of heritage protection and the private interests of owners.[349] Other interests are as well more likely to come into play with younger wrecks, for example, recently sunken wrecks are more likely to be maritime graves still containing the remains of those that went down with the ship.[350] The chances of close relatives of those deceased still being alive and perhaps putting pressure on policy makers is much higher for recently sunk wrecks.[351] Finally,

[346] O'KEEFE 2002, 42.
[347] DROMGOOLE 2013, 87.
[348] The UNESCO Convention does not deal with the issue of ownership rights. Leaving this to national legislators was considered to be a pragmatic way forward as it facilitated the inclusion of warships in the Convention as well as the entire negotiation process. It will thus be for national authorities and courts to deal with any ownership claims that might arise over material falling within the scope of the Convention and to conduct the exercise of balancing public interests against the rights of owners. Nevertheless, the very rules inscribed in the Convention do have the effect of interfering with ownership rights. The idea that *in situ* preservation should be considered as the first option limits the rights of owners that in principle have an absolute freedom to do with their property as they please. Similarly the prohibition of commercial exploitation, the fact that collections should be kept together and must be available for professional and public access, and the obligation to abide by the Rules of the Annex when undertaking activities directed at UCH considerably limit the freedoms that the owner has with in respect of his property. When the interference is of such an extent that it amounts to the deprivation of title, it is likely that compensation will have to be paid. The fact that the Convention only applies to wrecks that have been underwater for over 100 years will most likely result in a smaller number of ownership claims than would have been the case if the Convention applied to younger wrecks as well. It is, however, not unthinkable that ownership claims over older wrecks will arise as well, including claims from States. DROMGOOLE 2013, 117-118.
[349] DROMGOOLE 2013, 118.
[350] See *supra* section 4.2.5. for the discussion on article 2(9) UNESCO Convention.
[351] As was explained, the Mary Rose is an example of an older wreck still containing the human remains of the men that perished with the ship. The Mary Rose was a flag ship of Hendrik VII that sank in 1545 and contains the remains

these wrecks are more likely to pose an environmental hazard because of the fuel or other substances that might still be on board. By using the 100-year time cut-off, the negotiators were able to avoid dealing with these issues.[352]

During the negotiations more recent thresholds were proposed by a number of countries[353] to include more objects in the definition of UCH.[354] Other countries, including Sweden, Denmark and Norway already used a 100-year cut-off in their national legislation at the time of the negotiations. Additionally, the 100-year time cut-off could be found in a number of international conventions and recommendations, for example, in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention)[355] and the 1985 European Convention on Offences Relating to Cultural Property (1985 EU Convention)[356].[357] The 100-year threshold was also proposed in the 1978 Recommendation 848 on the Underwater Cultural Heritage of the Council of Europe (Recommendation 848)[358] and in the 1985 Draft Convention on the Underwater Cultural Heritage of the European Council (1985 Draft Convention).[359] In the 1970 UNESCO Convention, the 1985 EU Convention and the 1985 Draft Convention the wording was somewhat different in the sense that the object had to be 100 years old, rather than 100 years submerged.[360] This definition allows for a larger number of objects to fall within the scope of the respective Convention.

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of about 45% of its entire crew. The Mary Rose, *Skeletons and human remains*, www.maryrose.org/ (consulted 15 February 2016).
The likelihood that living relatives of such a crew can still be found is small. Nevertheless today living relatives are still known of the captain of the 18th century ship HMS Victory who drowned as his ship sank, M. PIETERS, correspondence via e-mail, 4 April 2014.

[352] DROMGOOLE 2013, 91.

[353] Poland wanted to include all wrecks from before 1945 and the US proposed a time cut-off of 50 years. DROMGOOLE 2013, 91 (referring to explanatory comments on art.2 of the 1998 UNESCO Draft Convention part of UNESCO Doc. CLT-96/Conf.202/2, April 1998) and VARMER 2006, 107.

[354] DROMGOOLE 2013, 90-91.

[355] Article 1(e and k) UNESCO Convention 1970.

[356] European Convention on Offences relating to Cultural Property of 23 June 1985, Delphi, C*ETS* No. 119, Appendix II (1)(f-h). Last year this Convention was replaced by the new Convention on Offences relating to Cultural Property of 19 May 2017, Nicosia, *CETS* No. 221, COM(2017)32-final**.**

[357] FORREST 2010, 335.

[358] Parliamentary Assembly, *Recommendation 848 (1978) on the underwater cultural heritage*, available at http://assembly.coe.int/nw/xml/XRef/Xref-DocDetails-EN.asp?FileID=14882&lang=EN (Recommendation 848).

[359] The final version of this text remains confidential and is thus not publicly available. Nevertheless, an earlier draft version of 1984 can be consulted. DROMGOOLE 2013, 40. The discussion on the Draft Convention 1985 within this dissertation is thus based on this 1984 draft version. Council of Europe, 1984 Draft Convention, Strasbourg, 22 June 1984, DIR/JUR(84) 1. (Draft Convention 1984). For more on this see *infra* section 6.2.2.

[360] A. STRATI, *Draft Convention on the protection of underwater cultural heritage, A commentary prepared for UNESCO*, April 1999, CLT-99/WS/8, 2 , http://unesdoc.unesco.org/images/0011/001159/115994eo.pdf

The UNESCO Convention sets out a clear time-criterion but does not explicitly allow for the possibility to exclude UCH that has been submerged for over 100 years but that might not be sufficiently significant to provide protection for. Recommendation 848, for example, provided that "*Protection should cover all objects that have been beneath the water for more than 100 years, but with the possibility of discretionary exclusion of less important objects (or of less important antiquities) once they have been properly studied and recorded, and the inclusion of historically or artistically significant objects of more recent date.*"[361] During the expert meeting in 2001, the UK made a proposal to include the possibility of excluding objects from the scope of the Convention. This proposal was, however, not withheld.[362] Similarly, the UNESCO Convention does not explicitly provide the possibility for States Parties to include younger UCH in the protection regime as well.[363] States are of course free to protect heritage that has not yet been submerged for 100 years in their national legislation.[364] By using such a strict time cut-off in the UNESCO Convention, the idea is created that objects only require protection once they have reached the 100-year time cut-off. This is, however, a dangerous assumption. Younger objects, for example wrecks from WWII can offer important historical information, are often 'maritime war graves' and are likely to one day become an important part of the heritage of mankind. By not awarding any specific protection to these wrecks, they are at risk of being looted and destroyed before reaching the 100-year cut-off point. A case arose in the Netherlands a few years ago that illustrated this problem. The case dealt with the wreck of the Tubantia, which is located in the Dutch EEZ. In 2015, a Belgian diver took a number of copper pipes from the wreck site. As the Dutch government considers this wreck to have scientific and cultural historical value, the Dutch heritage protection authorities did not approve of this looting. The competent authorities, unfortunately, did not have any legal instruments in place protecting this wreck. One of the main reasons for this was that at the time the copper pipes were removed, the Tubantia had only been submerged for 99 years and a couple of months. The UNESCO Convention was, therefore, considered not to be applicable. This almost ridicule example clearly demonstrates the danger of applying the 100-year time cut-off in a strict sense. It is crucial that States Parties, when implementing the UNESCO Convention in their national legislation, think ahead and offer a certain level of protection to more recently sunk objects that in the future are likely to be considered as UCH in the sense of the UNESCO Convention. A warning in this sense was given by the Scientific and Technical Advisory Body of the Convention during its

[361] Recommendation 848, Annex, ii.

[362] BOESTEN 2002, 140. This is very closely linked to the discussion to include a significance criterion in the Convention as was proposed by the UK. This is discussed below. See *infra* section 4.3.1.2.

[363] During the first phase of the negotiations, such a provision was included based on the ILA draft. States could decide to extend the protection provided by the Convention to items that have not yet been submerged for 100 years. According to Garabello this provision was deleted because it was believed that this could be a way for States to exercise title over recently wrecked military vessels that flew a foreign flag. GARABELLO 2003, 105.

[364] This is for example the case in the Netherlands, Germany, France and Belgium. See chapter three.

fourth meeting.[365] The Advisory Body recommended the Meeting of States Parties to encourage States Parties to ensure that proper protection is given to UCH sites from WWII and to educate the public in this regard. The chairman suggested to inform States Parties about the dangers posed to more recent heritage, especially that of WWII, as heritage from this period in time is pillaged equally often as heritage from WWI. Furthermore, as WWI heritage sites will soon completely fall within the protection of the UNESCO Convention, and will therefore be more expensive on the market, WWII artefacts might be increasingly targeted by treasure hunters.[366]

#### 4.3.1.2. A cultural, historical or archaeological character

In order to qualify as UCH, any 'trace of human existence' must have 'a cultural, historical or archaeological character'. This criterion was added to the text only late in the negotiations.[367] During the negotiations, a lot of discussion took place on whether or not a significance criterion should be inserted in the definition of UCH. A significance criterion entails that the assessment of whether an object constitutes UCH is not merely based on objective criteria, such as a time threshold or whether the find can be categorised as a building, monument or wreck, but as well on the importance and significance of the object. This subjective criterion allows States a certain margin of appreciation in selecting the objects that they wish to protect. By applying a significance criterion, the risk, however, exists that national governments would interpret this criterion in different , which could jeopardise the idea of a universal standard for UCH protection. Additionally, such an approach has the disadvantage that protection can only be afforded after a site has been discovered. In order to assess whether a site or object is of sufficient significance research must be conducted on the site, which can be quite time consuming. This leaves a time gap between the discovery of a site or object and the moment of its protection, during which the site might be damaged or looted. Traditionally, common law States tend to use a significance criterion and thus protect heritage assets in a more selective manner. Civil law countries on the other hand often apply a blanket-approach. This entails that all heritage sites or objects over a certain age or that fulfill a certain qualification (monuments, wrecks and antiquities) are automatically afforded protection.[368] The risks inherent to a selective approach as summarised above do not present themselves with a blanket approach as all heritage assets are automatically protected from the moment of their discovery on.[369] Using a blanket approach can, therefore, contribute to the

[365] See *infra* section 4.11.3. for more on the Scientific and Technical Advisory Body of the UNESCO Convention.
[366] Scientific and Technical Advisory Body, Fifth Meeting, Paris, 11 June 2014, UCH/14/5.STAB/6, 5 and Recommendation 4/STAB 5, 6-7.
[367] For a full report on the discussions concerning this provision see GARABELLO 2003, 106-109.
[368] DROMGOOLE 2013, 92-93.
[369] The advantages of a blanket protection were summed up by Graeme Henderson as follows: "*the administrators are not called upon for repetitious significance assessment decisions; the archaeologists can concentrate on programmes with more significant outcomes such as publications and museum exhibits; the general public gets*

establishment of a comprehensive protective framework worldwide. On the other hand, States Parties can find it inopportune to protect all heritage assets that are discovered, for example due to a lack of financial or administrative means. During the negotiations on the UNESCO Convention, the UK declared that it has over 10.000 wreck sites in the British territorial sea and indicated that it is neither opportune nor possible to protect them all. The UK declaration puts forward that it would be better to use the available means to only protect the most important and unique sites.[370]

This discussion between this common law and civil law approach clearly manifested itself during the negotiations on the UNESCO Convention. The final outcome of this discussion was the inclusion of the criterion 'cultural, historical or archaeological character' in the UCH definition.[371]

At first sight it would seem that the common law approach was preferred as some sort of significance criterion was inserted in the definition. However, this significance criterion has been heavily criticised for its practical value. The criterion is considered to be meaningless as it does not add anything to the definition at large.[372] The representatives of ICOMOS pointed out that while an object can be of archaeological interest or significance nothing can be of an 'archaeological character'. As for the cultural or historical character of an object, it can be stated that no trace of human existence can be found that is over 100 years old that does not have such a character by its very nature. The main issue lays with the use of the term 'character' which does not cover the same load as for example stating that the trace must be of archaeological, historical or cultural

*better value for money in the form of new knowledge products rather than endless signifcance [sic] assessments; and developers have a clearer sense of compliance requirements*". G. HENDERSON, "Significance assessment or blanket protection?", *The International Journal of Nautical Archaeology* 2001, 3-4.

[370] DROMGOOLE 2013, 93. This figure of 10.000 wreck sites that was invoked by the UK at the time of the negotiations has been nuanced in a 2010 review of wrecks included in the national records pertaining to England, Scotland, Wales and Northern Ireland. This review showed that the number of known wrecks in the UK territorial sea, meaning "*wrecks which have been located and are known to exist on the seabed*", that would be considered as UCH following the UNESCO Convention is less than 1.000. This 2010 study indicated that the national records include about 7.900 wrecks in total, which approaches the number of 10.000 wrecks provided by the UK in 2001. However, about 3.700 of these wrecks are not dated and would therefore not be subject to the UNESCO Convention. Of the wrecks that are dated, only 936 are over 100 years old. Even when all shipwrecks from WWI are included in the count, which were not yet submerged for over 100 years at the time of the review, the number of known wrecks in the territorial sea of the UK will only grow to about 2.800 by 2018. UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom*, Final Report, February 2014 available at www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf, 63-64. (UK UNESCO 2001 Convention Review Group, Impact Review 2014) For more on this see chapter three, section on the UK.

[371] During the 1999 and 2000 meetings, proposals were formulated by the UK and the US to add the requirement that UCH had to be significant in order to fall within the scope of the UNESCO Convention. O'KEEFE 2002, 42. Other States including Colombia, Portugal, Argentina and Greece were strongly against such a significance criterion as it is not possible to determine the archaeological value of an object before it has been removed. STRATI 2003, 41.

[372] STRATI 2006, 41.

importance.[373] The word 'character' can be compared to the term 'nature', as was used in article 149 and 303 UNCLOS, which is very wide and meaningless. In order to create a clearer significance criterion the drafters would have done better to use the word 'significance', 'importance', 'value' or 'interest'. The fact that such a wide criterion was used, encompassing nearly all sites and objects, can be interpreted as not allowing States any discretion to exclude assets from the protection offered by their national heritage legislation when they consider them to be of less or no significance.[374] However, several authors have nuanced this. Forrest believes that as the interpretation of this 'significance criterion' is not clear, it offers the possibility for States to apply some evaluative criteria in order to limit the scope of the UNESCO Convention to the assets that they consider to be significant.[375] Carduzzi argues that the fact that no real significance criterion was included does not entail that the Convention imposes an extreme obligation to protect every single trace of humanity that has been submerged for over 100 years. According to him, the 'character criterion' allows for some flexibility of interpretation as long as it is "*kept within due limits of a bona fide interpretation of the Convention and the general duty to cooperate for the protection of the underwater cultural heritage*". This flexibility can prevent extreme readings of the Convention, even though he must admit that the definition of UCH still remains broad.[376]

On the official website of the UNESCO Convention the following is provided on this issue: The Convention's definition of UCH does not contain a significance benchmark as this can differ between the local, national and international level. It is recognised that significance is subject to change as this can be created through research and raising public awareness. The more a site is discussed and brought to the public attention, the more significant it becomes. It is stressed that sites should be immediately protected, before checking their significance, especially when the site suffers from pillaging. This was taken into account by the States drafting the Convention in providing for a blanket protection.[377]

Two final remarks need to be made regarding the definition of UCH. The first is that this definition does not contain any criterion of representativeness or singularity. In other words, the fact that a large number of the same objects are discovered does not change their status as UCH in the Convention. It was reasoned that repetitiveness can offer important scientific information for example relating to the size of trade, the number of vehicles or the armament. A second remark

[373] O'KEEFE, 2010, 43.
[374] DROMGOOLE, 2013, 92-93.
[375] FORREST 2010, 334.
[376] G. CARDUZZI, "New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage", *AJIL* 2002*,* (420) 422-423.
[377] UNESCO, *The UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage and its Context*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/underwater-cultural-heritage/definition-of-underwater-cultural-heritage/ (consulted 5 September 2017). (UNESCO Context)

relates to the nature of a cargo that can be discovered in and around a wreck. Article 1 of the UNESCO Convention explicitly refers to the following as an example of UCH: "*vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context*".[378] The heritage character of cargoes is clearly stressed without any differentiation being made based on its value, purpose or destination. Any automatic exclusion of "*commercial loads consisting of materials in their raw state, serial movable who have had exchange or tax value such as coins and bullion, and industrial loads*" as UCH is contrary to the definition given by the UNESCO Convention.[379]

It can be concluded that the UNESCO Convention provides for a very wide definition of the concept UCH. As no real significance criterion was included in the definition, a large number of objects and sites will fall within the protective scheme offered by the Convention. However, as was pointed out by several authors, States Parties can introduce a number of criteria in order to determine the significance of discovered sites and objects. This must, however, be done *bona fide* and can thus not result in extremely stringent criteria leading to hardly any sites qualifying as UCH.[380] The underlying objective of the UNESCO Convention needs to be respected when drafting such criteria. Sites must as well be protected from the moment of their discovery on, even before an assessment of their significance took place. States can also opt to distinguish between sites, not by not considering them as UCH, but by differentiating in the level of protection offered to UCH sites and in their management. A difference can for example be made between whether or not it is allowed to dive on a site or in allowing amateur archaeologists to participate when intervening with the site. All of this must of course be done within the limits of the Convention and in conformity with the Rules of the Annex.

The main concern of States lies with the fact that protecting a large number of UCH sites might not be possible in terms of costs and administrative means. It should be noted, however, that the obligations imposed by the UNESCO Convention can in fact be interpreted in such a way that they do not oblige a State to protect all UCH sites located in its waters as some sort of protected sites, but rather that it requires States to regulate activities that are directed at UCH in accordance with the Rules of the Annex. This is the difference between a so-called site-based approach and an activity-based approach. This view was put forward by the 'UK UNESCO 2001 Convention Review Group' in 2014 and will be discussed in detail in chapter three in the section dealing with the UK and the UNESCO Convention.

[378] Article 1(1)(ii) UNESCO Convention.
[379] UNESCO Context.
[380] Using criteria that are too stringent is likely to jeopardise the principle of cooperation between States as the views on what is considered as UCH could vary to a great extent. This needs to be avoided.

#### 4.3.1.3. Exclusions from the scope

The UNESCO Convention explicitly excludes two types of objects from its scope. The first are cables and pipelines that were placed on the seabed.[381] This exception applies regardless of whether or not these cables and pipelines are still in use. The second exception deals with other types of installations that are not pipelines or cables. These installations are not considered to be UCH under the condition that they are still in use.[382] These installations can, for example, be military installations, installations linked to the exploration and exploitation of natural resources or installations linked to marine scientific research. According to Dromgoole, the reason why a distinction is made between cables and pipelines and other installations is because the cables and pipelines industry had a privileged position under UNCLOS and it seemed that especially the cable industry was keen on remaining in control of the removal of its old infrastructure. [383]

### 4.3.2. Activities directed at or incidentally affecting underwater cultural heritage

The UNESCO Convention is mainly focused on regulating activities that are directed at UCH, such as diving, looting, salvage and archaeological research. As for activities incidentally affecting UCH,[384] which comprises all the economic activities taking place at sea that disturb the seabed, article 5 of the UNESCO Convention provides that "*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.*"[385] A workable balance needed to be found between the economic use of the sea area and the protection of UCH. During the negotiations on the Convention there was some discussion on whether the Convention should deal with activities incidentally affecting UCH.[386] In the end, article 5 UNESCO Convention leaves it for the most part up to States Parties to determine which measures are necessary to mitigate or prevent the negative impact that activities taking place at sea can have on UCH. As these measures will most likely include imposing restrictions on developers and economic actors at sea, it is not surprising that this sensitive matter is left to States Parties. The drafters of the Convention did feel that it was necessary to at least make mention of activities incidentally affecting UCH. If no

[381] Article 1(1)(b) UNESCO Convention.
[382] Article 1(1)(c) UNESCO Convention.
[383] DROMGOOLE 2013, 89.
[384] Activities incidentally affecting UUCH are defined as "*activities which, despite not having UCH as their primary object or one of their objects, may physically disturb or otherwise damage underwater cultural heritage.*" Article 1(7) UNESCO Convention.
[385] Article 5 UNESCO Convention.
[386] For the negotiating details on this provision see BOESTEN 2002, 153-154 and GARABELLO 2003, 127-128. Activities directed at UCH are defined as "*activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage*." Article 1(6) UNESCO Convention.

provision dealing with this issue had been included, the Convention would have ignored the destruction of UCH that arises from these activities and would perhaps have given the impression that activities of salvors are the main threat to UCH and the main reason for their destruction. This has, however, not been proven nor even investigated. In any case, it would not have been prudent to not at least point out that activities incidentally affecting UCH can cause considerable damage and need to be taken into consideration when protecting UCH.[387]

## 4.4. The legal regime for the protection of underwater cultural heritage located in a state's sovereign waters

### 4.4.1. Underwater cultural heritage located in internal waters, archipelagic waters and the territorial sea

#### 4.4.1.1. Sovereignty of the coastal State

The UNESCO Convention was mainly drafted to regulate UCH protection in zones outside of national jurisdiction. Nevertheless, the Convention does intend to establish a set of minimum standards in all maritime zones, including the zones under coastal State jurisdiction. Therefore, it was felt necessary to include provisions in the Convention dealing with the territorial waters of a coastal State in article 7.[388] This article sets out the legal regime for the protection of UCH in internal waters, archipelagic waters and the territorial sea.[389] In these maritime zones, the coastal State has sovereignty following UNCLOS.[390] This entails that the coastal State has the exclusive right to regulate and authorise all activities directed at UCH.[391] This principle is reaffirmed in the first paragraph of article 7 UNESCO Convention. By becoming a party to the UNESCO Convention, however, coastal States do accept to apply the rules as set out in the Annex to UCH located within the maritime zones over which they have sovereignty.[392] In order to comply with these Rules a well-functioning national system is necessary.[393] A lot of diversity exists in the national legislation dealing with UCH, which will for a great part determine to what extent States will need to amend their national legislation in order to comply with the Convention. A number of the Rules in the Annex could simply be implemented as conditions for obtaining a permit for conducting an activity

[387] BOESTEN 2002, 155-156.
[388] BOESTEN 2002, 158.
[389] Article 29 UNESCO Convention provides States with the possibility to declare that the Convention shall not be applicable to parts of its territory, territorial waters, archipelagic waters or territorial sea. In this declaration the reasons for this shall be identified.
[390] Article 2 and 49 UNCLOS.
[391] A potential exception to this rule are the remains of warships, see *infra* section 4.4.1.2.
[392] Article 7(2) UNESCO Convention.
[393] Such a well-functioning system is in fact necessary throughout the entire Convention in order to comply with all provisions regardless of in which maritime zone the UCH is located.

directed at UCH. Other rules, however, might require more far-reaching legislative alterations such as Rule 2 dealing with the prohibition of commercial exploitation of UCH.[394] Whether a State Party will be able to fully comply with the UNESCO Convention will depend on its financial and political situation. When necessary, assistance should be offered at an international or inter-state level.[395]

#### 4.4.1.2. State vessels in the territorial sea and archipelagic waters

Specific provision is made for the remains of State vessels and aircraft located in a State's territorial sea or archipelagic waters.[396] This provision, as well as the issue of including State vessels and aircraft within the Convention in general was heavily debated during the negotiations on the UNESCO Convention. This discussion will be further looked into in chapter two of this dissertation.

Article 7(3) UNESCO Convention provides for a special regime for State craft found in the territorial sea and archipelagic waters of a third Coastal State. The coastal State *should inform* the Flag State Party[397] to the UNESCO Convention and, when applicable, other States with a verifiable link[398], of the discovery of identifiable[399] State vessels and aircraft with a view to cooperating on the best methods of protecting them.[400] This provision was one of the most controversial ones in the Convention. Especially the G-77 was strongly opposed to any special regime for warships. The most that they were willing to accept was a disclaimer clause on the sovereign status of a warship and other State vessels and a general provision on respecting human remains. Most of these States, together with Argentina, were opposed to the idea of imposing a duty on the coastal State in its territorial sea with respect to third States as it is sovereign in that zone.[401] Traditional maritime powers on the other hand, which historically had large fleets, insisted that a special regime for State craft was necessary. They wanted to include a binding provision obliging the coastal State to obtain consent from the flag State prior to any interference with State craft located in its territorial waters. These maritime powers, therefore, felt that the wording 'should inform' was insufficient.

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[394] O'KEEFE 2002,74-75.
[395] BOESTEN 2002, 160.
[396] Unlike the other two paragraphs, article 7(3) does not apply to the coastal State's internal waters.
[397] Oddly enough, this provision only provides for flag States Parties to be informed. However, as no enforceable rights are afforded to the flag State under this provision, there seems to be no logical reason why the flag State should be a party to the Convention before it is informed. DROMGOOLE 2013, 159. The rights given to non-State Parties in the UNESCO Convention are further discussed throughout this chapter.
[398] This link can especially be a cultural, historical or archaeological link. Article 7(3) UNESCO Convention.
[399] It should be noted that in order to identify a State vessel or aircraft, research will most likely need to be conducted on the wreck site. At this point, the flag State will not yet be known and can thus not yet be informed of the find or consulted with a view to cooperating. In the initial phase after the discovery, it will be the coastal State that gives the necessary authorisations for conducting research on the wreck site and that will take any measures it deems necessary for its protection.
[400] Article 7(3) UNESCO Convention.
[401] For more on the negotiating history of article 7(3) UNESCO Convention see GARABELLO 2003, 134-136.

They proposed that the word 'shall' rather than 'should' was inserted in article 7. Additionally, a number of States wanted to see the word 'consult' rather than 'inform'. The UK, the Russian Federation and the US on the one hand and France on the other proposed at the General Conference in October 2001 that the words 'should inform' be replaced by 'shall consult' and that an additional sentence would be added to article 7: "*Such State vessels and aircraft shall not be recovered without the collaboration of the flag State, unless the vessels and aircraft have been expressly abandoned in accordance with the laws of that State*". This amendment was rejected by majority vote.[402] Despite many attempts from maritime powers, in the end, the phrase 'should inform' was included in article 7(3). This regime for State craft located in the territorial waters of a State is one of the main reasons why a number of maritime powers abstained from voting on the Convention.[403]

The question arises whether the use of the words 'should inform' in article 7(3) UNESCO Convention allows coastal States not to inform flag States and decide on the fate of the State craft on their own. To resolve this matter regard must first be taken of article 2(8) UNESCO Convention which provides that the UNESCO Convention will not modify "*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*."[404] As will be explained under chapter two relating to State vessels and aircraft the rules of international law pertaining to sovereign immunities as well as to a State's rights with respect to its State vessels and aircraft are uncertain. Article 2(8) thus merely maintains this uncertain *status quo* and does not decide in favor of one view or another.[405] Nevertheless, flag States that are concerned by the regime pertaining to State vessels and aircraft in the UNESCO Convention believe that the policy and practice applied by them is a reflection of international law, namely that sunken State craft retain sovereign immunity and remain the property of the flag State indefinitely unless it has been abandoned explicitly.[406] These flag States can thus refer to article 2(8) UNESCO Convention to reinforce the claim that consent for activities directed at State vessels and aircraft from the flag State is required in all cases, regardless of the maritime zone in which such a wreck is located.[407] In any case, it should be borne in mind that all provisions in the Convention must be interpreted in light of its general provisions which entails that regardless of the wording of article 7(3), the general principle of cooperation applies throughout the entire

[402] GARABELLO 2003, 136. Alternatively, it would have been acceptable to use the words '*shall inform*' combined with the phrase that this will be "*with a view to cooperating*" with the flag State. DROMGOOLE 2013, 157.
[403] M. AZNAR-GOMEZ, "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* 2010, (209) 210. The reasons why a number of States abstained from voting on the UNESCO Convention are discussed in detail in chapter three.
[404] Article 2(8) UNESCO Convention.
[405] C. FORREST, "Culturally and Environmentally Sensitive Sunken Warships, *A&NZ Mar LJ.* 2012, (80) 85. (FORREST 2012)
[406] See chapter two on State vessels and aircraft.
[407] DROMGOOLE 2013, 159-160.

Convention. This renders it highly unlikely that a State Party would not at least inform another State Party when the latter State Party is the flag State "*with a view to cooperating on the best methods of protecting State vessels and aircraft*".[408] Furthermore, it is true that States, in most cases, already display sensitivity when dealing with sunken State craft in the waters under their sovereignty.[409] This practice is likely to be enhanced when States operate following the UNESCO Convention. While a lot of national legislation does not yet explicitly provide for the notification of the flag State upon discovery of a State vessel, such a provision could be introduced when implementing the UNESCO Convention. This could reinforce the position of flag States considerably.[410] For example, the Belgian Act for the protection of UCH provides in article 5§2 that for State vessel and aircraft discovered in the Belgian territorial sea, on its continental shelf or in the EEZ, consultation with the flag State should take place with a view to protecting the site.[411] This legislation was created in 2014 in order to implement the provisions of the UNESCO Convention.[412] Finally, it should be noted that flag States already recognise that the coastal State has the ultimate control over wreck sites located in the waters under its sovereignty and consider cooperation as a pragmatic way forward. Therefore, it can be stated that the fact that flag States do not have the sole control over the wreck sites of their State vessels and aircraft in the UNESCO Convention is a reflection of the current reality.[413]

#### 4.4.1.3. States with a verifiable link

When an identifiable State vessel or aircraft is discovered, not only should the flag State be informed of this, but as well other States with a verifiable link. This link can especially be a cultural, historical or archaeological link.[414] The notion 'States with a verifiable link' is used throughout the entire Convention as will be demonstrated. This concept is much broader than the notion 'States or countries of origin' as was used in article 149 UNCLOS. It is much easier for a State to establish a verifiable link as defined by the UNESCO Convention than it would be to demonstrate that it is the State of origin. While there is often only one State of origin, the notion 'States with a verifiable link' allows for all States that feel a strong sense of identification with the UCH to come forward.[415] Specific mention is made of States with a cultural, historical or archaeological link to the UCH. As

[408] Article 7(3) UNESCO Convention.
[409] It must not be forgotten, that in article 303(1) UNCLOS, States are already obliged to cooperate in respect of UCH. As UNCLOS has been ratified by many more States compared to the UNESCO Convention, this provision can be of considerable significance.
[410] DROMGOOLE 2013, 162.
[411] Wet van 4 April 2014 betreffende bescherming van het cultureel erfgoed onder water, *BS* 18 April 2014, 33729.
[412] This legislation will be discussed in detail under chapter four.
[413] DROMGOOLE 2013, 162-163.
[414] Article 7(3) UNESCO Convention.
[415] DROMGOOLE 2013, 128.

was already discussed above in the section on the definition of UCH,[416] the word 'archaeological' does not give any added value in this context and therefore does not seem to have any real practical meaning. O'Keefe, furthermore, points out that the use of the terms 'cultural' and 'historical' merely emphasises a logical requirement as naturally a historical and cultural link are essential components to establish a verifiable link.[417] The wording of the provision seems to indicate that another type of verifiable link, besides a historical, cultural or archaeological link, could be established as article 7(3) not simply refers to 'a verifiable cultural, historical or archaeological link'.[418] It seems hard, however, to imagine a type of link that would not fall under one of these categories.

The Convention refers to States with a verifiable link in five different contexts.[419] It should be noted that depending on the rights attributed to the linked State,[420] the Convention will refer either to States in general, allowing them to establish a verifiable link, or will only refer to States Parties to the UNESCO Convention. Under article 7(3) the linked States will merely be informed of the 'discovery of identifiable State vessels and aircraft' with a view too cooperation. As no real rights are awarded to the linked States, the Convention refers to States in general, rather than to States Parties under this provision.[421] In other words, all States regardless of whether they are a party to the UNESCO Convention or nor, should be informed of the discovery of State craft in a coastal State's territorial sea or archipelagic waters.

## 4.5. The legal regime for underwater cultural heritage located beyond the sovereignty of States

### 4.5.1. Compatibility with UNCLOS

While States have the exclusive right to regulate and authorise all activities directed at UCH within their internal waters, archipelagic waters and territorial sea, the jurisdiction of States decreases beyond these maritime zones. With a number of exceptions, beyond their territorial waters, States

[416] See *supra* section 4.3.1.
[417] O'KEEFE 2002, 70.
[418] DROMGOOLE 2013, 128.
[419] The involvement of States with a verifiable link can be seen under five different provisions. In article 6(2) UNESCO Convention allowing States with a verifiable link to be invited to join agreements made for UCH; in article 7(3) UNESCO Convention dealing with UCH discovered in the territorial sea; in article 9(5) UNESCO Convention for UCH discovered in the EEZ or on the continental shelf; in article 11(4) UNESCO Convention for UCH discovered in the Area; and in article 18(3-4) UNESCO Convention dealing with the seizure and disposition of UCH. All these provisions are discussed throughout this chapter.
[420] The UNESCO Convention attributes very few enforceable rights to linked States. For example in article 7(3) UNESCO Convention, the linked State does not have the right to be informed but should be informed. Only in case of seizure in article 18 UNESCO Convention, linked States have the right to be notified. DROMGOOLE 2013, 129-130.
[421] DROMGOOLE 2013, 129-130.

only have jurisdiction over the vessels flying their flag and their own nationals. This results in it becoming increasingly difficult for coastal States to protect UCH sites as they lie further from the coast. The UNESCO Convention has therefore created an international cooperation mechanism for dealing with UCH located in the EEZ, continental shelf and the Area based on the sharing of information, consultations and cooperation between States Parties.[422]

Because of the fact that the UNESCO Convention regulates the protection of UCH beyond territorial State jurisdiction, concerns have risen with regard to the compatibility of the UNESCO Convention with UNCLOS. These concerns were mainly expressed by a number of maritime powers, including France, Germany, the Netherlands, Norway, Russia, the UK and the US. The main issue is the fear that the UNESCO Convention could jeopardise or alter the fine balance between the rights of coastal States and those of flag States as this was consolidated under UNCLOS.[423]

The UNESCO Convention makes several references to UNCLOS.[424] The preamble recognises the need to develop and codify rules for the protection and preservation of UCH in conformity with international law and practice, including UNCLOS.[425] In the objectives and general principles of the Convention it is provided that consistent with State practice and international law, including UNCLOS, the UNESCO Convention cannot be interpreted as modifying the rules on sovereign immunities or the rights that a State has with respect to its State craft.[426] Article 3 of the UNESCO Convention clearly provides that:

> "*Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea*. *This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.*"[427]

Article 311(3) UNCLOS as well seems to prevent the UNESCO Convention from altering the jurisdiction of coastal and flag States as set out under UNCLOS:

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[422] The contiguous zone should be considered as a part of the EEZ and the continental shelf, where a number of specific competences are given to the coastal State regarding UCH in article 8 UNESCO Convention.
[423] These concerns were, for example, expressed in the UK Statement of Vote, the Dutch Statement of Vote and the Norwegian Statement of Vote. DROMGOOLE 2013, 298. In what way these rights might be jeopardised will be explained below in the section addressing the EEZ and the continental shelf. See *infra* section 4.5.3.
[424] The legal basis for the adoption of the UNESCO Convention was considered to be article 303(4) UNCLOS.
[425] Preamble point 12 UNESCO Convention.
[426] Article 2(8) UNESCO Convention. Additionally, article 2(11) UNESCO Convention provides that the acts and activities taken under the UNESCO Convention cannot "*constitute grounds for claiming, contending or disputing any claim to national sovereignty or jurisdiction*." Article 2(11) UNESCO Convention.
[427] Article 3 UNESCO Convention.

> "*Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention […] provided that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention*."[428]

The creation of the maritime zones and the jurisdictional allocation within them as established under UNCLOS can without a doubt be considered as part of the basic principles set forth under UNCLOS and should not be affected by the UNESCO Convention.[429]

It would thus appear that in case of an incompatibility between UNCLOS and the UNESCO Convention, the former will prevail. However, in article 3 of the UNESCO Convention, as well as in all other references made by the UNESCO Convention to the compatibility with UNCLOS, a constructive ambiguity can be seen. This ambiguity lies in the use of the words "i*nternational law, including the United Nations Convention on the Law of the Sea".* This wording gives a certain amount of freedom to States Parties in interpreting the provisions of the UNESCO Convention as it seems to suggest that the provisions set out under UNCLOS are part of an "*ongoing and evolutionary process of development in international law*".[430] This suggests that over time the interpretation of UNCLOS can change following the development of State practice and that new rules of international customary law could emerge that displace the ones recorded in UNCLOS. Article 3 of the UNESCO Convention thus failed at reassuring States on the question of compliance between the UNESCO Convention and UNCLOS.[431]

### 4.5.2. Legal regime for underwater cultural heritage in the contiguous zone

The first zone located outside of coastal State sovereignty is the contiguous zone. As was the case under UNCLOS, the UNESCO Convention sets forth a special regime for the contiguous zone. Quite a complicated legal construction was created in doing so:

> "*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. In so doing, they shall require that the Rules be applied.*"[432]

[428] Article 311(3) UNCLOS.
[429] DROMGOOLE 2013, 279.
[430] DROMGOOLE 2013, 280.
[431] DROMGOOLE 2013, 280-281.
[432] Article 8 UNESCO Convention.

This provision firstly refers to the cooperative regime set out for the EEZ and the continental shelf in articles 9 and 10 by stating that article 8 will apply "*without prejudice to and in addition to articles 9 and 10*". This phrase causes some controversy as it could be interpreted as meaning that the coastal State in the circumstances determined in articles 9 and 10 needs to consult with other interested States before it can act with respect to UCH in its contiguous zone. During the negotiations on the UNESCO Convention Greece expressed its concerns on this provision in its statement of vote as it felt that this reference could be interpreted as diminishing the rights already given to coastal States in article 303(2) UNCLOS.[433] Article 8 was cited as one of the reasons why Greece abstained from voting on the Convention.[434] Strati feels that this reference should be "*interpreted as simply accommodating the "interests" of States parties with a cultural, historical or archaeological verifiable link to the underwater cultural heritage concerned and not affecting the otherwise applicable jurisdiction of the coastal State*".[435] Another option to explain the reference to articles 9 and 10 is that this was inserted in article 8 to clarify that these provisions remain applicable in the 12 nm of the contiguous zone in case the coastal State would be unwilling or unable to exercise the powers awarded to it in article 8 or in case the State has not declared a contiguous zone.[436] The UNESCO Convention encourages States to cooperate in order to better protect UCH, as is also provided for in article 10. It seems, however, that when cooperation is not possible, for example due to a lack of interested States or inaction from States, article 8 allows the coastal State to regulate and authorise activities directed at UCH in its contiguous zone.[437]

Another contentious aspect of article 8 UNESCO Convention is the reference to article 303(2) UNCLOS. As was explained above it is uncertain what type of rights this provision awards to coastal States.[438] Therefore, its inclusion in article 8 UNESCO Convention likewise causes some interpretative issues. Aznar identifies two possible interpretations that can be given to this reference. The first interpretation is that the scope of article 8 should be reduced in order to fit the interpretation given to article 303(2) UNCLOS. Boesten states that "*as reference was made to article 303, the article should be read as '[…] regulate and authorise "removal" activities*".[439] Likewise, Dromgoole provides that "*article 8 must be interpreted in a way that does not go beyond the authority provided by article 303(2)*".[440] Aznar feels that such an interpretation is inadequate as article 8 refers to 'activities directed at UCH'. The definition of 'activities directed at UCH' in

[433] See *supra* section 2.3.3.2.
[434] GARABELLO 2003, 138.
[435] STRATI 2006, 44.
[436] RAU 2002, 413.
[437] AZNAR-GOMEZ 2014, 9.
[438] See *supra* section 2.3.3.2.
[439] BOESTEN 2002, 161.
[440] DROMGOOLE 2013, 288.

article 1(6) UNESCO Convention is not limited to the removal of UCH, but includes all activities directed at UCH.

A second possible interpretation would be to interpret this reference in such a way that it gives a logical meaning to the term approval in article 303(2) UNCLOS. According to Aznar this entails that article 303(2) UNCLOS not only awards enforcement jurisdiction to States, but that the term 'approval' necessarily implies "*a legislative term of reference*".[441] The reference to article 303(2) UNCLOS in article 8 UNESCO Convention could be seen as another constructive ambiguity. Aznar concludes that article 8 clearly adds legislative jurisdiction to the enforcement jurisdiction that already existed following article 303(2). This might be considered as a form of 'creeping jurisdiction'.[442] However, States[443] did not seem to oppose to this at the time of adopting the Convention.[444] Concerns that States had with regard to creeping jurisdiction are related to the regime for the EEZ and the continental shelf as set out in articles 9 and 10 of the UNESCO Convention.[445]

[441] AZNAR-GOMEZ 2014, 7.

[442] AZNAR-GOMEZ 2014, 10-11.

[443] The exception was Turkey who did comment on this provision in light of a dispute with Greece concerning the maritime boundaries in the region where Greek islands lie near the Turkish coast. For the comment made by Turkey see GARABELLO 2003, 137.

[444] State practice in this field can be very diverse. An example where this diversity is taken into account is in the 1992 Valletta Convention of the Council of Europe, as will be discussed below. See *infra* section 6.3. The explanatory note to this Convention provides, with regard to the jurisdiction of States, that "*the actual area of State jurisdiction depends on the individual States and, in this respect, there are many possibilities. Territorially, the area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the exclusive economic zone or a cultural protection zone. Among the members of the Council of Europe some States restrict their jurisdiction over shipwrecks, for example, to the territorial sea, while others extend it to their continental shelf. The revised convention recognises these differences without indicating a preference for one or the other*." Council of Europe, Explanatory Report to the European Convention on the Protection of the Archaeological Heritage (Revised), Valletta, 16 January 1992, *CETS* No. 143. (Valletta Convention Explanatory Report)

[445] AZNAR 2014, 14-16. Aznar further assessed State practice with regard to the exercise of jurisdiction in their contiguous zone. He distinguishes between conventional practice and unilateral practice. As for the Conventional practice, Aznar concludes that from 1982 on when UNCLOS was adopted States have "*developed an evolving practice that has progressively enlarged the territorial scope of their domestic legislation protecting underwater cultural heritage through different conventional instruments: from a material protection based on a legal fiction in the LOSC, through a specialised geographical extension in the Valletta Convention and the Mediterranean and Caribbean Protocols, towards a more general and complete jurisdiction in the 2001 UNESCO Convention*." As for the unilateral practice, Aznar discusses a number of States that exercise jurisdiction over UCH in their contiguous zone in one way or another. For this analysis see AZANAR 2014, 11-30. Under chapter three and four of this dissertation the extent to which a number of States namely France, the Netherlands, the UK, Germany and Belgium, exercise jurisdiction over UCH in their contiguous zone will be assessed.

### 4.5.3. Legal regime for underwater cultural heritage in the EEZ and on the continental shelf

#### 4.5.3.1. Reporting and notification

One of the main objectives of the UNESCO Convention was to set out a regime for UCH discovered in the EEZ and on the continental shelf.[446] Under UNCLOS, it was very unclear whether and to what extent UCH located in these maritime zones was protected. There was thus a need for a clear regime for UCH protection in these zones, which has been provided by articles 9 and 10 UNESCO Convention. The length and complexity of these provisions testify to the difficulty that was faced when creating this regime.[447] Article 9 deals with the reporting and notification of UCH, while article 10 sets out the rules for consultation between States and the protection of UCH.

Article 9 UNESCO Convention gives States the responsibility to protect UCH located in the EEZ and on the continental shelf in conformity with the Convention.[448] The last part of this phrase 'in conformity with the Convention' indicates that States must respect the Rules of the Annex, as well as the general principles of the Convention when implementing this provision. States Parties must protect UCH located both in their own EEZ or on their own continental shelf as well as UCH located in the EEZ or on the continental shelf of a third State Party.[449]

States Parties shall require their nationals[450] and the masters of vessels flying their flag to report to them the discovery of UCH or the intent to direct activities at UCH located within their EEZ or on their continental shelf.[451] This provision does not cause any issues. Much more problematic is the situation where a national or a flagged vessel of one State discovers UCH or intends to engage in an activity directed at UCH in the EEZ or on the continental shelf of another State. In this situation there is no direct link of nationality or flag between the coastal State and the individual or vessel concerned. This issue was cause for a lot of discussion during the negotiations on the

[446] Garabello describes articles 9 and 10 as the key provisions of the UNESCO Convention. GARABELLO 2003, 141.
[447] DROMGOOLE 2013, 289.
[448] Article 9(1) UNESCO Convention.
[449] Article 9(1) UNESCO Convention.
[450] During the plenary session of the fourth session of the Meeting of Experts agreement it was agreed that the term '*national*' is to be interpreted as the leader of the expedition or any other operation. O'KEEFE 2002, 84.
[451] Article 9(1)(a) UNESCO Convention. The UNESCO Convention provides an exception to the reporting duty for "*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*". Article 13 UNESCO Convention. These vessels must not report discoveries of UCH under articles 9, 10, 11 and 12 UNESCO Convention. States Parties should, however, adopt appropriate measures to ensure that they do comply with articles 9-12 UNESCO Convention in as far as is "*reasonable and practicable*". Article 13 UNESCO Convention. The underlying reason for this provision is that imposing a duty to report on these government ships could result in them being forced to reveal details on the operation the ship was conducting at that time which the flag State might prefer to keep a secret. O'KEEFE 2002, 101.

UNESCO Convention. In the original ILA draft on which the Convention was based, the possibility was created for States to establish a "cultural heritage zone" coextensive with their continental shelves.[452] In this zone States Parties would have jurisdiction over activities affecting UCH.[453] During the 1996 Meeting of Experts, however, a number of States including Germany, Greece, Italy, the Netherlands and the UK opposed to the establishment of a new maritime zone. As the negotiations progressed, several proposals were made in order to establish to what extent the coastal State should be awarded jurisdiction over UCH located on its continental shelf. A group of States, including Argentina, Canada, Greece, Italy, Tunisia and Egypt, argued that the particular role of the coastal State needed to be recognised as it is in the best position to ensure that UCH on its continental shelf is protected. Even though they recognised the fear of creeping jurisdiction, these States insisted that the 'critical role' of the coastal State needed to be reflected in the text of the Convention. Other States, including the US, the UK, Norway and Germany, opposed to this view as they felt that any new competences given to the coastal State that were not recognised under UNCLOS would amount to creeping jurisdiction which was felt to be unacceptable.[454] This discussion was finally reduced to the core question of whether coastal States should be given the competence to impose a reporting duty on foreign nationals and vessels with regard to UCH located in their EEZ or on their continental shelf. The final version of the provision dealing with this issue, article 9(1)(b), was drafted in such a way that it can be interpreted in several ways accommodating the opposite views expressed during the negotiations. This provision can therefore be considered as a constructive ambiguity. At the end of the negotiations, amendments were proposed clarifying this ambiguity. This was, however, rejected by the majority of States that wished to see the possibility of alternative interpretations to be left open.[455]

Article 9(1)(b) provides two alternative options, which, as was stated, are both susceptible to different interpretations.[456] Article 9(b) reads as follows:

*"(b) 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.*

[452] This was based on the fact that a number of States were already exercising jurisdiction over UCH on their continental shelf. This included Australia, China, Ireland, Morocco, Spain, Jamaica, Cape Verde, Iran, Malaysia, Portugal and Bangladesh. GARABELLO 2003, 141.

[453] Article 5§1 ILA Draft.

[454] They feared that this could infringe upon the freedom of navigation as established under UNCLOS. GARABELLO 2003, 144. For a more elaborate overview of the negotiating history on this provision see GARABELLO 2003, 140-145.

[455] O'KEEFE 2002, 83; GARABELLO 2003, 145; DROMGOOLE 2013, 300.

[456] Upon deposing the instrument of ratification, acceptance, approval or accession, States Parties need to declare which option they prefer for the transmission of reports. Article 9(2) UNESCO Convention.

*(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."* [457]

The first option can be interpreted in two different manners. The first interpretation of paragraph (i) is that States Parties must require their nationals or the master of their flagged vessels to report the discovery of UCH or the intention to undertake an activity directed at UCH to them and to the coastal State. This interpretation seems to be the one that is most in conformity with State jurisdiction set out under UNCLOS as it does not afford any substantial new rights to the coastal State. The coastal State is merely the recipient of the report and is not given the competence to require such a report from the national or vessel in question. In other words, the notion '*States Parties*' has been interpreted as only referring to the flag State of the vessel or the State of nationality. In a second interpretation of paragraph (i) the notion '*States Parties*' is interpreted in a broader sense including as well the coastal State in whose EEZ or on whose continental shelf the UCH is located. Under this interpretation both the flag State or State of nationality as well as the coastal State are given the right to impose a reporting duty. By allowing the coastal State to directly require reporting from foreign flagged vessels and foreign nationals, a new jurisdictional competence is given to the coastal State that it did not have under UNCLOS. The coastal State is namely given (limited) jurisdiction over UCH located in its EEZ or on its continental shelf, where under UNCLOS the coastal State has no jurisdiction in this field. Similarly, the alternative under paragraph (ii) of article 9(1(b) UNESCO is ambiguous as well. On the one hand this paragraph can be interpreted as allowing States Parties to impose a reporting duty on their own nationals and flagged vessels, while on the other hand the notion '*State Party*' can be read as to include the coastal State as well, once again giving it the right to directly require reporting and thus giving the coastal State an additional jurisdictional competence.[458]

While many States oppose to the idea of granting additional competences to coastal States, a number of benefits of such an approach can be cited. When UCH is located in the EEZ or on the continental shelf of a State that is located far away from the flag State or State of nationality, this makes it extremely difficult for that State to exercise control over and enforce such an obligation to report. The coastal State is best placed to exercise control over activities taking place in its EEZ and on its continental shelf. A second issue that could be avoided by allowing the coastal State to demand that reporting is done to it, is that of the flags of convenience. As in article 9 UNESCO Convention a lot of responsibility is placed with the flag State, which in practice might be flags of

[457] Article 9(1)(b) UNESCO Convention.
[458] DROMGOOLE 2013, 299-300.

convenience that are unlikely to ever ratify the UNESCO Convention, this can potentially undermine the entire system created under this Convention.[459]

States Parties will need to notify the Director-General of UNESCO of any reports done to it concerning the discovery of UCH or the intention to direct activities at it following article 9(1) who in his turn will make this information available to all States Parties.[460] When the coastal State in whose EEZ or on whose continental shelf the UCH is located is not a party to the UNESCO Convention, this can have the strange effect that it will not be informed of discoveries or activities taking place in its own EEZ or on its own continental shelf while all States Parties to the UNESCO Convention are informed of this. In light of practical cooperation, it might have been better to provide that the coastal State is informed of this regardless of whether this State is a party to the Convention or not. Similarly, as will be seen below, it is possible that in article 10 UNESCO Convention States Parties decide on the fate of UCH located on the continental shelf or in the EEZ of a coastal State not party to the Convention without consulting it.[461] This is of course a very strange situation, which should be avoided.

In order for the reporting duty mentioned above to properly function, an effective communication system from the ship to the flag State or State of nationality is required. Furthermore, upon ratification, States Parties will have to put in place an effective reporting system and ensure that their nationals and the ships flying their flag are aware that such a duty exists. This will require wide publication. Additionally, States Parties will have to specify which information is to be reported. This information, once it has been shared, should allow other States to make informed decisions in order to exercise the rights given to them by the UNESCO Convention.[462]

The regime as set out in articles 9 and 10 completely depends on the willingness of the finder to declare its find. When the finder does not comply with this duty, the system will not function. While realising the importance of the role of the finder and the difficulty of exercising control over compliance with this provision, however, no provisions are included in the Convention to give the finder a reward upon fulfilling his reporting duty. Giving a(n) (financial) incentive to finders in order to provide for the best possible functioning of the system, should perhaps be considered at the national level.[463]

[459] O'KEEFE 2002, 83-85.
[460] Article 9(3-4) UNESCO Convention.
[461] See *infra* section 4.5.3.2.
[462] O'KEEFE 2002, 83-85.
[463] BOESTEN 2002, 167. See chapter three and four for more on such a reward.

Finally, article 9 provides the possibility for any State Party to declare to the coastal State Party to the Convention that it has an interest in being consulted on how to protect UCH. This declaration shall be based on the verifiable link that this State has with the UCH.[464] It should be noted that a verifiable link can only arise once the necessary research has been conducted in order to determine the nature, and in case of wrecks, the identity of the UCH.[465]
Contrary to what was the case in article 7(3) of the UNESCO Convention, article 9(5) only allows States Parties to be linked States. The reason for this is that the linked State will not only be consulted on the future of UCH, but will participate in the consultation regime set out by the UNESCO Convention. It would be inappropriate to allow a non-States Parties to participate.[466]

#### 4.5.3.2. Protection regime for underwater cultural heritage in the EEZ and on the continental shelf

Article 10 UNESCO Convention was negotiated together with article 9 as a package and deals with the protection of UCH in the EEZ and on the continental shelf.[467] Article 10(2) provides the possibility for coastal States to prohibit or authorise activities directed at UCH located in these zones that interfere with their sovereign rights or jurisdiction as provided under international law, including UNCLOS.[468] This provision allows coastal States to indirectly protect UCH located in their EEZ or on their continental shelf. The fear of creeping jurisdiction does not come into play here as the coastal State merely protects the sovereign rights already given to it under international law, including UNCLOS. These sovereign rights include the right to exploit the resources in the EEZ and on the continental shelf and gives a coastal State jurisdiction with regard to installations and structures, marine scientific research and the preservation of the marine environment in its EEZ.[469] Article 10(2) can prove to be a powerful provision for coastal States to unilaterally protect UCH.[470] As the UNESCO Convention applies to objects that have been submerged for over 100 years, it is possible that these have become part of the marine environment and therefore any activity that interferes with such UCH is likely to have an impact on natural resources as well. When a coastal State becomes aware of any possible interference following the notification procedure of article 9

[464] This provision seems to be strangely placed, as it is not a part of the reporting duty, but rather forms part of the protection regime as set out in article 10. O'KEEFE 2002, 86.
[465] O'KEEFE 2002, 86.
[466] DROMGOOLE 2013, 130.
[467] GARABELLO 2013, 147.
[468] Article 10(2) UNESCO Convention.
[469] Article 56 and 77 UNCLOS. See *supra* section 2.2.
[470] According to O'Keefe it is highly unlikely that other States would challenge the exercise of this power by a coastal State on the ground that the activity in question does not interfere with the sovereign rights or jurisdiction of that State. Not only would the facts need to be proven, but "*something approaching misconduct on the part of the coastal State*" would need to be demonstrated. O'KEEFE 2002, 90.

UNESCO Convention or through any other channel, this would give that State ground to act on the basis of article 10(2).[471]
Concerns have, nevertheless, been expressed on this provision. The first once again relates to the use of the wording 'international law, including UNCLOS' which gives the impression that there are multiple sources of international law from which States could derive jurisdiction or sovereign rights in their EEZ or on their continental shelf. The second concern lies in the fact that article 10(2) allows coastal States to act in order to "*prevent interference*" with their sovereign rights or jurisdiction. The words 'prevent interference' suggest that coastal States can control both activities that may interfere with as well as activities that actually interfere with their sovereign rights and jurisdiction. It seems that in order to be in full compliance with UNCLOS, coastal States can only act when there actually is interference with their sovereign rights. The words 'prevent interference' can thus potentially allow for a(n) (limited) extension of coastal State jurisdiction. This issue was debated during the negotiations on the UNESCO Convention where the Netherlands and the US refused to accept the words 'prevent interference'.[472]

Where States cannot or do not wish to apply article 10(2) UNESCO Convention, paragraphs 3 to 6 of article 10 provide for an alternative solution to protect UCH. These provisions are based on a system of consultations between the coastal State and all States Parties that have declared to have an interest in the concerned UCH. The coastal State shall, upon learning about a discovery of or the intention to direct an activity at UCH located in its EEZ or on its continental shelf, consult on how the UCH should be best protected with all States Parties that have declared to have an interest under article 9(5). The coastal State is given the task of coordinating these consultations as the Coordinating State.[473] The Coordinating State is responsible for implementing the protective measures that were agreed on by the consulting States, for issuing all authorisations necessary for the execution of these measures in conformity with the Rules of the Annex and for conducting the necessary preliminary research on the UCH. The Coordinating State shall promptly inform the Director-General of UNESCO of the results of the preliminary research, who in his turn will make this information available to all States Parties.[474] When executing its tasks, the Coordinating State shall act on behalf of all States Parties as a whole rather than in its own interest.[475] Additionally, it

[471] DROMGOOLE 2013, 291.
[472] GARABELLO 2013, 148; DROMGOOLE 2013, 301.
[473] Article 10(3) UNESCO Convention. When the coastal State expressly declares that it does not wish to assume the role of Coordinating State, the States Parties that have declared an interest shall appoint another Coordinating State. Article 9(3)(b) UNESCO Convention. There can be a number of reasons why a coastal State would prefer not to take up the role of Coordinating State, including that it does not wish to spend funds or deploy personnel for this purpose especially when it has little or even no connection to the UCH. O'KEEFE 2002, 91. The UNESCO Convention does not explicitly state that this newly appointed Coordinating State should be a State Party. Nevertheless, it seems to be likely that this will be one of the States Parties that declared an interest in the UCH. DROMGOOLE 2013, 291.
[474] Article 10(5) UNESCO Convention.
[475] Article 10(6) UNESCO Convention.

is emphasised that any action of the Coordinating State will 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."*[476] This paragraph was introduced to reassure States that the special position of the Coordinating State would not give rise to creeping jurisdiction or violations of international law.[477]

As was said, the Coordinating State has to implement "*all measures of protection which have been agreed"* by the consulting States. When considering the wording of this provision the impression is given that States would have to come to an unanimous consent during the consultations. Requiring unanimity could, however, cause problems, especially when a large number of States are involved in the consultations.[478] No further clarification is given by the Convention with regard to the decision-making method that should be used during the consultations.[479] In any case, when no agreement is reached on the measures that need to be taken for the protection of UCH, the peaceful dispute settlement mechanisms included in article 25 of the UNESCO Convention could potentially offer a solution.[480]

One of main flaws in the consultation system is that it departs from the assumption that UCH has been identified allowing States to express their interest in being consulted on its fate. However, in case of for example the discovery of a shipwreck, it can take months or even years before the identity of the wreck has been determined, sometimes requiring the use of invasive research techniques. Protective measures are likely to be necessary during this initial period as well. Therefore, in practice, it will often be the coastal State or perhaps the coastal State and the flag State of the reporting vessel or national make the decisions during the crucial early stages. This does not mean that no consultation will take place, but it is possible that it will take months or even years before consultation with all the interested States becomes possible.[481]

Another issue relating to this mechanism is that it does not include any reference to who should bear the financial responsibility for the management of a site. It would appear that this is a shared burden between at least the coastal State, flag State and any other State that has declared an interest and was thus involved in the consultations. However, as UCH must be protected for the

[476] Article 9(6) UNESCO Convention.
[477] GARABELLO 2003, 150.
[478] BOESTEN 2002, 167.
[479] O'Keefe states that the coastal State cannot ignore the results of the consultation in case it does not agree with them. O'KEEFE 2002, 91. This suggests that no unanimity would be required.
[480] In first instance, attempt should be made to resolve any disputes concerning the interpretation or application of the UNESCO Convention through negotiations or any other peaceful means of settlement as agreed on. The Convention offers a number of possibilities including mediation or the use of any of the means for settling issues under Part XV of UNCLOS. Article 25 UNESCO Convention.
[481] DROMGOOLE 2013,304.

benefit of humanity, argument can be made in favor of requiring all States Parties to contribute. The Convention remains silent on this issue. In the operational guidelines on the Convention, however, some light is shed on this question. The guidelines provide that when the Coordinating State implements protective measures, issues authorisations or conducts preliminary research as was agreed on during consultations as provided in article 10 and 12 of the Convention, it are the consulting States that need to finance this commonly.[482] In deciding on how to divide this financial burden consideration must be taken of the capacity of the States that took part in the consultations, the strength of the verifiable link that these States have with the UCH, their interest in its protection and its location. In any case, except when the heritage is in immediate danger, the decision to implement measures should not be taken unless sufficient funding can be ensured.[483] Boesten provides a similar point of view. She feels that the statement of interest in the UCH should be linked to the acceptance sharing in the costs. She suggests that a system should be put in place whereby States that declare an interest and are willing to contribute financially to the management of the UCH at question, are awarded preferential rights over States that declare an interest without willing to contribute financially. While it is true that a need exists for a clear division of the financial burden for UCH management, caution must be taken not to discriminate developing States resulting in them not ratifying the Convention or not declaring an interest because they cannot bear the financial burden. A Fund that is based on contributions of States could potentially offer a better solution.[484] In the Meeting of States Parties this issue was recognised and a fund was created that can offer financial support to States Parties in the execution of the UNESCO Convention. This fund will be discussed further in detail below.[485]

In order for States to fully implement this system of consultation and cooperation worldwide, they will need the capacity to analyze all incoming information, to disseminate all their findings on UCH, to inform other States Parties of their interests in UCH and to fulfill the role of Coordinating State when necessary. Executing all these tasks requires a good functioning national bureau that has sufficient means, expertise and personnel available.[486]

In the UNESCO Convention it is recognised that in case of immediate danger, it is not always possible for the Coordinating State, flag State and all other interested States to come together and consult in time to prevent damage to the UCH. Therefore, article 10(4) UNESCO Convention

[482] This approach once again does not take into account the situation where it might take months or even years to identify a wreck site, leaving it up to the coastal State (and potentially the flag State or State of nationality of the one that reported the UCH) to finance all initial protective and research measures necessary for the identification of the UCH.
[483] UNESCO Operational Guidelines, 13-14.
[484] BOESTEN 2002, 179.
[485] See *infra* section 4.11.2. on the Meeting of States Parties.
[486] BOESTEN 2002, 168.

determines that in case UCH is under immediate danger arising from human activities or any other cause, which includes looting, the Coordinating State may take all practicable measures and issue all necessary authorisations to prevent this danger, if necessary prior to consultations.[487] A problem would arise when the coastal State does not wish to take on the role of Coordinating State. In this case, it might take some time before it becomes clear which State can be appointed as Coordinating State as this requires consultation between the States Parties that have declared an interest.[488] This process might take too long in order to react against the immediate danger.
Article 10(4) proved to be controversial during the negotiations.[489] One of the main issues with this provision was that it does not specify which measures the coastal State acting as Coordinating State is allowed to take. This seems to entail that this is left entirely to the discretion of this coastal State. Therefore, depending on the interpretation of this paragraph, it could be considered as an expansion of coastal State jurisdiction.[490] In any case the measures taken and authorisations issued must be in accordance with international law, including UNCLOS, and in conformity with the UNESCO Convention,[491] which includes the Rules of the Annex.[492] Other issues with this provision include the fact that such measures can be taken prior to consultations which undermines the idea of having a Coordinating State that implements the agreed measures. The fact that this provision seems to allow the Coordinating State to take measures directed at all types of human activities, including activities incidentally affecting UCH while it was agreed early during the negotiations that the Convention would generally be limited to activities directed at UCH, is considered to be problematic as well.[493]

Finally, a separate provision was included in article 10 UNESCO Convention dealing with State vessel and aircraft. Article 10(7) provides that

> "*subject to the provisions of paragraphs 2 and 4 of this Article, no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State and the collaboration of the Coordinating State.*"[494]

[487] Article 10(4) UNESCO Convention.
[488] O'KEEFE 2002, 92.
[489] During the negotiations, Italy had proposed to include a provision dealing with provisional measures. Other States criticised this by arguing that provisional measures had the tendency of becoming permanent measures, that provisional measures would give rise to disputes between States and that provisional measures could be considered as a form of creeping jurisdiction. In the end the notion "*provisional measures*" was altered by the expression "*practicable measures*" as it was felt by Japan that it was better to use a more neutral word in order to hide the enforcement powers given to the coastal State under this provision. GARABELLO 2003, 149-150.
[490] DROMGOOLE 2013, 301.
[491] Article 9(4) UNESCO Convention.
[492] Article 33 UNESCO Convention provides that, unless provided otherwise, a reference to the Convention includes a reference to the Rules.
[493] DROMGOOLE 2013, 300.
[494] Article 10(7) UNESCO Convention.

This provision does not require that the flag State should be a State Party to the Convention.[495] The extent to which this provision is in conformity with the positions expressed by flag States during the negotiations depends on the interpretation of paragraphs 2 and 4 to which it refers as both these paragraphs can be interpreted as allowing an extension of coastal State jurisdiction. Furthermore, such a potential extension of coastal State jurisdiction is hidden in paragraph 7 as well. This paragraph provides that no activity directed at State craft can be conducted without the collaboration of the Coordinating State, which is likely to be the coastal State. This gives the impression that the coastal State, acting as Coordinating State, has the jurisdiction to prevent flag States from deciding on the fate of their State craft located in the EEZ or on the continental shelf. As under UNCLOS coastal States have not been awarded jurisdiction over UCH in their EEZ or on their continental shelf this provision can be regarded as an extension of coastal State jurisdiction.[496]

Very recently, in the beginning of 2018, we had the first example of a site protected by the UNESCO Convention located outside territorial waters. Italy notified UNESCO of the discovery of a number of UCH sites located on the Skerki Banks. These banks are located on the continental shelf of Tunesia and are in fact of importance both from a heritage as well as a biodiversity point of view. The Skerki banks contain a number of wreck sites ranging from ancient shipwrecks that are over 2.000 years old to more modern shipwrecks originating from the World Wars.[497] Some of these wrecks are up to 30 meters in length. Furthermore, bronze and lead artefacts as well as amphora have been discovered on the banks. Today, the UCH located on these banks is highly threatened by uncontrolled fishing activities, non-regulated passage of tankers and industrial works. During the ninth meeting of the Scientific and Technical Advisory Body, it was recognised that this reporting done by Italy was very important as it represents a first opportunity to protect UCH outside territorial waters. Furthermore, it was felt that this could be "*an excellent model case for international cooperation in areas of this nature*".[498] During this meeting it was stated that the heritage discovered on the Skerki banks would from then on be protected by all States Parties to the UNESCO Convention. These States need to work together to ensure that all activities impacting this area, ranging from dredging activities over investigation to trawling, are conducted with

[495] O'KEEFE 2002, 94.
[496] DROMGOOLE 2013, 158.
[497] These banks in fact lie in an intensively used maritime route, which has been used since antiquity and was the site of a famous sea battle during WWII. UNESCO, First Cultural Heritage Site to be Protected in International Waters, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/first_cultural_heritage_site_to_be_protected_in_internationa/ (consulted 8 August 2018).
[498] Scientific and Technical Advisory Body, Ninth Meeting, Paris, 24 April 2018, UCH/18/9.STAB/11. (STAB 24 April 2018)

respect for the archaeological sites.[499] It was provided that a Coordinating State will be appointed responsible for authorising activities and which may, for example, ensure that a Heritage Impact Assessment is undertaken for activities on site.[500] During this ninth meeting, the Tunesian delegation already expressed Tunesia's strong interest in the protection of the Skerki Banks and its strong support for international cooperation with Italy. Mr. L'Hour also informed the Secretariat of the fact that France will express an interest in the cooperation as well. The Scientific and Technical Advisory Body "*recommended to the Meeting of States Parties to encourage States Parties to express their interest in the protection of the Skerki Banks, as notified by Italy and following the example of Tunisia, and to actively participate in all efforts to protect this site.*"[501] This will be a very interesting case to follow in order to see how the cooperation and consultation mechanism described in the UNESCO Convention for the protection of UCH in the EEZ or on the continental shelf will work in practice.

### 4.5.4. The legal regime for the protection of underwater cultural heritage in the Area

The UNESCO Convention determines that States Parties have the responsibility to protect UCH in the Area and must do so in conformity with the provisions of the UNESCO Convention as well as with article 149 UNCLOS.[502] In article 149 UNCLOS, the reference to the 'preservation' or 'disposal' of objects of an archaeological and historical nature gives the impression that the object should be found and potentially even recovered before this provision takes effect. Such an approach does not comply with modern day archaeological principles as stipulated in the Annex to the UNESCO Convention. Article 11(1) UNESCO Convention must be applied in conformity with the UNESCO Convention at large, entailing that preservation *in situ* should be considered as the first option.[503] Since article 149 UNCLOS remains silent on who is responsible for the implementation of the protective objective that it enshrines as well as on how this should be achieved practically, the UNESCO Convention seeks to answer these questions.[504] Hereto, a similar system of reporting and

[499] It is interesting to note that while the UNESCO Convention leaves the regulation of activities incidentally affecting UCH mainly to the individual States, here explicit mention is made of the importance of ensuring that such activities do not further damage the UCH located on the Skerki Banks.
[500] The idea of conducting a "Heritage Impact Assessment" is not mentioned in the UNESCO Convention as this relates to activities incidentally affecting UCH. It will be interesting to see how States cooperate in this regard as the UNESCO Convention does not offer any guidelines on these types of activities.
[501] STAB 24 April 2018.
[502] Article 11(1) UNESCO Convention; UNESCO, First Cultural Heritage Site to be Protected in International Waters, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/dynamic-content-single-view/news/first_cultural_heritage_site_to_be_protected_in_internationa/ (consulted 8 August 2018).
[503] DROMGOOLE 2013, 295.
[504] DROMGOOLE 2013,294.

cooperation as was created in article 9-10 UNESCO Convention for the EEZ and the continental shelf has been established for the Area.[505]

States Parties must oblige their nationals and the vessels flying their flag to report discoveries and the intention to engage in activities directed at UCH located in the Area.[506] This provision caused a lot less controversy than its counterpart for the EEZ and the continental shelf. In the Area, only flag State jurisdiction and jurisdiction of the State of nationality come into play. Reporting should thus be done to the flag State or the State of nationality of the leader of the expedition or other activity. As no coastal State jurisdiction exists within the Area, the fear for creeping jurisdiction was not an issue here. Other issues, that played a role in articles 9 and 10 UNESCO Convention, do, however, present themselves again with regard to this mechanism for the Area. These include, *inter alia*, the problem of flags of convenience that can undermine the reporting system and the challenge for States Parties to facilitate this reporting duty administratively.[507] The difficulty that the distance of the UCH from the State of nationality or flag State can pose in terms of control and enforcement is likely to manifest itself within the Area as well.

Upon receiving a report, States Parties shall notify the Director-General of UNESCO as well as the Secretary-General of the ISA.[508] The former will promptly make the received information available to all States Parties.[509] Based on a verifiable link with the UCH, States Parties can declare to the Director-General of UNESCO that they wish to be consulted on its protection.[510]

The cooperation mechanism established for the Area is *quasi* identical to that stipulated for the EEZ and the continental shelf in article 10. A number of practical differences were however, necessary. The Director-General of UNESCO will be the one to invite all States that have declared an interest in order to consult on the protection of UCH and to appoint a Coordinating State.[511] Unlike for the EEZ and continental shelf in the Area there is no coastal State that is best placed to assume the role of Coordinating State. It is likely that this task will be taken up by either the State to which the reporting was done or one of the States that declared an interest, even though the

[505] Article 1(5) UNESCO Convention defines the Area as "*the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.*"
[506] Article 11(1) UNESCO Convention. The exception to this obligation that was created for sovereign immune government ships as provided in article 13 of the UNESCO Convention applies in the Area as well.
[507] O'KEEFE 2002, 96.
[508] Article 11(2) UNESCO Convention.
[509] Article 11(3) UNESCO Convention.
[510] Article 11(4) UNESCO Convention. As was the case for the EEZ and the continental shelf, only States Parties can declare such an interest as they will be involved in the management scheme of the Convention. No rights are given to non-States Parties.
[511] Article 12(2) UNESCO Convention. It should be noted that this system places a heavy burden on the Director-General of UNESCO. This will require a well-organised system within UNESCO. BOESTEN 2002, 171.

Convention does not exclude other States Parties from assuming this role.[512] The Secretary-General of the ISA[513] will be invited to participate in the consultations.[514] The purpose of this is not to give the ISA the responsibility to regulate UCH protection in the Area, but merely to ensure that ISA is notified of and involved in these consultations.[515] The presence of the ISA could be very useful as deep seabed mining is an activity that can potentially be very destructive for UCH and the ISA will know the locations where seabed operators are conducting their works as well as their nationality.[516] The ISA can be very helpful in the protection of UCH located in the Area. When implementing the regulatory framework for mineral exploration and exploitation as set out under part XI UNCLOS the ISA ensures that contractors take UCH into consideration when conducting their work.[517]

The Coordinating State has the task of implementing the agreed measures and issuing all authorisations necessary thereto in conformity with the Convention.[518] It may also conduct the necessary preliminary research and must inform the Director-General of UNESCO of the results who will communicate these to all other States Parties.[519] When fulfilling its tasks the Coordinating State will act for the benefit of humanity as a whole[520] taking particular account of the preferential rights of "*States of cultural, historical or archaeological origin*".[521] This provision reflects the content of article 149 UNCLOS, which referred to '*the benefit of mankind as a whole*' and takes particular account of a State's '*preferential rights*' as well. The fact that regard shall be paid to these preferential rights can prove to be of importance when the State of origin is not a party to the UNESCO Convention. Even though this State will not have the right to be involved in the consultation procedure and decide on the protection of the UCH, its interests will nevertheless be taken into account. Article 149 UNCLOS seemed to suggest that some sort of priority needed to be given to the rights of (the) State(s) of origin while nothing in article 11 or 12 UNESCO Convention

[512] DROMGOOLE 2013, 295.
[513] As was explained *supra* in section 2.3.2. , the ISA has the task of regulating activities regarding the exploration and exploitation of mineral resources in the Area. No direct role was given to the ISA under UNCLOS in relation to UCH.
[514] Article 12(2) UNESCO Convention.
[515] DROMGOOLE 2013, 297.
[516] O'KEEFE 2002, 98.
[517] At the moment, no commercial exploitation of mineral resources in the seabed takes place, however, a number of licenses have already been issued and a Mining Code has been developed by the ISA. (for this Mining Code see www.isa.org.jm/mining-code) As was mentioned above, the ISA has already adopted Regulations dealing with three types of mineral resources that address the issue of UCH.
[518] Article 12(4) UNESCO Convention.
[519] Article 12(5) UNESCO Convention.
[520] How humanity is supposed to benefit from the scheme set out by these provisions is left to the Coordinating State and other interested States to determine. To what extent and in what way non-States Parties should be considered, which are part of humanity, is not clarified by these provisions. State practice will have to resolve this issue. BOESTEN 2002, 171.
[521] Article 12(6) UNESCO Convention.

suggests that the same level of priority should be afforded under this provision. This can, however, create a conflict when the State of origin wishes to see certain actions taken that are not in conformity with the principles of the UNESCO Convention, for example the commercial exploitation of the site.[522]

When UCH located in the Area is threatened by immediate danger arising from human activities or any other cause, all States Parties may take all practicable measures that are in conformity with the UNESCO Convention to prevent this. The Convention allows all States Parties to take such measures entailing that this is not limited to the Coordinating State or States Parties with a verifiable link. When necessary these measures can be taken prior to any consultations.[523] Contrary to article 10(4), article 12(3) does not explicitly provide that these measures must be taken in conformity with international law. Nevertheless, considering that these measures must be taken in conformity with the UNESCO Convention of which article 3 as an overarching principle provides that "*Nothing in Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea*"[524], it is clear that international law must be respected when taking measures. According to Dromgoole, this entails that the measures that can be taken are essentially those specified in articles 14-16 UNESCO Convention which will be discussed in the next section.[525]

Finally, article 12 provides for a specific regime for dealing with State vessels and aircraft. This provision is rather straightforward and provides that the consent of the flag State is required before any State Party can undertake or authorise activities directed at State craft.[526] It is not required that the flag State is a State Party. Overall, articles 11 and 12 did not create any fundamental problems during the negotiations.[527]

### 4.6. Control of entry into the territory, dealing and possession of illicitly exported or recovered UCH

States Parties are required to take measures preventing "*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.*"[528] It appears that this provision applies in three cases:

[522] DROMGOOLE 2013, 297.
[523] Article 12(3) UNESCO Convention.
[524] Article 3 UNESCO Convention.
[525] DROMGOOLE 2013, 296.
[526] Article 12(7) UNESCO Convention.
[527] GARABELLO 2003, 155.
[528] Article 14 UNESCO Convention. The UNESCO Convention does not define the term 'illicit' export. The same term is, however, used in article 3 of the 1970 UNESCO Convention. Under this provision it was determined that it could

1. When UCH has been recovered contrary to the UNESCO Convention and then illicitly exported; 2. When UCH was recovered contrary to the UNESCO Convention and 3. When UCH was illicitly exported.[529] This provision does not explicitly require States to take 'all measures' or 'all necessary measures', leaving it up to States Parties to determine which measures they consider best to prevent the entry of, dealing in or possession of such heritage. It should be noted that States need to take into account the obligations that they already have in the 1970 UNESCO Convention[530] and in the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.[531] Measures that States already have in place in order to fulfil their commitments under these Conventions will aid with the compliance with article 14 of the UNESCO Convention.[532] The implementation of such measures and the public debate that accompanied it led to buyers and sellers of antiquities becoming more and more conscious of the importance of having sufficient information on the origin of all objects. Operators in the market are reluctant to trade in so called 'tainted objects' of which the origin is unclear leading to the suspicion that they are stolen or looted.[533]

The UNESCO Convention does not require that its States Parties create legislation making it illegal to export UCH not recovered in conformity with the Convention or that they create a permit system for the export of UCH. Article 14 UNESCO Convention merely deals with the situation in which heritage has already been illicitly exported or recovered contrary to the Convention. Fortunately, most States already have legislation on the export of cultural heritage in place under which a permit is required for exporting heritage or under which the export of certain types of cultural heritage is prohibited. In order to allow article 14 UNESCO Convention to reach its full effect, it is important that States Parties ensure that their national legislation applies to UCH as well.[534] By requiring a permit for the export of UCH, which can be linked to whether it was recovered in conformity with the Convention and the Rules of the Annex, or by prohibiting the export of UCH, this sort of export can potentially become illicit allowing for article 14 to apply.

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be interpreted as meaning 'contrary to law'. This meaning would be appropriate in the context of article 14 UNESCO Convention as well. O'KEEFE 2002, 104.

[529] Article 14 does not require that the UCH is illicitly exported from the territory of a State Party, but rather applies to illicit export from all States regardless of whether they are a party to the UNESCO Convention. DROMGOOLE 2013, 335.

[530] 131 States are party to this Convention, including Belgium, France, Germany, the Netherlands and the UK. UNESCO Convention 1970, List States Parties, www.unesco.org/eri/la/convention.asp?KO=13039&language=E&order=alpha

[531] The UNIDROIT Rome *Convention on Stolen or Illegally Exported Cultural Objects of 24 June 1995,* 34 *ILM* 1322*.* (UNIDROIT 1995) 44 States are party to this Convention. Of all the States bordering the North Sea, only Denmark ratified the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995. The Netherlands and France have signed the Convention but have not yet ratified it. UNIDROIT 1995, *Status of the Convention*, www.unidroit.org/status-cp (last update 21 June 2018). O'KEEFE 2002, 103.

[532] The implementation of the UNESCO Convention can likewise help States to fulfil their obligations under the 1970 UNESCO Convention. DROMGOOLE 2013, 336.

[533] MAARLEVELD, GUERIN and EGGER 2013, 31.

[534] O'KEEFE 2002, 104.

Additional measures such as a well-functioning customs service, cooperation between authorities and information sharing between States are crucial as well.

In former drafts of the UNESCO Convention, a provision was included providing States with the power to issue a permit to those that had recovered UCH in a manner consistent with the Annex and wished to bring the UCH into the State's territory. In 2000, a statement was added providing that it would be an offence to import heritage that was recovered without a permit or in a manner not consistent with the Annex to the Convention. In the end, however, no reference was made in the UNESCO Convention to any form of permit system for import and export. It was felt that as other articles already dealt with import, a specific permit system would give the impression that UCH could be traded. In the absence of a global permit system which could have considerably helped with the assessment of whether an object was exported illicitly or whether it was recovered in conformity with the Convention, this assessment is entirely left to States Parties, and more specific in most cases customs officials. A well-functioning internal system with sufficient experts controlling objects will be required to determine whether a particular object qualifies as UCH and whether it was illicitly exported or recovered contrary to the provision of the Convention. This assessment is crucial for customers wishing to purchase such an archaeological or historical object from a dealer in antiquity as they will want to know exactly what they are buying in order protect it from being confiscated.[535] It cannot be expected that the checks by the customs authorities cover all possible cargo and passenger baggage. A number of techniques have been developed to assist customs in making a selection such as profiling which allows customs to target specific persons or cargo movements. This is of course merely an aid and can only go so far.[536]

As was mentioned, States must also take measures to prevent the entry of, dealing in or possession of UCH that has been recovered contrary to the UNESCO Convention.[537] Article 14 does not limit this obligation to UCH that has been recently raised entailing that even when an object constituting UCH has passed many States before arriving in a particular State Party to the Convention, that State Party still has the obligation under article 14 to have measures in place preventing the entry of this object into its territory.[538] Not only can this make it very hard to determine whether the Convention was complied with upon recovery, but States must also take into account that the purchaser, especially when the object changed hands already a number of times, might not know

[535] BOESTEN 2002, 172-174.
[536] O'KEEFE 2002, 105.
[537] When UCH was recovered from the Area, for example, and brought in a State Party's territory, this heritage will not have been illicitly exported, as it does not originate from another State's territory. Nevertheless, this does not alter the fact that it might have been recovered contrary to the Convention, which includes the principles of the Rules of the Annex.
[538] It should be noted that States will need to take into account article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969 (*UNTS*, vol.1155, 331) concerning retroactivity.

the circumstances of the recovery while they are still exposed to the risk of seizure. Another difficulty relating to this provision is that it is possible to deal in an object even when the object itself is located within the territory of another State.[539]

### 4.7. Use of areas within the jurisdiction of States Parties contrary to the Convention

States Parties have to take measures to prevent that their territory is being used in support of any activity directed at UCH which not in conformity with the UNESCO Convention. The notion 'territory' needs to be interpreted in a wide sense so that it includes maritime ports, artificial islands, installations and structures that fall under a State's exclusive jurisdiction or control.[540] This provision is based on the so-called port-State jurisdiction.[541] Once again, the UNESCO Convention does not specify which measures should be taken, but leaves it to the States Parties to decide on this.

While article 14 will only come into play once intervention with UCH has already taken place, entailing that the other mechanisms of the Convention have failed, article 15 UNESCO Convention can help prevent the recovery of UCH contrary to the provisions of the UNESCO Convention. By not allowing their territory to be used for activities directed at UCH contrary to the Convention, States Parties can cut off the supply lines necessary for these activities and put an end to the interference with the UCH.[542] This approach will be the most effective in (semi-)enclosed sea areas where a large number, if not all, of the bordering States are States Parties to the UNESCO convention and implement this provision. For operations in the Area, or in regions where only few or no States have ratified the Convention, this provision will prove to be a lot less effective as operators can simply sail to neighbouring non-States Parties for supplies and bring their loots on land there. In order for this provision to obtain full effect, a large number of ratifications is indispensable.[543]

[539] O'KEEFE 2002, 106.
[540] Article 15 UNESCO Convention.
[541] During the negotiations all States that were opposed to coastal State jurisdiction heavily relied on 'port State jurisdiction', 'national jurisdiction' and 'flag State jurisdiction'. Respect for the Rules of the Annex should be ensured by States by controlling their nationals, vessels and ports. GARABELLO 2003, 158.
[542] Deep-water recovery for example can take many months requiring a steady supply of food, fuel, equipment and personnel. When it becomes uncertain whether this supply chain can be established this might discourage persons that refuse to respect the UNESCO Convention's rules and principles from engaging in activities directed at UCH. DROMGOOLE 2013, 284.
[543] DROMGOOLE 2013, 304-305. Additionally, of course, sufficient monitoring is required in order to know when a ship is operating contrary to the provision of the Convention. Especially in the Area, this might prove to be challenging.

Article 15 UNESCO Convention could potentially be of interest for a coastal State as it can take only limited action against activities contrary to the Convention that are being conducted in its EEZ and on its continental shelf without having to resort to the consultation procedure of article 10(3-6) UNESCO Convention.[544] This provision does not give any new rights to coastal States as it is limited to the use of the territory of a State or other structures under its exclusive jurisdiction.[545]

### 4.8. Measures applicable to nationals and vessels worldwide

The UNESCO Convention, as was discussed, provides a specific legal regime for dealing with UCH in each maritime zone based on the obligation imposed on nationals and vessels to report discoveries of and the intention to conduct activities directed at UCH. In article 16 UNESCO Convention, an additional generally applicable obligation was introduced requiring that States Parties "*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*."[546] This provision is based on the principles of jurisdiction over nationals and flag State jurisdiction.

Contrary to articles 14-15 UNESCO Convention, this provision requires States to take "*all practicable measures*" rather than just "*take measures*". This imposes a higher burden on States Parties as they must do everything within their power to ensure compliance with article 16 UNESCO Convention. According to Dromgoole, this provision was designed, in part, to reinforce the obligations imposed by the UNESCO Convention for the EEZ, the continental shelf and the Area. This stricter obligation to take "*all practicable measures*" in article 16 can probably be explained in light of the correlation with the wording of the obligations in articles 9-12 UNESCO Convention.[547]

In order to comply with article 16 States Parties will need to have legislative and administrative provisions in place to prevent their nationals and vessels flying their flag from engaging in activities contrary to the Convention. Additionally, these provisions must be well known by those that are most likely to be involved in such activities, for example salvors, diver organisations and masters of vessels, as well as preferably to the public at large.[548]

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[544] In case article 10(2) UNESCO Convention can be applied, it seems more likely that a State would resort to directly prohibiting the activities rather than merely refusing access to its territory in the hope that this will deter the operators from undertaking the activities.
[545] O'KEEFE 2002, 107. He notes that under international law States have the right to close their ports to protect their vital interests. Additionally, States may impose conditions for the access to their ports. This right is recognised under UNCLOS as well as under other international agreements especially dealing with pollution.
[546] Article 16 UNESCO Convention.
[547] DROMGOOLE 2013, 285.
[548] O'KEEFE 2002, 109.

The obligation in article 16 in fact creates an interesting tool for coastal States Parties as this allows them to request help from another State Party in case the latter State's nationals or vessels flying its flag violate the Convention within that coastal State's waters. This could be highly useful for coastal States that have a lot of heritage located in their waters but do not have the means to police them.[549]

Article 16 is in fact essential within the framework of the Convention. This is true especially for the Area, but as well for the EEZ and the continental shelf considering the issues that surround direct reporting to the coastal State. Since the Convention relies heavily on jurisdiction over nationals and flag State jurisdiction, it is crucial that flag States, especially the ones that have the technological capabilities for deep-water recovery, support the Convention. These States include the US, France, the UK, Germany, Norway, and Russia. All of them expressed reservations about the Convention. At the moment the Convention has already been ratified by France and Germany considers ratification in the near future.[550] Nevertheless, in order for the Convention to be successful, ideally all these States need to support the Convention.[551]

## 4.9. Sanctions in the UNESCO Convention

### 4.9.1. Sanctions

In order to ensure full compliance with the provisions of the UNESCO Convention, a State Party must "*impose sanctions for violations of measures it has taken to implement the Convention*"[552] and should cooperate[553] to ensure the enforcement of these sanctions.[554] These sanctions must be "*adequate in severity*" to ensure compliance with the Convention and to discourage violations regardless of where they occur. They must also deprive offenders of the benefit that they have derived from these violations.[555] States will need to consider what sanctions are 'adequate in severity'. Determining a fixed sanction that applies worldwide seems to be impossible as what is

[549] BOESTEN 2002, 174-175.
[550] See chapter three for more on the French and German legislation for UCH.
[551] DROMGOOLE 2013, 305.
[552] Article 17(1) UNESCO Convention.
[553] Originally, a number of examples were meant to be given in the Convention of areas in which States could cooperate such as the "*production and transmission of documents, making witnesses available, service of process and extradition...*" CLT-96/CONF.202/5 Paris, April 1998 (reproduced in S. DROMGOOLE and N. GASKELL, "Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998", *IJMCL* 1999, 171-206). (DROMGOOLE and GASKELL 1999) However, as a number of problematic complexities were associated with these duties, it was eventually decided that the manners in which States can cooperate should not be listed or limited. FORREST 2010, 354.
[554] Article 17(3) UNESCO Convention.
[555] Article 17(2) UNESCO Convention.

considered to be an adequate sanction in one part of the world, might not be adequate in another part.[556] Additionally, States might also want to align these sanctions with the ones that already exist for similar offences against cultural heritage on land.[557] The fact that the type and severity of the sanctions is left to States Parties might have the negative consequence of offenders deliberately searching for the State with the least stringent sanctioning system to bring the recovered material on land. Additionally, sanctioning offences will only work to its full extent when a large number of States have ratified the Convention, eliminating the option for offenders to operate from non-States Parties.[558]

Sanctions must "*deprive offenders of the benefit deriving from their illegal activities*".[559] It might be hard to assess the precise benefit that can be derived from UCH as not only the economic value of the UCH must be taken into account, but as well its aesthetic value that remains as long as the person holds possession of the UCH.[560] The classic sanctions such as fines and imprisonment might be adequate in severity, however they do not deprive offenders of the benefit obtained. Therefore, the Convention envisages the use of other types of sanctions as well. States Parties are required to provide for a specific sanction meant to deprive offender of the benefits of their illegal activities, namely the seizing of UCH. [561] This is described in article 18 of the UNESCO Convention.

### 4.9.2. Seizure of underwater cultural heritage

All States Parties should take measures[562] to provide for the seizure of UCH in its territory that was recovered not in conformity with the UNESCO Convention.[563] This obligation is very broad. Not only does it apply to UCH recovered in the territory of the State Party, but as well to UCH that at some point in time was brought in the territory but that does not originate from this State's territory. This entails that, especially when the recovery took place some time ago and the UCH

[556] For example, financial sanctions in Europe must be much higher than financial sanctions in a developing County to generate the same effect.
[557] O'KEEFE 2002, 111.
[558] BOESTEN 2002, 178.
[559] Article 17(2) UNESCO Convention.
[560] O'KEEFE 2002 112.
[561] DROMGOOLE 2013, 330.
[562] According to Forrest, the fact that article 18 UNESCO Convention requires that States must take measures rather than requiring that they must simply seize the UCH, reflects the reluctance of States to be bound to achieve a certain result which might practically not be achievable. FORREST 2010, 352.
[563] Article 18(1) UNESCO Convention. O'Keefe rightfully points out that the seizure of an object could give rise to a claim for compensation and refers thereto to article 1 of the First Protocol of the European Convention on Human Rights which provides for the peaceful enjoyment of possessions. He provides, however, that the more transactions took place between the recovery and the seizure of the UCH, especially when in the meanwhile it has been purchased *bona fide*, the less willing courts will be to uphold the seizure. The reason for this is that a rule has been adopted by courts in the framework of this article 1 stipulating that proportionality must exist between the degree of control imposed and the effect on the owner. O'KEEFE 2002, 115-116.

has already passed in a number of States, it might be difficult to determine whether it was recovered in conformity with the Convention.[564] The UCH can be seized from anyone and not just from the parties that were involved in the recovery.[565] This can create a problem when a third person has purchased the UCH *bona fide*. The Convention itself does not provide any guidance as to how this situation should be dealt with and thus leaves it up to States Parties to determine the best course of action.

Once UCH has been seized, the State Party shall "*record, protect and take all reasonable measures to stabilize*" the UCH at stake.[566] The seizing State Party must inform the Director-General of UNESCO, as well as any State Party with a verifiable link of the seizure of UCH.[567] Contrary to other provisions where States Parties can explicitly declare that they have a verifiable link with UCH, in article 18 it seems to be assumed that the seizing State Party is aware of which States have a verifiable link with the UCH. This can be very difficult to determine, especially considering that this provision allows all States to have a verifiable link and not merely other States Parties. The seizing State Party may thus have to take the initiative to investigate the identity and origin of the UCH in order to determine any potential links. When the competent national authorities do not have the necessary means to conduct such an investigation, assistance may be required. [568]
The seizing State Party must ensure that UCH is disposed for the public benefit taking into account the need for conservation and research, the need for the reassembly of a dispersed collection, the need for public access, exhibition and education and finally the interests of States with a verifiable link.[569] Complying with all these requirements can potentially be burdensome and costly for States. The question arises what should happen when a State seizes an object without having the necessary means to comply with the requirements set by article 18(4) UNESCO Convention in place and whether such a situation would prevent States from seizing UCH.[570] Financial as well as other types of assistance offered by UNESCO or other States Parties might be necessary in these circumstances.

Cooperation with other States will be essential especially to learn more about the origin and circumstances of recovery of material originating from outside the territory of the seizing State.[571]

[564] See also *supra* section 4.6.
[565] DROMGOOLE 2013, 330.
[566] Article 18(2) UNESCO Convention. What these reasonable measures are will depend on the State's infrastructure, technical expertise, financial means and facilities. Developing countries might need the expertise of UNESCO and States with a verifiable link. FORREST 2010, 353.
[567] Article 18(3) UNESCO Convention.
[568] DROMGOOLE 2013, 332.
[569] Article 18(4) UNESCO Convention.
[570] BOESTEN 2002, 179.
[571] In this regard a permit system would have been helpful, as was originally foreseen in the Convention. This was omitted in the final text of the Convention. BOESTEN 2002,178.

Article 18 itself does not provide for the duty to cooperate, but considering that seizure can be considered as a type of sanction to deprive offenders of the benefit of their activities as defined in article 17, the duty to cooperate for the enforcement of these sanctions, as provided in article 17(3), would apply. Additionally, article2(2) and the duty in article 19 for States to cooperate, assist each other and share information for the management and protection of UCH would equally apply in the case of seizure.[572]

While article 18 UNESCO Convention does not offer any specifications as to where the seized UCH must remain, it can be assumed that when the seizing State has little or no cultural link with the UCH it will most likely be willing to hand over the UCH to States that express an interest in the UCH. This is likely to occur in case the UCH is imported into a State sometime after it was recovered. By handing the UCH over to another State, the seizing State can avoid the potential burdensome and costly responsibility to care for the UCH itself.[573] The seizing State in this case may assume that it has fulfilled its duty in the UNESCO Convention when the State to which it gives the UCH is bound by the terms of the UNESCO Convention as well. This is, however, not the case when handing the UCH to an interested non-State Party that might not treat the material in a manner consistent with the UNESCO Convention. When a non-State Party claims ownership over the UCH, this can place the seizing State in a difficult position where it will have to choose between refusing to hand over the UCH, which can result in a breach of general international law, or to breach its obligations under the UNESCO Convention.[574]

Article 18 does not provide what must be done in case the seized artefact has an identifiable owner. The rights of owners should be dealt with by the national legislation of the States Parties.[575] Furthermore, when the UCH originates from the Area, account will have to be taken of the preferential rights of the State of origin, as proclaimed in article 149 UNCLOS and 12(6) UNESCO Convention.[576] These States, as was mentioned, can be non-State Parties as well that are not bound by the principles and provisions of the UNESCO Convention.

[572] DROMGOOLE 2013, 331-332.
[573] Italy expressed some concerns on this issue during the negotiations. It feared that the seizing State might abuse the provisions of article 18 to hold on to UCH with which it has no cultural link for the simple reason that is has seized it while it was present in its territory. As was explained, it seems to be unlikely that States would ignore the requests of interested States as it would have to bear the responsibility of, as well as all the costs associated with preserving the UCH. DROMGOOLE 2013, 332. For more on the Italian concerns see GARABELLO 2003, 164.
[574] FORREST 2010, 352.
[575] FORREST 2010, 352.
[576] DROMGOOLE 2013, 333.

## 4.10. Law of salvage and finds in the UNESCO Convention

As was explained above, the law of salvage and finds are often considered as inappropriate instruments to deal with UCH.[577] Special account thus needed to be taken of this when drafting the UNESCO Convention. During the negotiations on this Convention discussions took place as to how the law of salvage and finds could fit in the protective regime for UCH envisaged by the Convention. The main contradiction existed between a number of common law States that apply the law of salvage to UCH and consider the law of salvage and finds as very old principles of international law on the one hand and civil law States where this concept is less known and is certainly not considered as an international principle but rather as domestic law concepts on the other. Salvage law in civil law States is considered to be a form of assistance to be offered to ships in peril. Under no circumstances can this apply to ancient shipwrecks, which in civil law jurisdictions often become the property of the State once it is established that no owner can be identified.[578] Nevertheless, even for civil law States it was crucial to consider this issue as it is possible that salvors would seek to exercise the law of salvage or finds in a State that does recognise the applicability of these common law instruments over UCH, such as the US, over UCH located in the territory of another State or in international waters.[579] After an intense debate, delegates were able to reach a compromise which was adopted by consensus.[580] This compromise can be found in article 4 of the UNESCO Convention.

As a general rule article 4 UNESCO Convention provides that activities relating to UCH to which the UNESCO Convention applies shall not be subject to the law of salvage and finds. An exception is, however, provided to this general rule when three conditions are cumulatively met: 1) when the activity is "*authorised by the competent authorities*"; 2) when the activity is conducted "*in full conformity with*" the UNESCO Convention and 3) when it is ensured that "*any recovery of the underwater cultural heritage achieves its maximum protection*".[581]

The first condition provides that the activity must be authorised by the competent national authority. Often in national legislation, authorisation is already required in order to conduct activities in the territorial waters of that State. One of the main effects of this requirement is that such authorisation will be required in international waters as well.[582] The national authority will

[577] See *supra* section 3.4.
[578] GARABELLO 2003, 123. This is also true for example in England where abandoned wrecks become the property of the Crown. O'KEEFE 2002, 61.
[579] This was seen in the past in US case law, for example for the Titanic and Lusitania. O'KEEFE 2002, 61-62.
[580] GARABELLO 2003, 123. For the negotiating history of this article 4 UNESCO Convention see GARABELLO 2003, 123-127.
[581] Article 4 UNESCO Convention.
[582] O'KEEFE 2002, 63.

have to take the principles and Rules provided by the UNESCO Convention into account before authorising an activity. One of these fundamental general principles is that preservation *in situ* should be considered as the first option.[583] Therefore, the competent national authority can only allow recovery of UCH to take place after having considered *in situ* preservation and having identified reasons why this recovery would be necessary.[584]

The second condition requires that the recovery is undertaken in full conformity with the Convention. This requirement introduces some far reaching limitations to the original concepts of the law of salvage and finds. As the activity must be undertaken in full conformity with the Convention, this entails that the rules of the Annex must be complied with as well. These Rules deal with, *inter alia*, project design, methodology and techniques, funding, competence and qualifications of the team, conservation and site management, documentation, reporting, curation of project archives and dissemination. Even though complying with these Rules would impose a large burden on the salvor, especially considering that following the law of salvage in its original form no requirements are imposed relating to the preservation of the archaeological integrity of a wreck,[585] it is not impossible to comply with them.[586] However, one of the main difficulties could prove to be that as the UNESCO Convention prohibits the commercial exploitation of UCH,[587] recovery that is motivated by an economic self-interest might not comply with the Rules concerning the sale of recovered artefacts and funding of the project. Under Rule 17 of the Annex, it is required that an adequate funding base is assured prior to any activity. When no adequate funding base can be demonstrated in advance, the project should not be authorised to begin with.[588] Furthermore, it would seem that the traditional practice where the recovered artefacts become the object of a judicial sale in order to pay the reward to the salvor is hard to reconcile with the prohibition of commercial exploitation and, in some cases, the rule of keeping UCH together as one collection allowing them to be accessed by professionals and the public.[589]

[583] Article 2(5) UNESCO Convention and Rule 1 Annex UNESCO Convention.
[584] See *supra* section 4.2.3. MAARLEVELD, GUERIN and EGGER 2013, 21.
[585] As was discussed in sections 3.2. and 3.4., in a number of cases under US law the courts considered the extent to which the salvor has preserved the archaeological and historical integrity of a wreck to determine the size of the salvage award. Nevertheless, according to a study conducted on this phenomenon, the US courts apply their own definition of what this would entail which is only a partial reflection of the requirements used by the archaeological profession, and thus the UNESCO Convention. P. FLETCHER-TOMENIUS, M. WILLIAMS and P. O'KEEFE, "Salvor In Possession: Friend Or Foe To Marine Archaeology", *IntlJCultProp* 2000, (263) 298.
[586] It may be assumed, though, that archaeologically responsible excavations are a lot more time and money consuming than simply allowing the salvor to destroy the wreck in order to obtain the economically valuable parts of the site. The salvage of UCH sites, therefore, will lose a lot of its appeal for salvors.
[587] Article 2(7) UNESCO Convention and Rule 2 Annex UNESCO Convention.
[588] DROMGOOLE 2013, 203.
[589] Rule 33 Annex UNESCO Convention.

Finally, the last condition in article 4 UNESCO Convention provides that the recovery of UCH must achieve its maximum protection. The main question to be asked here is what is meant by 'maximum protection'. As the UNESCO Convention was drafted in accordance with current archaeological standards, it may be assumed that by 'maximum protection' the level of protection offered by the UNESCO Convention is meant. While this Convention seems to offer a clear standard of protection, potential issues might still arise when determining what exactly constitutes 'maximum protection'. For example, the Convention does not clearly determine when the recovery of UCH would be preferred over preserving the UCH *in situ*. In certain cases UCH is considered to be protected at its maximum level by leaving it *in situ*, while in other cases in view of its long term preservation it is considered better to recover the heritage. As there are no clear binding rules in this regard, some discretion is left to national authorities in determining in what way the maximum protection of UCH must be achieved. Likewise some of the other principles included in article 2 of the Convention are open to interpretation. For example, it is not entirely clear what is meant by 'preserving UCH for the benefit of humanity'[590] nor does the Convention specify the notion 'proper respect' that needs to be given to all human remains in maritime waters.[591] It will thus, at least partially, be up to national authorities to fill in the concept 'maximum protection' and to require that the salvor complies with it.

When considering these three conditions for the application of the law of salvage and finds, it may be concluded that not much remains of the original concepts.[592] It should be noted that the Convention does not prevent States from going further and completely excluding UCH from the application of the law of salvage and finds. Dromgoole considers that adopting such a complete exclusion might be preferable for States as this would avoid potentially complex problems to arise on the relationship of the law of salvage and the obligations that States have under the UNESCO Convention.[593]

[590] Article 2(3) UNESCO Convention.
[591] Article 2(9) UNESCO Convention.
[592] O'KEEFE 2002, 64.
[593] DROMGOOLE 2013, 204. The Convention as such does not seem to preclude the possibility for States Parties to offer a reward for reporting the discovery of a find. However, this type of practice is considered to be contentious as this might be an incentive for treasure hunting. DROMGOOLE 2013, 204. On the other hand, this is of course also a strong incentive for reporting the discovery of UCH. As will be discussed under chapter three, a number of States do in fact offer the possibility if such a reward.

## 4.11. The bodies of the UNESCO Convention and their main achievements

### 4.11.1. The Secretariat

The Secretariat of the Convention has the task of organising the Meetings of States Parties as well as assisting States Parties in the implementation of the decisions made by the Meeting of States Parties. It functions under the responsibility of the Director-General of UNESCO.[594]

Over the last couple of years, the secretariat of the Convention has made considerable efforts for the promotion of the ratification and implementation of the UNESCO Convention which includes capacity-building[595] and awareness-raising. These efforts further include the publication of a training manual and the Manual for Activities directed at UCH,[596] the organisation of training courses, exhibitions, regional meetings, an exchange day for UCH, the creation of the UNITWIN Underwater Archaeology Network,[597] the organisation of scientific conferences, the organisation of activities for the commemoration of the centenary of World War I[598] and reaching out to the youth through education,[599] cartoons, children books and a new website[600].[601]

[594] Article 24 UNESCO Convention.

[595] Between 2008 and the present, UNESCO managed to train over 400 specialists from more than 80 countries in underwater archaeological research in courses that lasted from 2 weeks to 3 months. UNESCO, *UNESCO's Work and Achievements in the Protection of the Underwater Cultural Heritage*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/protection/unescos-work/ (consulted 7 August 2018). For more on the UNESCO Capacity-Building Programme see UNESCO, *UNESCO Capacity-Building Programme on Underwater Cultural Heritage Protection*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/education/capacity-building-programme/ (consulted 7 August 2018).

[596] These are available at www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/publications-resources/publications/.

[597] For more on this network see UNESCO, *UNESCO UNITWIN Network for Underwater Archaeology*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/education/unitwin-network/ (consulted 7 August 2018).

[598] For a list of these activities see UNESCO, *Heritage for Peace – Centenary of World War I*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/underwater-cultural-heritage/heritage-for-peace-wwi/ (consulted 7 August 2018).

[599] See for example D. TIMMERMANS and U. GUERIN, *Heritage for Peace and Reconciliation - Safeguarding the Underwater Cultural Heritage of the First World War – Manual for Teachers*, 2015 available at www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/education/training-materials/.

[600] A website on the Convention was created aimed at children. See www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-heritage/kids-page/

[601] For details on the activities pursued by the Secretariat in this field see Meeting of States Parties to the Convention on the protection of the Underwater Cultural Heritage, Third Session, 13-14 April 2011, UCH/11/3.MSP/220/INF.7 REV; Fourth Session, 28-29 May 2013, UCH/13/4.MSP/220/INF.1 REV2; Fifth Session, 28-29 April 2015, UCH/15/5.MSP/INF4.1, Sixth Session, 30-31 May 2017, UCH/17/6.MSP/INF4.1REV.

### 4.11.2. The Meeting of States Parties

#### 4.11.2.1. About the Meeting of States Parties

In order to allow the UNESCO Convention to function optimally and to further develop and assess the protection of UCH worldwide, the Convention provides for a Meeting of States Parties to convene on a regular basis.[602] As a general Rule, the Meeting of States Parties will convene every two years. When the majority of the States Parties, however, requests so the Director-General of UNESCO can convene an extraordinary meeting.[603] This occurred once in 2009 in order to speed up the process of implementation of the Convention. The Meeting consists of representatives from all States Parties to the Convention, observers from other UNESCO member States, delegates from NGO's that are accredited as well as invited experts. As the main organ of the Convention, the Meeting of States Parties took a number of crucial steps and developed important instruments to further the ratification and implementation of the UNESCO Convention worldwide.[604]
The first Meeting of States Parties took place from 26-27 March 2009, which was about two months after the Convention entered into force on 2 January 2009. During this meeting the functions and responsibilities of the Meeting of States Parties were laid down. These include *inter alia*, the elaboration and approval of the operational guidelines for the Convention, the examination of reports and requests for advice made by States Parties and the search for means or the raising of funds.[605] During its first gathering, the Meeting of States Parties established the Scientific and Technical Advisory Body which has the task of assisting the Meeting in questions of a scientific or technical nature with regard to the implementation of the Rules contained in the Annex to the UNESCO Convention as well as other issues.[606] The Meeting of States Parties adopted the statutes for this subsidiary organ. Today it still continues to elect the Advisory body's members and decide on any recommendations made by it.[607]

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[602] Article 23 UNESCO Convention.
[603] Rules of Procedure of the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, 26-27 March 2009, CLT/CIH/MCO/2009/PI/99, rule 5 (Rules of Procedure Meeting of States Parties) and article 23(1) UNESCO Convention.
[604] UNESCO, *Underwater Cultural Heritage-Meetings*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/meetings/ (consulted 28 august 2017).
[605] Rule 3 Rules of procedure Meeting of States Parties.
[606] Meeting of States Parties to the Convention on the protection of the Underwater Cultural Heritage, First Session, 26-27 March 2009, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/meetings/meetings-of-states-parties/first-meeting-of-states-parties/ (consulted 7 August 2018); Article 1 UNESCO, *Statutes of the Scientific and Technical Advisory Body to the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage*, modified 28-29 April 2015, CLT/CIH/MCO/2009/PI/100 REV1 (Statutes STAB); Article 23(4) UNESCO Convention provided the possibility for the Meeting of States Parties to establish the Scientific and Technical Advisory Body.
[607] Rule 3 Rules of procedure Meeting of States Parties.

#### 4.11.2.2. Operational guidelines

During this first Meeting of States Parties, the request was made for the creation of operational guidelines. A number of objectives were set forth by the Meeting that could potentially be achieved by creating these guidelines. These included providing States Parties with guidance on the cooperation mechanism established in articles 8-13 of the Convention, regulating funding for measures taken in the framework of this Convention, offering guidelines on the appointment of a Coordinating State for UCH located in the Area and elaborating on other issues requiring State cooperation such as the transfer of technology, training in underwater archaeology and the exchange of knowledge. The Meeting of States Parties identified the key users of such operational guidelines and felt that these include the national authorities of States Parties, the Secretariat to the Convention, the Scientific and Technical Advisory Body, professionals, site managers and stakeholders that are active in the field of UCH protection.[608] The Meeting requested the Secretariat to prepare a preliminary draft of these guidelines based on consultations that took place with the States Parties. The Secretariat offered specific attention to two aspects namely giving guidance on State cooperation and consultation as foreseen in article 8-13 and the appointment of a Coordinating State in the Area.[609] This preliminary draft formed the basis for the guidelines that, after numerous amendments based on remarks made during the subsequent Meetings of States Parties and the efforts of a working group consisting of sixteen States Parties,[610] were finally adopted during the fourth and fifth session of the Meeting of States Parties.[611]

The operational guidelines consist of seven chapters: an introductory chapter, a chapter on State cooperation, on operational protection, on financing, on partners, on the accreditation of NGO's and finally on the logo of the Convention. For a large part, these operational guidelines repeat and further elaborate the provisions of the UNESCO Convention with the objective to assist States in the full implementation of its provisions. A number of aspects in these guidelines, however, are new compared to the text of the Convention and merit a closer look.

A first novelty in the operational guidelines relates to the creation of the 'Fund for Underwater Cultural Heritage'. During the second Meeting of the States Parties the chairman, following the

[608] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, First Session, 26-27 March 2009, CLT/CIH/MCO/2009/ME/90.

[609] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Second Session, 1-3 December 2009, UCH/09/2.MSP/220/4, 11.

[610] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fifth Session, 28-29 April 2015, UCH/15/5.MSP/220/2, 8.

[611] During the fourth meeting, the operational guidelines were adopted with the exception of chapter VII. In the fifth session chapter VII as well as an amended version of chapter IV of the operational guidelines were adopted. Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fourth Session, 28-29 May 2013, UCH/13/4.MSP/220/10 and Resolution 6/MSP 4, 6; Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fifth Session, 28-29 April 2015, UCH/15/5.MSP/11, 5 and Resolution 8/MSP5, 6.

proposal of the Secretariat, introduced an agenda point to create a special account which would contain the UCH Fund. The Representative of the Director-General explained that the UNESCO Convention in itself does not specifically provide for the establishment of a fund as a possible way in which to finance activities relating to UCH. However, article 9(g) of the Rules of Procedure of the Meeting of States Parties determines that one of the responsibilities of this Meeting is "*to seek means for raising funds and to take the necessary measures to this end*". The Secretariat thereto proposed the creation of a special account in order to finance the overall functioning of the Convention, the State cooperation mechanism, international cooperation projects, assistance given by the Scientific and Technical Advisory Body to States Parties, capacity-building in States Parties and the general enhancement of UCH protection. The sources envisaged for collecting such funds are diverse, including voluntary contributions from States Parties, funds appropriated for this purpose by the General Conference of UNESCO, contributions from other States and from organisations or programmes within the United Nations' (UN) system or even contributions from private entities.[612] Under chapter IV of the operational guidelines, rules are set out on how the fund will be used. These rules determine that the Meeting of States Parties can receive, evaluate and approve any request for financial assistance depending on the available resources in the Fund. The Scientific and Technical Advisory Body will as well give its recommendations on the request to the Meeting of States Parties after evaluating it. Priority will be given to requests coming from developing States Parties and projects that enhance State cooperation and involve more than two States Parties. The operational guidelines include a number of criteria on which the Meeting of States Parties should base its decision to grant financial assistance. These include whether the amount of assistance requested is appropriate; whether the proposed activities are well conceived, feasible and in line with the objectives of the Convention; whether the project can be expected to have lasting results and whether the beneficiary contributes in paying the costs of the activities for which assistance was requested within the limits of its resources.[613]

As was explained, in the UNESCO Convention no mention was made of the creation of a fund. This is contrary to other UNESCO Conventions where the creation of such a fund was inscribed in the Convention text itself. In the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage, article 15 provides for the establishment of the 'World Heritage Fund'.[614] Likewise, article 25 of the 2003 UNESCO Convention for the safeguarding of the intangible

[612] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Third Session, 13-14 April 2011, UCH/11/3.MSP/220/4rev, 10. The operational guidelines invite States Parties, institutions and private entities to provide support to the Convention either by making contributions to the Fund or by providing direct contributions, either financial or technical, to projects assisting in the protection of UCH. UNESCO Operational Guidelines, 14.
[613] UNESCO Operational Guidelines, 14-15.
[614] Article 15 UNESCO World Heritage Convention 1972.

cultural heritage establishes the 'Intangible Cultural Heritage Fund'.[615] For these funds, their respective Conventions determine that contributions by States Parties are (partially) compulsory. For the World Heritage Fund, States Parties shall pay a contribution every two years in the form of a uniform percentage that applies to all States and that is determined by the General Assembly of States Parties to the Convention.[616] Likewise, for the Intangible Cultural Heritage Fund a percentage for a compulsory contribution by States Parties is decided on at least every two years. [617][618] While a Fund assisting in the full application of the UNESCO Convention seems to be indispensable, the question arises whether in practice many contributions will be made. Firstly, this Fund, unlike the World Heritage Fund and the Intangible Cultural Heritage Fund, was established by the operational guidelines rather than the Convention itself. These guidelines are not legally binding, entailing that States Parties have no obligation to participate in this Fund. Secondly, contributions to the UCH Fund are done on a voluntary rather than a compulsory basis. States are therefore free not to contribute. As the specific rules dealing with this Fund in the operational guidelines were only adopted during the fifth session of the Meeting of States Parties in 2015, it is too early to make any definitive statements on whether this Fund will serve its purpose and receive sufficient contributions to assist in fully implementing the UNESCO Convention.

A second novelty worth mentioning that was addressed in the operational guidelines relates to the identification of partners that can help with the implementation of the UNESCO Convention. Under chapter V of the operational guidelines such partners were identified as including governmental or government-related institutions active in UCH related activities; NGO's that were accredited by the Meeting of States Parties, NGO's that carry out activities related to the Convention, scientific institutions, museums, universities and private entities that work in full conformity with the principles of the Convention. Any entity that supports the commercial exploitation of UCH or is engaged in its irretrievable dispersal cannot be considered as a partner. The operational guidelines further encourage States Parties to establish cooperation with and between *inter alia* non-governmental organisations, communities, groups, experts and research institutes in order to enhance the protection of UCH. National governments should facilitate the participation of these

[615] Article 25 UNESCO Intangible Heritage Convention 2003.

[616] Article 16(1) UNESCO World Heritage Convention 1972. For the financial period 2016-2017 this contribution was set at 1% of the contribution to the regular budget of UNESCO. UNESCO General Assembly of States Parties to the Convention concerning the Protection of the World Cultural and Natural Heritage, 20th Session, 18-20 November 2015, WHC-15/20.GA/8, 1.
For more information on this Fund, as well as a list of State contributions consult http://whc.unesco.org/en/world-heritage-fund (list as at 30 June 2018).

[617] For the financial period 2016-2017 this contribution was set at 1% of the contribution to the regular budget of UNESCO. For this period, this comes down to 3,5 million US dollars in compulsory contributions. UNESCO, General Assembly of the States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage, Sixth Session, 30 May-1 June 2016, IHT/16/6.GA/9, 5.

[618] Article 26(1) UNESCO Intangible Heritage Convention 2003.

partners especially for the identification, documentation and protection of UCH, the establishment of inventories and the raising of awareness on the importance of UCH.[619]

One of the categories mentioned above as potential partners are accredited NGO's. In the operational guidelines criteria and a procedure for the accreditation of NGO's were established.[620] Cooperation between these NGO's and the Meeting of States Parties and its Advisory Body is crucial as these NGO's are working directly in the field together with national authorities all over the world. This results in them having valuable insights into current practices and issues that relate to UCH archaeology. These NGO's can thus directly facilitate the further development of underwater archaeology on a regional, national and international level. At the moment, 15 NGO's have been accredited by the Meeting of States Parties.[621]

A final point relating to the operational guidelines that should be noted is that a number of forms that can be used for the implementation of the UNESCO Convention were adopted alongside the operational guidelines. These forms deal with the declaration of an interest in UCH, the notification of a discovery or intended activity,[622] the request for financial assistance and contain a model sheet for inventories. The operational guidelines, as well as the Meeting of States Parties in its resolutions encourage States Parties to use these forms for the implementation of the UNESCO Convention.[623]

#### 4.11.2.3. States' best practice

Aside from the creation of the operational guidelines, another project that was developed within the Meeting of States Parties is worth mentioning. Following Resolution 4/MSP 5 after the fifth Meeting of States Parties, States Parties were invited to provide examples of best practices relating to UCH. The criteria that need to be met in order for an UCH site or project to be considered as best practice are the following: 1) the heritage falls within the definition of the UNESCO Convention or has been submerged less than 100 years, but is classified as UCH under national

[619] UNESCO Operational Guidelines, 16.
[620] UNESCO Operational Guidelines, 16-18.
[621] UNESCO, *Underwater cultural heritage- Accredited Non-Governmental Organizations,* www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/partners/accredited-ngos/ (consulted 27 August 2017).
[622] In the fourth Meeting of States Parties, the Secretariat informed the States Parties that the first notification of the discovery of a shipwreck using the UNESCO form attached to the operational guidelines, which were at that time not yet approved, had been submitted by Italy. Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fifth Session, 28-29 April 2015, UCH/15/5.MSP/220/2, 3.
[623] These forms can be found on the UNESCO website relating to the operational guidelines: UNESCO, *Operational Guidelines*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/operational-guidelines/ (consulted 7 August 2018).

law; 2) the heritage is appropriately protected both legally and in practice; 3) responsible non-intrusive access to the heritage is possible; 4) there is a framework to ensure the sustainable management of the heritage and 5) a special and outstanding effort is made in order for the site to be accessible to the public.[624] Currently, seven examples of best practice sites can be found on the UNESCO website. Four of them are located in Spain, two in Mexico and one in Portugal.[625] These examples can encourage other States (Parties) to protect and manage their heritage in a manner conform the UNESCO Convention and the criteria set out for best practice examples.

### 4.11.3. Scientific and Technical Advisory Body

The Scientific and Technical Advisory Body was established during the first Meeting of States Parties in order to assist this Meeting. This Advisory Body is composed of experts nominated by the States Parties taking into account the principle of equitable geographical distribution and gender balance.[626] In order for this organ to function, States Parties should endeavour to provide appropriate funding.[627] Members from developing countries and countries in transition may benefit from financial assistance in order to participate in the meetings of this Body.[628] The Advisory Body convenes once a year, but under special circumstances and when funds are available, an additional session can be convened by the Director-General of UNESCO.[629]

One of the most notable tasks of the Advisory Body is that it provides practical assistance to States Parties when requested.[630] When States Parties do not have experienced underwater archaeologists to fall back on in case questions arise relating to UCH, these States can ask the Advisory Body for assistance. This assistance can either be provided in the form of practical advice that is given to the State Party or by the Advisory Body going on a mission in order to evaluate a

[624] Meeting of States Parties to the Convention on the protection of the Underwater Cultural Heritage, Fifth Session, 28-29 April 2015, UCH/15/5.MSP/11, Resolution 4/MSP 5, 2.
[625] These were adopted as examples of best practices during the sixth session of the Meeting of States Parties. Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Sixth Session, 30-31 May 2017, UCH/17/6.MSP/12REV, Resolution 6/MSP 6, 4. For more information on these sites see UNESCO, *Best Practices of Underwater Cultural Heritage*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/underwater-cultural-heritage/best-practices-of-underwater-cultural-heritage/ (consulted 24 August 2017).
[626] UNESCO, *First session of the Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/meetings/meetings-of-states-parties/first-meeting-of-states-parties/ (consulted 22 August 2017); Article 1 Statutes STAB.
[627] UNESCO as well shall make efforts to identify funding from regular and extra budgetary sources. Article 7 Statutes STAB.
[628] Article 7 Statutes STAB.
[629] Article 4 Statutes STAB.
[630] Aside from offering assistance to States Parties, the Advisory Body has over the years made numerous recommendations to the Meeting of States Parties in order to further the ratification and implementation of the UNESCO Convention. These recommendations were largely included in the resolutions of the Meetings of States Parties.

site or other issues on the scene. Anno 2018, the Advisory Body has already been on missions to three States Parties. During its first mission a delegation went to Haiti in order to verify the identity of a wreck site that was believed to contain the remains of the Santa María, Christopher Columbus' flagship on his first expedition to the Americas. Investigations showed, however, that the remains are those of another ship. Evidence for this were the nails and pins found on site. Since these are of copper alloy rather than iron or wood, as is to be expected from a wreck like the Santa María, the remains are clearly those of a more recently sunk ship.[631] The second mission undertaken by the Advisory Body was one to Madagascar in order to verify the status of the historical shipwrecks near Sainte Marie Island and to evaluate an excavation project that was being executed by a film team. This film team announced that they had discovered a silver ingot found on the Adventure Galley, which is a shipwreck associated with the pirate William Kidd. The third mission went to the San José wreck located in Panama. In 2003 a recovery and development project was undertaken on this wreck by the company 'Investigaciones Marinas del Istmo' under a contract with the Ministry of Economy and Finance. Panama had requested the Advisory Body to undertake an audit of this project to assess its compliance with the Rules annexed to the UNESCO Convention.[632]

The possibility to rely on the Advisory Body, which offers advice and practical assistance to States that do not have the expertise themselves, can already form in itself an incentive for States to become a party to the UNESCO Convention.

## 4.12. The ratification and implementation of the UNESCO Convention

### 4.12.1. Ratifications of the UNESCO Convention

Anno 2018, 60 States are a party to the UNESCO Convention. The last States to have joined the Convention in 2018 were the Federated States of Micronesia and Costa Rica. As for the States bordering the North Sea, France and Belgium are the only ones that already ratified the Convention. France did this on 7 February 2013 and Belgium on 5 August 2013.[633] The Netherlands and Germany have indicated that they are planning to ratify the Convention in the near future and

[631] Meeting of the Scientific and Technical Advisory Body, Sixth Meeting, Paris, 30 April 2015, UCH/15/6.STAB/9, 2; UNESCO, *UNESCO Scientific and Technical Advisory Body rejects identification of wreck as Sancta Maria-Mission Report*, www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/advisory-body/missions/mission-to-haiti/ (consulted 27 August 2017).

[632] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Sixth Session, 30-31 May 2017, UCH/17/6.MSP/220/3, 8 and 11; Fifth Session, 28-29 April 2015, UCH/15/5.MSP/11, Resolution 4a/MSP5; Meeting of the Scientific and Technical Advisory Body, Seventh Meeting, 10 May 2016, UCH/16/7.STAB/8, 3-5.

[633] UNESCO, *States Parties UNESCO Convention*, www.unesco.org/eri/la/convention.asp?KO=13520&order=alpha (consulted 24 July 2018). For more on France and Belgium see respectively chapter three and four.

in the UK several studies were conducted in an attempt to make the government consider ratification as well.[634]

As the number of States Parties to the UNESCO Convention rises, more States will be prone to ratify the Convention themselves. As the Convention gains more Parties, it will start to play a bigger role at a global level. States that refuse to ratify the Convention, will not be involved as members of the Meeting of States Parties and can, in other words, not influence the practical implementation of the Convention nor how it will evolve in the future. Especially now that a number of States that initially had concerns about the Convention have ratified it or have stated that they will do so in the near future, a lot of pressure is placed on other States to do the same. The French ratification in 2013 was called by many "a breach in the wall of resistance".[635] France was namely the first State to ratify the Convention that had abstained from voting on it in 2001. In the meanwhile Paraguay and Guinea-Bissau, two other States that abstained from voting on the Convention ratified it as well, respectively in 2006 and 2016. Germany and the Netherlands, two other States that abstained from voting, have indicated that they wish to ratify the Convention in the near future as well. Additionally, studies have taken place in the Netherlands and the UK addressing the issues that these States had with the UNESCO Convention at the time of its adoption. These studies concluded that it is perfectly possible to interpret the UNESCO Convention in a such a way that it is completely compatible with UNCLOS, leaving these States with no reason not to ratify the Convention.[636]

A tendency is also visible in the resolutions of the UN General Assembly towards promoting the ratification of the UNESCO Convention. The UN General Assembly has made mention of the UNESCO Convention in its resolutions ever since it was adopted in 2001. In the years immediately following the adoption of the Convention, the General Assembly generally merely noted the efforts that were made by UNESCO for the preservation of UCH, and referred in particular to the Rules annexed to the Convention.[637] An exception to this rule were the resolutions relating to the return and restitution of cultural property to the countries of origin, wherein the General Assembly invited States to become a party to the UNESCO Convention.[638] It was, however, only in 2011 in its

[634] See chapter three of this dissertation.
[635] S. DROMGOOLE, "Reflections on the position of the major maritime powers with respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage", *Mar. Policy* 2013, (117) 120.
[636] See chapter three for more on the (potential) ratification of the UNESCO Convention by States bordering the North Sea.
[637] United Nations General Assembly, Sixtieth Meeting, 29 November 2005, A/RES/60/30, point 8; Sixty-fourth Meeting, 4 December 2009, A/RES/64/71, point 8; Sixty-Fifth Meeting, 7 December 2010, A/RES/65/37, point 8. On certain occasions, the General Assembly also explicitly recognised the importance of the UNESCO Convention. United Nations General Assembly, Sixty-fifth Meeting, 4 December 2006, A/RES/61/52, point 5; Sixtieth Meeting, 7 December 2009, A/RES/64/78, point 5.
[638] See for example United Nations General Assembly, Sixty-first Meeting, 4 December 2006, A/RES/61/52, point 5.

resolutions relating to oceans and the law of the sea that the General Assembly began to consistently call upon States to consider becoming a party to the UNESCO Convention.[639] The fact that the UN General Assembly since 2011 consistently encourages States to become a party to the UNESCO Convention illustrates that the protection of UCH is considered to be of significant importance within the framework of the UN. Coming from the General Assembly, these resolutions are a very strong encouragement for States to become a party to the Convention.

### 4.12.2. The implementation of the UNESCO Convention: model for a national act on the protection of cultural heritage

Within the framework of UNESCO a Model Act was made in order to assist States in the creation or improvement of national acts dealing with cultural heritage.[640] This Model Act departs from a comprehensive approach and incorporates the protection of cultural heritage on land and UCH into one single act.[641] Combining and coordinating the rules for heritage on land and submerged heritage with one another has its benefits, especially for heritage in the intertidal zone which is located partly on land and continues in the marine area. As will be demonstrated further in this dissertation, even when a comprehensive act encompassing all types of cultural heritage is created, a distinction is often made between heritage on land and submerged heritage within the act itself. While on land, the territory is mostly divided into smaller authorities such as municipalities and provinces which are well placed to deal with heritage matters and are therefore often competent for this matter, no such competence division exists at sea. Even in a single integrated act protecting heritage, therefore a distinction will in most cases be made between the authorities competent for heritage on land and those competent for heritage located in the maritime zones. Additionally, the protection of cultural heritage under water does require a number of specific provisions because of its specificity and especially because of the fact that it can be located in the Area or in a State's EEZ/ on a State's continental shelf where coastal States do not have (full) jurisdiction over UCH. Finally, as will be demonstrated, the national competence division between several legislative levels, as is the case in for example Belgium and Germany, can prevent the creation of a single act.[642]

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[639] See for example United Nations General Assembly, Seventy-first Meeting, 23 December 2016, A/RES/71/257, point 9; Seventieth Meeting, 23 December 2015, A/RES/70/235, point 9.

[640] UNESCO, *Model Act for a National Act on the Protection of Cultural Heritage*, available at www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/publications-resources/legal-documents/. (UNESCO Model Act)

[641] This UNESCO Model Act is based on internationally accepted standards, in particular on the UNESCO Convention, but also incoporates for example the 1970 UNESCO Convention. The Act, however, does not address all types of heritage. For example no specific mention is made of world heritage and the 1972 UNESCO Convention dealing with it.

[642] See chapter three and four of this dissertation.

This UNESCO Model Act is based on internationally accepted standards and serves to implement especially the UNESCO Convention, but as well the 1970 UNESCO Convention. Furthermore, the Model Act suggests that regulations on natural heritage could as well be included under a comprehensive national act. It should be noted that this Model Act is merely a suggestion and is in no way binding. Nevertheless, it does give a clear overview of all the aspects that a national legislation should contain in order to fully comply with the UNESCO Convention.

#### 4.12.2.1. Territorial and material scope

The UNESCO Model Act applies to all cultural heritage whether covered by water or located on land within the limits of national jurisdiction.[643] By including a generally formulated phrase, the question of whether or not the EEZ and the continental shelf are part of this territory is left to the coastal States to determine. Additionally, this Model Act applies to all vessels flying the State's flag and to all its nationals regardless of where they are located.[644] This once again emphasises the importance of not only protecting UCH located in the sea areas over which the coastal State has jurisdiction, but to protect UCH worldwide even when it is located in the Area or in the maritime zones of third States. Land-locked States do not escape the responsibility to create legislation for the protection of UCH, as they as well should impose the principles included in the UNESCO Convention on their vessels and nationals.

The Model Act departs from a wide definition of cultural heritage similar to the one given by the UNESCO Convention but leaves the question of how old a site, structure or object should be to the States.[645] The Model Act suggests that the 100-year benchmark put forward by the UNESCO Convention could be used, but allows for a more recent benchmark, for instance 50 years, to be used as well. The fact that the natural and cultural context of the discovery are an inherent part of the UCH is explicitly mentioned within the definition. A separate definition is given for cultural heritage of an archaeological character which includes "*undiscovered and discovered cultural heritage which is located in the soil or under water*".[646] This definition illustrates that within national policies and legislation account should be taken of the possibility that undiscovered heritage might be present within the soil or seabed and that this heritage as well should be included in the protective regime.

[643] Article 1(1) UNESCO Model Act.
[644] Article 1(2) UNESCO Model Act.
[645] Cultural heritage includes "*all traces of human existence having a cultural, historical or archaeological character, which are older than [__ years] […] together with their archaeological and natural context*" Article 2(1)(a) UNESCO Model Act.
[646] Article 2(1)(e) UNESCO Model Act.

#### 4.12.2.2. Competent national authority

The UNESCO Model Act requires that a national authority is established which has the responsibility to control, protect, conserve, present and manage cultural heritage and that should issue permissions in this regard.[647] Additionally, this authority has responsibilities in encouraging public awareness, research, education and in fostering the establishment of museums.[648] It should create and maintain an inventory which includes a list of UCH located beyond the limits of national jurisdiction if a verifiable link with that heritage exists.[649] In order for this national authority to properly fulfil all its responsibilities, it is essential that sufficient means and expertise are made available to support this authority. It is crucial to realise that the task of the authority is not limited to addressing reports that are submitted to it and issuing permits when requested, but that this authority must also build a framework surrounding the protection of UCH trough, *inter alia*, education, awareness raising, training of archaeologists, facilitation of research and providing access to UCH. This is a time-consuming task that requires significant insight in the matter as well as a clear strategy and sufficient financial means. The importance of a strong national authority must thus not be underestimated.

#### 4.12.2.3. Reporting discoveries and intended activities

The Model Act requires States to prohibit the search for, exploration, investigation, interference with, displacement or removal of cultural heritage of an archaeological character without a permit from the national authority.[650] This is a very extensive prohibition as even the search for UCH without a permit would be prohibited. The Model Act does not specify whether this would only include the search for UCH using certain techniques or equipment or whether this is a general prohibition. The latter interpretation would potentially cause problems in case of an incidental find that needs to be reported. The person reporting the find would have to be able to demonstrate that he discovered the find accidentally and was not actively searching for it. As this requires the prove of the absence of an intent which is very difficult to prove or refute, it is more likely that this prohibition should be limited to the search for cultural heritage using specialist equipment or techniques.

Upon discovering UCH, this should be left undisturbed unless interference is authorised by the competent national authority or in case of "*actual and immediate danger of serious damage or*

[647] See also article 22 UNESCO Convention.
[648] Article 5(1) UNESCO Model Act.
[649] Article 5(2)(b) UNESCO Model Act.
[650] Article 6(1) UNESCO Model Act.

*destruction*" or when the heritage "*poses a concrete and immediate danger to human life*".[651] When introducing such a provision within national legislation, caution must be taken that the notion of "*actual and immediate danger*" is not interpreted too widely by non-experts.

Any discovery of UCH shall be reported to the competent national authority within a fixed number of days - three is suggested - or alternatively on reaching the first port.[652] Likewise, when a person is aware of an activity being conducted by an unauthorised person that "*poses an actual and immediate danger of serious damage or destruction to cultural heritage*" he must report this to the competent authority.[653]

Nationals and the masters of vessels flying the State's flag must report any discovery or intended activity directed at UCH even when this is located beyond national jurisdiction.[654] In case this heritage is located within the EEZ or on the continental shelf of another State, nationals and masters of the vessel should report this to the authorities of that coastal State as well.[655] Under this provision the coastal State will be informed of any discovery or intended activity at UCH located in its EEZ or on its continental shelf based on the nationality and flag State jurisdiction of another State. In other words, this provision circumvents the issue of whether or not a coastal State can directly impose a duty to report on third State nationals and flagged vessels. The coastal State, when party to the UNESCO Convention, will in this case be involved in the consultations on the management and protection of the UCH, probably as Coordinating State.

#### 4.12.2.4. Permits for activities

The possibility to obtain a permit for any activity directed at UCH is foreseen in the UNESCO Model Act.[656] Such a permit will only be granted if this is in the best interest of protecting the UCH and if it "*significantly contributes to the protection of, enhancement or knowledge about, the concerned cultural heritage*". Furthermore, the activity must be conducted in full conformity with the Rules set out by the Annex and a proper scientific study should be conducted.[657] Permits can only be granted based on a project design in accordance with the Rules of the Annex and no permit can be issued for the commercial exploitation of cultural heritage.[658] The Model Act sets out a number of

[651] Article 6(2) UNESCO Model Act.
[652] Article 6(4) UNESCO Model Act.
[653] Article 6(5) UNESCO Model Act.
[654] Article 6(7) UNESCO Model Act.
[655] Article 6(10) UNESCO Model Act.
[656] Article 8(1) UNESCO Model Act.
[657] Article 8(2) UNESCO Model Act.
[658] Article 8(3) and (4) UNESCO Model Act.

formalities relating to the permit and the procedure to obtain it.[659] It is crucial that under national legislation this procedure is clearly elaborated in order to allow, for example, project developers, scientists or other sea users to apply for such a permit knowing what are the conditions for obtaining it and the formalities that need to be fulfilled. The Model Act provides a number of provisions relating to the modalities of permits: 1) that a permit contains all conditions in order to ensure the proper conduct of the activity, the documentation, conservation and access to the site by the competent national authority; 2) that the permit can only be issued for a period of one year after which it can be renewed following revision; 3) that the permit can be revoked in case the conditions set in the permission, the Rules or the project design are not complied with or in the interest of the protection of the cultural heritage;[660] 4) that permits are non-transferrable and that the national authority will keep a national register containing all permits[661]; and 5) that a permit can only be executed under the effective supervision of the person that is authorised to undertake the activity while respecting the proper safety measures and protecting the environment.[662]

Specific provision is made for permits dealing with activities that are directed at cultural heritage located outside the limits of national jurisdiction. Such a permit can only be issued when the enacting State is the Coordinating State, in case the UCH is threatened by immediate danger or when the cultural heritage is located in the coastal State's EEZ or on its continental shelf and the permit is granted to prevent interference with the coastal State's sovereign rights and jurisdiction.[663]

#### 4.12.2.5. Export certificate

Provision is made in the Model Act for an export certificate to be issued under strict conditions to allow heritage to be exported outside of the territory of the State.[664] In the Annex to the Model Act an export certificate for cultural objects is included, without which no cultural heritage can be exported.[665] The creation and use of such a uniform export certificate can considerably assist States Parties in preventing the entry into their territory of illicitly exported UCH as required in article 14 UNESCO Convention. States Parties should therefore seriously consider applying this form attached to the Model Act.
The Model Act provides for the return of illegally trafficked cultural heritage. Heritage is illegally trafficked, *inter alia*, when it has been brought into a State without an export certificate, if such a

[659] Article 6(6) and article 8(3-7) UNESCO Model Act.
[660] Article 8(5) UNECO Model Act.
[661] Article 8(6) UNESCO Model Act.
[662] Article 8(7) UNESCO Model Act.
[663] Article 8(8) UNESCO Model Act.
[664] Title V UNESCO Model Act.
[665] Article 10(3-4) UNESCO Model Act.

certificate is mandatory. The modalities of a claim for the return of illegally trafficked cultural heritage are set out more in detail in the Model Act.[666]

#### 4.12.2.6. Underwater cultural heritage outside national jurisdiction

As was explained, one of the primary objectives of the UNESCO Convention is to regulate the protection of UCH located outside the national jurisdiction of States. In order to implement the UNESCO provisions on this, the Model Act includes a separate section on the protection of UCH outside of national jurisdiction. As will be demonstrated, this extraterritorial aspect is often still missing from national legislation.[667] The Model Act can therefore in this respect serve as an example for States wishing to fully implement the UNESCO Convention.

The national competent authority must inform the Director-General of UNESCO in case of any discovery of or intended activities directed at UCH located outside the limits of national jurisdiction.[668] When the heritage is located within the EEZ or on the continental shelf of a third State (Party), that coastal State will be informed as well as all other States Parties.[669]

In the Model Act, the national competent authority is given clear responsibilities in receiving invitations or declarations for consultation and in declaring that the State it represents has a verifiable link with a UCH site.[670] In case of discoveries or intended activities in the EEZ or on the national continental shelf, the competent national authority or Foreign Office must either, acting as a Coordinating State, consult with all States Parties that have made a declaration if this is based on a verifiable link or make a declaration that it does not wish to assume the role of Coordinating State if a reasonable motive exists for this.[671] When the UCH is located in the Area and a declaration of interest has been made by the competent national authority, it has the task of declaring how the UCH should be best protected, it must give its opinion on which State should be appointed as Coordinating State and, if the State it represents is appointed as Coordinating State, conduct and coordinate the consultations.[672] When the State acts as the Coordinating State, the competent national authority has the responsibility to implement all agreed measures and issue all necessary permits thereto.[673]

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[666] Article 23 UNESCO Model Act.
[667] See chapter three.
[668] Article 11(1) UNESCO Model Act. In case the heritage is located in the Area, the national competent authority must notify the Secretary-General of the ISA as well. Article 11(1) UNESCO Model Act.
[669] Article 11(2) UNESCO Model Act.
[670] Article 12 UNESCO Model Act.
[671] Article 13(1) UNESCO Model Act.
[672] Article 13(2) UNESCO Model Act.
[673] Article 14(1) UNESCO Model Act.

This cooperation mechanism in the UNESCO Convention is fairly new for all States and still needs to be implemented by most, if not all. States have cooperated in the past on the protection of UCH either informally or by creating a binding agreement on a specific UCH site. However, the UNESCO scheme is the first binding cooperation mechanism for UCH located outside territorial jurisdiction. In order for this system to function, States Parties need to ensure that their competent national authority has the means to fully implement this cooperation mechanism, especially when the State acts as Coordinating State. The responsibilities of the national competent authority need to be laid down in legislation. The Model Act can certainly serve as an inspiration thereto.

#### 4.12.2.7. Activities incidentally affecting underwater cultural heritage

Unlike the UNESCO Convention, which mainly deals with activities directed at UCH and leaves it mostly up to States Parties to regulate activities incidentally affecting UCH in article 5, the Model Act does give some indication as to how this type of activities should take UCH into account.

The competent national authority should be notified of any intended activity in an area that is known to contain UCH or where there is a reasonable expectation that the area might contain UCH.[674] When the activity endangers or damages the UCH more than appears to be reasonable compared to the public benefit that will be achieved, it should be prohibited.[675] This can potentially be a tricky balancing exercise as it is difficult to measure, for example, economic benefits against the value of an UCH site. The Model Act does not specify which entity needs to decide on this.

Industrial activities that affect areas (potentially) containing UCH must undertake an impact assessment as part of the application for obtaining authorisation for the project.[676] In authorising development or resource extraction projects in such areas, the competent national authority must be consulted.[677]

In any case, the Model Act provides that the project developer will ensure that the necessary funds are available and that he is responsible for 1) assessing the project area and identifying the UCH present therein; 2) preventing, to the extent possible, any impact on UCH caused by the project;

[674] States will have to conduct research to identify the areas which are likely to contain UCH and communicate this to developers and other sea users. For example, in the Belgian SeArch project one of the objectives was to create an archaeological expectancy map to identify in which areas UCH is most likely to be found.
[675] Article 16(1) UNESCO Model Act.
[676] Article 16(2) UNESCO Model Act.
[677] Article 16(3) UNESCO Model Act.

3) mitigating negative effects in the project area and its surroundings and 4) conserving and promoting affected UCH and disseminate knowledge about it.[678]

As a general rule, which will often apply to activities such as fishing or dredging, the Model Act provides that anyone who displaces UCH has to declare this to the competent national authority and has to either deposit the object with that authority or hold it at its disposal under conditions that ensure the conservation of the heritage.[679]

While the UNESCO Convention itself does not address in detail activities incidentally affecting UCH, the Model Act can potentially be seen as offering some sort of (non-binding) minimum requirements that States should comply with in order to adequately protect UCH from activities incidentally affecting it.

#### 4.12.2.8. Ownership rights over underwater cultural heritage

Another issue that was left out of the UNESCO Convention and that should be dealt with at the national level is that of title over UCH. Once again, the Model Act gives a number of guidelines on how this can be dealt with.

The Model Act sets out two major principles relating to ownership over UCH. The first is that UCH is owned by the State unless ownership existed immediately prior to its discovery.[680] This provision leaves room for discussion as it is unclear what is meant by "*immediately prior to*". For shipwrecks, for example, would it be sufficient that there was an owner at the time of sinking who comes forward to claim his rights either in person or in the form of his legal successors? Regardless of the answer to this question, the underlying idea of this provision is clear and it is up to the national legislators to resolve this issue. The second major principle is that neither the law of salvage nor the law of finds apply to UCH without any exceptions.[681] The Model Act thus goes one step further than the UNESCO Convention by completely excluding UCH from the scope of these instruments. As was already explained, this might be the better solution in order to prevent potential issues between the application of the law of salvage and finds and the obligations that States have following the UNESCO Convention.

[678] Article 16(4) UNESCO Model Act.
[679] Article 6(3) UNESCO Model Act.
[680] Article 17(1) UNESCO Model Act.
[681] Article 17(2) UNESCO Model Act.

The Model Act provides for the possibility to reward persons that discover and report UCH at the discretion of the competent authority.[682] The possibility of receiving a reward could be a strong incentive for people to report the discovery of UCH. Especially for UCH located outside national jurisdiction, where control and enforcement become more difficult, such a reward could help with the overall compliance with the UNESCO Convention which is heavily based on this reporting duty as a starting point. On the other hand, however, such a reward can only be given if the person reporting the discovery fully complies with the national legislation by which he is bound, and thus the UNESCO Convention. Thereto he must, *inter alia*, report the find within the requested time frame, leave it *in situ* and not damage it in any way. Caution should also be exercised when introducing such a reward as this could result in the infringement of the prohibition to search for UCH without authorisation. By making the reporting of discoveries into a lucrative activity, treasure hunters might be drawn to this and use techniques for searching heritage that are not allowed without a permit. This needs to be avoided as it would jeopardise the main objective of the UNESCO Convention.

The Model Act foresees the possibility for a State, potentially via the competent national authority, to acquire cultural heritage that is considered to be of public utility through negotiations.[683] When such negotiations are unsuccessful the national authority may[684], for objects, declare the compulsory transfer of ownership to take place against indemnification.[685] For sites, buildings and structures, the national legislation relating to the acquisition of these types of heritage by the government applies.[686] Introducing such a provision under national legislation could be valuable when for example a shipwreck is of particular importance, but the owner refuses to allow research to take place on it. By acquiring the wreck through compulsory transfer the government can guarantee that it is being properly researched, sufficiently protected and made available for the general public either directly or indirectly.

#### 4.12.2.9. Sanctions and seizure

UCH is subject to seizure when it has been recovered without a valid permit, when it was stolen or illicitly imported, exported or when the transfer of ownership was illegal.[687] The Model Act gives a number of suggestions of potential seizing authorities such as "*police authorities, frontier control,*

[682] Article 17(3) UNESCO Model Act.
[683] Article 18(1) UNESCO Model Act.
[684] The competent national authority needs the approval of the Ministry of Culture hereto. Article 18(2) UNESCO Model Act.
[685] Article 18(2) UNESCO Model Act.
[686] Article 18(4) UNESCO Model Act.
[687] Article 19(1) UNESCO Model Act.

*the coast guards and the national competent authority*".[688] Once heritage is seized it must be recorded, stabilised and protected. It shall be disposed of for the public benefit.[689] When the seized UCH was recovered from a site outside national territorial waters, the competent national authority must notify the Director-General of UNESCO and any State with a verifiable link of the seizing.[690] The competent national authority and/or police should have the right to access private or public property, including vessels,[691] in order to conduct an inspection as "*this is reasonably necessary to fulfil its tasks, in particular regarding an object, which appears to be cultural heritage.*"[692]

The Model Act explicitly includes provisions implementing articles 14 and 15 of the UNESCO Convention. The Act prohibits the "*entry into national territory, the dealing in, or the possession of cultural heritage unlawfully exported and/or recovered from another State or recovered in a manner not in conformity with the UNESCO Convention*"[693] and "*The use of State territory under national* jurisdiction *and control […] in support of any illegal or damaging activity directed at cultural heritage*".[694]

A number of offences were listed in the Model Act, which can be punished by a fine and/ or imprisonment.[695] As was discussed above,[696] it seems that the combination of a fine and/or imprisonment together with the possibility to seize the UCH amounts to an adequate punishment.

## 4.13. Conclusion

The UNESCO Convention is without a doubt the most elaborate convention dealing with the protection of UCH. Its greatest merits are the establishment of a set of internationally accepted archaeological rules for activities directed at UCH in its Annex and the creation of a framework for dealing with UCH located outside the waters under coastal State jurisdiction. While a number of States had/ have their concerns on a number of aspects such as the regime for State vessels, the issue of creeping jurisdiction for coastal States and the application of the law of salvage and finds, it is possible to interpret the Convention in a manner that is consistent with international law including UNCLOS.

[688] Article 19(4) UNESCO Model Act.
[689] Article 19(2) UNESCO Model Act.
[690] Article 19(3) UNESCO Model Act.
[691] An exception is made for property that is used in the military. Article 20(1) UNESCO Model Act.
[692] A judicial warrant needs to be delivered before such access can take place. Article 20(1) UNESCO Model Act.
[693] Article 21(1) UNESCO Model Act.
[694] Article 21(2) UNESCO Model Act.
[695] Article 22 UNESCO Model Act.
[696] See *supra* section 4.9.

As the definition of UCH is formulated in a very broad sense, the Convention has the potential of offering a protective framework for all sites and objects that have been submerged for over 100 years. At the same time, the lack of a clear significance criterion allows States, within limits, to develop a number of criteria to be used at the national level for identifying UCH.

The UNESCO Convention does have its shortcomings as it contains a number of ambiguities, does not resolve important issues such as the question on immunity of and ownership rights over sunken State craft and leaves younger heritage completely unprotected, including wrecks from WWII. Nevertheless, it offers a good baseline for States to work from and develop national legislation dealing with UCH protection or, hopefully, multi- or bilateral agreements. The Meeting of States Parties together with the Advisory Body have, and will continue to, further elaborate the Convention. Instruments that have been developed within these organs, such as the operational guidelines, will help States Parties to fully understand and implement the Convention within their national legislation. Similarly, the UNESCO Model Act offers a clear guideline on how the principles of the UNESCO Convention can be applied in national legislation. Nevertheless, the practical implementation of the Convention remains a challenge for States Parties. Especially the cooperation mechanism for the protection of UCH located outside coastal State's territorial waters poses a challenge. The case of the Skerki banks is a very interesting development in this regard and might offer new insights in the near future on the practical application of this cooperation mechanism. In any case, in order for the Convention to fully function, it is crucial that a large number of States ratify and implement it. As a number of States that initially had concerns on the Convention have already done so, or are planning on doing this in the near future, and considering the fact that the UN General Assembly in its latest resolutions encourages States to become a party to this convention, it would not be surprising that over the next couple of years more States decide to ratify the Convention. While this would be a positive evolution, it is likely to still take many years of trial and error before a large number of States have fully implemented the principles of the Convention and before the Convention regime becomes fully operational. Once it does, however, this will be an enormous step forward in the international protection of UCH.

## 5. The role of the European Union in the protection of underwater cultural heritage

As this dissertation aims to assess the Belgian legislation for UCH protection in light of international and regional obligations, it is crucial to have a look at the role of the EU with regards to UCH protection. Belgium, being an EU Member State, is bound by legislation issued by the EU and can profit from any framework set up by it. In this section an assessment is given of to what extent and in what way the EU has contributed to UCH protection.

## 5.1. Competence of the European Union over cultural heritage

The European Commission considers cultural heritage as a part of the EU's common wealth for which we are all responsible as it is an irreplaceable source of knowledge and is valuable for economic growth, employment and social cohesion. It enriches the lives of millions of people and is a driving force for the European cultural and creative industries. The way in which we preserve the heritage and valorise it, is a major factor in defining the place of Europe in the world and the general attractiveness as a place to live and work.[697]

While it is clear that the Commission feels strongly about its importance at the European level, cultural heritage has always been perceived as in essence being a national matter that must be dealt with by the national, regional and local authorities of each Member State. This view is reflected in the limited competences given to the EU in this field. Article 3(3) of the Treaty on the European Union (TEU) states that the EU "*shall ensure that Europe's cultural heritage is safeguarded and enhanced*".[698] The EU thus certainly has responsibilities with regard to cultural heritage. However, the EU was only given limited competences in the field of heritage protection and management. Article 6 of the Treaty on the Functioning of the European Union (TFEU) provides that "*The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be […] (c) culture*".[699] This entails that for culture the EU cannot adopt any legally binding acts requiring its Member States to harmonise their laws and regulations. This does not mean, however, that the EU has no role to play in protecting cultural heritage, and more specifically UCH, in line with the Treaties of the EU and the principle of subsidiarity.[700] According to article 167 TFEU "*The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore*."[701] The EU can take actions to encourage cooperation between Member States and if necessary to support or supplement the actions of the Member States in *inter alia* the "*conservation and safeguarding of cultural heritage of European significance*" and the "*improvement of the knowledge and dissemination of the culture and history of the European peoples*".[702] It is up to the European Commission to help address common challenges such as the

[697] European Commission, Communication Towards an Integrated Approach to Cultural Heritage for Europe, Brussels, 22 July 2014, COM(2014) 477 final, 2. (Commission Communication COM(2014)477 final)
[698] Article 3(3) European Union, Consolidated Version of the Treaty on the European Union, 13 December 2007, *OJ* 26 October 2012, C 326/13. (TEU)
[699] Article 6 European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, *OJ* 26 October 2012, C 326/47. (TFEU)
[700] Commission Communication COM(2014)477 final, 2.
[701] Article 167(1) TFEU.
[702] Article 167(2) TFEU.

digitisation of information and the promotion of cultural richness and diversity as well as to offer support to the innovation potential of cultural and creative industries.[703]

Over the years the EU has introduced numerous initiatives and funds that directly or indirectly have an effect on the protection of cultural heritage in the EU. An overview of the most relevant initiatives is given in order to understand the role that the EU can play with regard to heritage protection.

### 5.2. The European Union as a contributor to heritage protection through policy and projects

Over the years, the EU institutions have adopted numerous resolutions, conclusions, communications and decisions stipulating their policy on and their goals regarding cultural heritage.

In 2007 the European Council adopted the European Agenda for Culture.[704] This Agenda was a milestone in the sense that for the first time at the European level a number of overarching objectives in the field of cultural cooperation were identified. The European Agenda for Culture sets out a framework for this cooperation, which includes cultural heritage. The Agenda holds three strategies: to promote cultural diversity and intercultural dialogue; to promote culture as a catalyst for creativity in the Lisbon strategy framework for growth, jobs, innovation and competitiveness; and to promote culture as a crucial element in the international relations of the Union.[705] A role is seen for cultural heritage under all three strategies.[706]

Since the 2007 Agenda, the Council has considered cultural heritage as a priority in its Work Plans for culture. The latest Work Plan that was adopted runs from 2015-2018.[707] One of its priorities is in fact cultural heritage.[708] The Plan foresees that the experts of Member States will exchange

[703] *Strategic framework – European Agenda for Culture*, http://ec.europa.eu/culture/policy/strategic-framework_en (last update 7 August 2018). European Commission, Communication on A European Agenda for Culture in a Globalizing World, Brussels, 10 May 2007, COM(2007) 242 final.
[704] European Council, Resolution on the European Agenda for Culture, 16 November 2007, *OJ* 29 November 2007, C 287/1. (Council Resolution 2007/C 287/01) The European Agenda for Culture was drafted by the European Commission after consultation with civil society, adopted by all member States and later endorsed by the European Parliament. A. CRABB, "The Initiatives of the EU in the Area of Cultural Heritage" in G. BRAECKMAN and K. VAN DEN GOOR (eds.), *Cultural heritage, A Resource for Europe. The benefits of interaction*, 2011, available at https://www.vlaanderen.be/nl/publicaties/detail/cultural-heritage-a-resource-for-europe-the-benefits-of-interaction, 53-64. (CRABB 2011)
[705] Point 2 Council Resolution 2007/C 287/01.
[706] CRABB 2011.
[707] European Council and the Representatives of the governments of the member States, Conclusions on a Work Plan for Culture (2015-2018), *OJ* 23 December 2014, C 463/4. (Council Conclusions 2014/C 463/2)
[708] Council Conclusions 2014/C 463/2, 4-5.

information in order to identify innovative approaches to multilevel governance of heritage involving the public sector, private stakeholders and the civil society. By the end of 2016, it was foreseen that a '*Manual of good practice for policy makers and cultural heritage institutions*' needed to be created. Furthermore, the Work Plan requires experts of Member States to exchange information in order to work on capacity building for heritage professionals. Focus should be on the transmission of traditional skills and know-how as well as on emerging professions, for example, in the context of the digital shift. By the end of 2018 this should result in the publication of a '*Manual of good practices for cultural and education institutions*'. The European Commission is given the task to conduct a risk assessment in order to safeguard cultural heritage from natural and human threats. Hereto, the Commission must map the existing strategies and practices at the national level taking into account such factors as over-exploitation, pollution, unsustainable development and natural catastrophes.[709] Different working methods are used in the Work Plan, including the open method of cooperation,[710] informal meetings of officials of Ministries of Culture, ad-hoc expert groups, thematic seminars, conferences and studies. The Member States are invited to consider the results of the Work Plan when developing national policies and to spread information on the results of the Plan to the stakeholders at all levels.[711]

A very important programme that was launched within the EU was Europe 2020.[712] Europe 2020 is a ten-year strategy for "*smart, sustainable and inclusive growth*"[713] that was launched in 2010. Under this Strategy three priority themes are set forth namely smart growth, sustainable growth and inclusive growth as well as five headline targets that should be accomplished by 2020. These targets are situated in the areas of employment, research and development, climate change and energy, education, and the fight against poverty.[714] In order to achieve these targets, seven flagship initiatives were proposed under each of the priority themes.[715]

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[709] Council Conclusions 2014/C 463/2, 9-10.

[710] Under the method of open coordination (OMC) experts from Ministries of Culture and national cultural institutions come together 5-6 times over a period of 18 months in order to exchange good practice and to produce policy manuals and toolkits that can be spread throughout Europe. The Member States will decide every four years in the Work Plan for Culture of the European Council on which topics the OMC should focus. *European Cooperation: the Open Method of Coordination*, http://ec.europa.eu/culture/policy/strategic-framework/european-coop_en (last update 7 August 2018).

[711] Council Conclusions 2014/C 463/2, 4-5.

[712] European Commission, Communication from the Commission Europe 2020 - A strategy for smart, sustainable and inclusive growth, Brussels, 3 March 2010, COM(2010) 2020 final. (Commission Communication COM(2010) 2020 final)

[713] Commission Communication COM(2010) 2020 final, 2.

[714] Commission Communication COM(2010) 2020 final, 3 and 5.

[715] The seven flagship initiatives that have been adopted are: '*Digital agenda For Europe*', '*Innovation Union*', '*Youth on the move', 'Resource efficient Europe', 'An industrial policy for the globalisation era', 'An agenda for new skills and jobs'*, and a '*European platform against poverty*'. Commission Communication COM(2010) 2020 final, 5.

In the Europe 2020 Strategy, the Blue Growth Long-Term Strategy was developed to support the sustainable growth in maritime sectors and the marine environment. [716] "*It is the maritime contribution to achieving the goals of the Europe 2020 strategy.*"[717] One of the three components of which this strategy consists is the development of sectors that have a large potential for sustainable growth and jobs. Coastal and maritime tourism has been identified as one of these sectors. In the Blue Growth Strategy, cultural heritage is considered as an important element of this coastal and maritime tourism.[718] In 2014, in the framework of the Blue Growth Strategy, the European Commission drafted a Communication on *A European Strategy for more Growth and Jobs in Coastal and Maritime Tourism.*[719] In this Communication the tourist sector is encouraged to develop new products tailored to the unique and customised experience that many tourists seek nowadays. These new products should promote the attractiveness and accessibility of, *inter alia*, "*coastal and marine archaeology, maritime heritage and underwater tourism*".[720] Member States are invited to develop tourism based on cultural heritage and create underwater archaeological parks.[721] In 2015 a call for proposals was launched that could help States to facilitate this new type of maritime tourism, namely the call for proposals for Thematic Routes on Underwater Cultural Heritage. This call was launched by the Executive Agency for Small and Medium-sized Enterprises.[722] The call for proposals explicitly mentioned the UNESCO Convention referring to its main principles and explains that the objective of the action is "*to promote the creation of touristic thematic routes on underwater cultural heritage and its preservation as a way*

[716] The Blue Growth Strategy was endorsed by the European Ministers for Maritime Affairs in October 2012 in Limassol (Council of the European Union, Declaration of the European Ministers responsible for the Integrated Maritime Policy and the European Commission on a Marine and Maritime Agenda for Growth and Jobs adopted on 8 October 2012 (Limassol Declaration)). In May 2014 the European Commission published a Communication as a follow-up to the Strategy (European Commission, Communication Innovation in the Blue Economy: Realising the Potential of our Seas and Oceans for Jobs and Growth, Brussels 1 May 2014, COM(2014) 254 final/2).

[717] European Commission - Maritime Affairs, *Blue Growth*, http://ec.europa.eu/maritimeaffairs/policy/blue_growth_en (consulted 8 February 2017).

[718] A number of funding opportunities exist for the support of tourism such as the European Structural and Investment Funds, Horizon 2020, the Competitiveness of Enterprises and Small and Medium-sized Enterprises framework programme (COSME), the Creative Europe programme and the LIFE+ programme. L. REMOTTI and T. DAMVAKERAKI, Ocean Research in Horizon 2020: The blue growth potential - Study for the ITRE Committee, February 2015, IP/A/ITRE/2014-07, available at www.europarl.europa.eu/RegData/etudes/STUD/2015/518775/IPOL_STU(2015)518775_EN.pdf, 13.

[719] European Commission, Communications on A European Strategy for more Growth and Jobs in Coastal and Maritime Tourism, Brussels, 20 February 2014, COM(2014) 86 final. (Commission Communications COM(2014) 86 final)

[720] Commission Communications COM(2014) 86 final, 7.

[721] Commission Communications COM(2014) 86 final, 8.

[722] The Executive Agency for Small and Medium-sized Enterprises (EASME) has been set-up by the European Commission to manage a number of EU programmes on its behalf. European Commission Executive Agency for Small and Medium-sized Enterprises (EASME), *Call for Proposals "Thematic Routes on Underwater Cultural Heritage"*, 2 December 2015, EASME/EMFF/2015/1.2.1.8. (EASME, EASME/EMFF/2015/1.2.1.8.) This call was launched according to the 2015 Work programme for the implementation of the European Maritime and Fisheries Fund. EASME, EASME/EMFF/2015/1.2.1.8., 2.

*to promote the competitiveness of the coastal and maritime tourism sector and to promote diversification in tourism offer."*[723] The budget available for such actions amounted up to 345.000 euro.[724] This call for proposals was closed in 2016.

In order to contribute to the objectives of the European Agenda for Culture and the Europe 2020 Strategy, a new generation of financial instruments[725] was created of which two in particular deserve further consideration in light of this dissertation: Creative Europe and Horizon 2020.[726]

## 5.3. Financing programmes

### 5.3.1. Creative Europe

In line with the Europe 2020 Strategy for growth and jobs, the European Commission has the task to ensure that the cultural sector is able to contribute, increasingly, to employment and growth in Europe. This entails that the Commission must provide financial and technical support. This can be in the form of grants or by establishing networks and platforms in support of the sector. As a means of supporting the cultural and creative industries, the European Commission established the Creative Europe[727] funding framework program.[728] This programme has the objective to

[723] EASME, EASME/EMFF/2015/1.2.1.8., 5.

[724] European Commission (EASME), *Addendum to the call for proposals "Thematic Routes on underwater Cultural Heritage*", 19 February 2016, EMFF/2015/1.2.1.8., 1.

[725] It is important to notice that article 107(3)(d) TFEU allows the granting of "*aid to promote culture and heritage conservation*" as it provides that this may be considered to be compatible with the internal market "*where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest*".

[726] In the past there have already been financing possibilities for cultural heritage projects. For example, specifically for UCH, the project '*Monitoring, safeguarding and visualizing North-European Shipwreck Sites (MoSS)*' which ran from 2001-2004 and the MACHU (Managing Cultural Heritage Underwater) project which ran from 2006-2009 were both supported by the European Union's Culture 2000 programme. For more information on these projects see: *MoSS project*, http://moss.nba.fi/; M. MANDERS, R. OOSTING and W. BROUWERS (eds.), Machu Final Report nr. 3, Rotterdam, Educom Publishers BV, 2009, available at www.machuproject.eu. The Culture 2000 programme was a European Union programme dedicated to the promotion of a cultural area which is characterised by cultural diversity and shared cultural heritage. It ran from 2000-2006 and had a budget of 236,4 million euros that was used for projects of cultural cooperation in the artistic or cultural field. One of these fields was heritage. The programme was formally established by a Decision of the European Parliament and the European Council in 2000 (Parliament and Council, Decision establishing the Culture 2000 Programme, 14 February 2000, *OJ* 10 March 2000, 508/2000/EC L63/1).

[727] European Commission, Communication on Creative Europe – A new framework programme for the cultural and creative sectors (2014-2020), Brussels, 23 November 2011, COM(2011) 786 final; European Parliament and European Council, Regulation establishing the Creative Europe Programme (2014 to 2020) and repealing Decisions No 1718/2006/EC, No 1855/2006/EC and No 1041/2009/EC, 11 December 2003, *OJ* 20 December 2013, 1295/2013 L347/221. (Parliament and Council Regulation 1295/2013 L347/221)

[728] Creative Europe is the successor of the previous culture and media mundus programmes which ran from 2007-2013. European Commission, *Creative Europe*, https://ec.europa.eu/programmes/creative-europe/ (consulted 7

"*safeguard, develop and promote European cultural and linguistic diversity and to promote Europe's cultural heritage*".[729] The Creative Europe programme supports cross-border cooperation in order to promote the modernisation of the heritage sector. This programme will also encourage the heritage sector to try to reach more diverse audiences, including migrants and young people.[730] The programme is divided in two sub-programmes, a culture and a media sub-programme, and is supported by a cross-sectoral strand.[731] A budget of 1.46 billion euros is available under Creative Europe and it runs from 2014 to 2020.[732]

Creative Europe supports a number of important initiatives that contribute to the promotion and the spreading of knowledge on cultural heritage throughout the EU. These projects include the European Heritage Days,[733] the European Union Prize for Cultural Heritage,[734] the European

August 2018). Creative Europe has a budget of 422 million for the sub-programme culture. It is open to all creative and cultural organisations both from member States as well as from a large number of non-EU countries. European Commission, *Mapping of Cultural Heritage actions in European Union policies, programmes and activities*, last update August 2017, http://ec.europa.eu/assets/eac/culture/library/reports/2014-heritage-mapping_en.pdf, 6-7.

[729] Parliament and Council Regulation 1295/2013 L347/221, article 3(1).

[730] Commission Communication COM(2014) 477 final, 9.

[731] Parliament and Council Regulation 1295/2013 L347/221, article 6.

[732] Parliament and Council Regulation 1295/2013 L347/221, article 1(2).

[733] This annual event allows people to visit thousands of sites that are rarely opened and take part in unique events. Commission Communication COM(2014) 477 final, 9.

[734] This prize, also known as the Europa Nostra Awards serves to highlight some of the best achievements in Europe in heritage care and celebrates the remarkable efforts that are made in trying to raise awareness about cultural heritage. European Commission, *Creative Europe - European Union Prize for Cultural Heritage*, https://ec.europa.eu/programmes/creative-europe/actions/heritage-prize_en (consulted 7 August 2018). In 2018, for example, a Belgian project was amongst the winners (Ief Postino: Belgium and Italy Connected by Letters). EU Prize for Cultural Heritage/ Europa Nostra Awards, *Ief Postino: Belgium and Italy Connected by Letters*, 14 May 2014, www.europeanheritageawards.eu/winners/ief-postino-belgium-italy-connected-letters/.

Capitals of Culture,[735] the European Heritage Label[736] and the European remembrance strand of the programme 'Europe for Citizens'.[737]

### 5.3.2. Horizon 2020

Horizon 2020[738] is an EU research and innovation programme that has nearly 80 billion euros in funds available. It runs from 2014 until 2020. This financial instrument serves to implement the Innovation Union, which is a Europe 2020 flagship initiative aiming to secure the global competitiveness of Europe.[739] The EU Commission feels that this programme will reinforce the position of the EU in the field of preservation, restoration and valorisation of cultural heritage by supporting cooperation among researchers. Under all three pillars of the Horizon 2020 programme (excellent science, industrial leadership and societal challenges), opportunities exist for heritage related research and innovation.[740] The programme recognises that cultural heritage is irreplaceable and that it is "*a major driver of societal cohesion, identity and well-being, and they*

[735] This initiative, awarding European cities the title of European capital of culture, highlights the potentially large social and economic return that can be generated upon investing in heritage. Commission Communication COM(2014) 477 final, 9; In 2015, this title was bestowed on, *inter alia*, the Belgian city 'Bergen'. See European Commission, *Creative Europe - European Capitals of Culture*, https://ec.europa.eu/programmes/creative-europe/actions/capitals-culture_en (consulted 7 August 2018).

[736] The EU has created the possibility for States to apply for a European Heritage Label for cultural heritage sites both on land and under water. European Parliament and European Council, Decision establishing a European Union Action for the European Heritage Label, 16 November 2011, *OJ* 22 November 2011, 1194/2011/EU L303/1. The purpose of this label is "*strengthening European citizens" sense of belonging to the Union, in particular that of young people*" and "*strengthening intercultural dialogue*" (Article 3(1)). In order for this label to be obtained a site must have a "*symbolic European value and must have played a significant role in the history and culture of Europe and/or the building of the Union.*" (article 7(1)). The site shall be preselected at the national level. (article 10) At the European level the selection of sites for the attribution of the label will be done by the European panel (article 11), established under a recommendation (article 8). The European Commission designates the sites that are awarded the label (article 14). Participation to this action by Member States is on a voluntary basis (article 4). This initiative is based on article 167 TFEU. The idea of a European Heritage Label was first launched on 28 April 2006 in Granada as an intergovernmental initiative. In 2008 the European Council adopted Conclusions with the aim to transform this intergovernmental initiative into a Union action. It invited the European Commission to submit a proposal for the creation of a European Heritage Label (Preamble 4-5).

[737] This programme is designed to finance projects that reflect on totalitarian regimes in the modern European history and that commemorate the victims of these regimes. European Commission Education, Audio-visual and Culture Executive Agency, *Europe for Citizens- European Remembrance*, http://eacea.ec.europa.eu/home/europe-for-citizens/strands/european-remembrance_en (consulted 7 August 2018).

[738] European Parliament and European Council, Regulation establishing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decision No 1982/2006/EC, 11 December 2013, *OJ* 20 December 2013, 1291/2013 L347/104. European Council, Decision establishing the specific programme implementing Horizon 2020 - the Framework Programme for Research and Innovation (2014-2020) and repealing Decisions 2006/971/EC, 2006/972/EC, 2006/973/EC, 2006/974/EC and 2006/975/EC, 3 December 2013, *OJ* 20 December 2013, 2013/743/EU L347/104. (Parliament and Council Decision 2013/743/EU L347/104)

[739] European Commission, *What is Horizon 2020*, https://ec.europa.eu/programmes/horizon2020/en/what-horizon-2020 (consulted 7 August 2018).

[740] Commission Communication COM(2014) 477 final, 7.

*contribute significantly to sustainable growth and job creation.*"[741] Cultural heritage is also considered to be an important part of the European identity. It is recognised that this heritage is under threat from both human activities and natural factors.[742]

In the Horizon 2020 programme, an informal and temporary expert group on cultural heritage was established.[743] In 2015 this expert group published a report on their findings entitled '*Getting cultural heritage to work for Europe*'.[744] This report explains that cultural heritage and cultural activities were traditionally considered as a cost for society. This view has shifted towards the appreciation that cultural heritage is "*an essential part of Europe's underlying socio-economic, cultural and natural capital*".[745] The economic benefits that cultural heritage can create are wider than merely generating tourism revenues,[746] as it is also considered to be "*an innovative stimulant for growth and employment in a wide range of traditional and new industries*".[747] Cultural heritage can also contribute to social cohesion, bring communities together and stimulate young people to engage more with their environment.[748] It is considered to be a vital resource for citizens and even an important part in the competitive advantage that Europe has with the rest of the world.[749] Cultural heritage innovation can help transform some of the challenges that the European society faces today in terms of migration, demographic change and the political disengagement of, especially, young and unemployed people into positive outcomes for European cohesion and wellbeing.[750] The 2015 Report therefore concludes that the EU should promote "*the innovative*

[741] Parliament and Council Decision 2013/743/EU L347/104, 5.6.
[742] Parliament and Council Decision 2013/743/EU L347/104, 5.6 and 6.3.
[743] European Commission, *Register of Commission Expert Groups and Other Similar Entities*, http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3091, last updated 25 January 2016.
[744] European Commission, *Getting cultural heritage to work for Europe, Report of the Horizon 2020 Expert Group on Cultural Heritage*, 2015, available at https://ec.europa.eu/programmes/horizon2020/en/news/getting-cultural-heritage-work-europe. (Commission Report 2015 Getting cultural heritage to work for Europe)
[745] Commission Report 2015 Getting cultural heritage to work for Europe, 5.
[746] The EU was granted competence over tourism for the first time by the Treaty of Lisbon. In article 6 TFEU, it is stated that this competence, as is the case for cultural heritage, is the competence to support, coordinate or supplement the actions of the Member States. Amongst other places, in the adoption of the European budget for 2018 it is stated that "*The Union will coordinate, promote and support actions for sustainable tourism, such as preservation of long-term sustainable tourism resources through protection of natural, cultural, historical and industrial heritage*" European Parliament, Definitive adoption (EU, Euratom) of the European Union's general budget for the financial year 2018, 30 November 2017, *OJ* 28 February 2018, 2018/251 L57/1. This can form an indirect contribution to heritage protection with a view to conserving it for tourist purposes. An example of a project that was an international communication campaign introduced to promote European heritage to tourists was the "*Europe - Whenever you're ready*" campaign which ran from 2012-2013. European Commission, *Europe as a tourism destination*, 26 October 2012 http://ec.europa.eu/growth/content/europe-tourism-destination-0_en (consulted 7 August 2018).
[747] Commission Report 2015 Getting cultural heritage to work for Europe, 5.
[748] Commission Report 2015 Getting cultural heritage to work for Europe, 5.
[749] Commission Report 2015 Getting cultural heritage to work for Europe, 6.
[750] Commission Report 2015 Getting cultural heritage to work for Europe, 7.

*use of cultural heritage for economic growth and jobs, social cohesion and environmental sustainability*."[751]

### 5.3.3. Alternative means of financing

A number of alternative EU funds can contribute to heritage protection as well. The EU policies are often interlinked and contribute to each other's realisation. Funding opportunities for cultural heritage, therefore, cannot only be found in the policy field of culture under the responsibility of the Directorate-General for Education and Culture, but for example as well in the policy field of cohesion under the Directorate-General for Regional and Urban Policy.[752] Examples of such funds are the European Regional Development Fund,[753] The European Social Fund,[754] the European Agricultural Fund for Rural Development[755] and the European Maritime and Fisheries Fund.[756] These funds run from 2014-2020 and form part of the European Structural and Investment Funds.[757]

## 5.4. Cultural heritage in the European Union institutions' instruments

In its Conclusions of 21 May 2014 the European Council recognised that cultural heritage has both an important social and economic impact and that it plays an important role in achieving the Europe 2020 strategy goals.[758] The Council asked the Member States and the Commission, each

[751] Commission Report 2015 Getting cultural heritage to work for Europe, 5.
[752] The Directorate-General for Regional and Urban policy is responsible in this field. *Mapping of Cultural Heritage actions in European Union policies, programmes and activities*, last update August 2017, http://ec.europa.eu/assets/eac/culture/library/reports/2014-heritage-mapping_en.pdf, 10.
[753] European Parliament and European Council, Regulation on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, 17 December 2013, *OJ* 20 December 2013, 1301/2013 L347/289.
Article 5 of this Regulation mentions the conservation, promotion and development of natural and cultural heritage as one of the fund's investment priorities. Article 5(6)(c).
[754] European Parliament and European Council, Regulation on the European Social Fund and repealing Council Regulation (EC) No 1081/2006, 17 December 2013, *OJ* 20 December 2013, 1304/2013 L347/470.
[755] European Parliament and European Council, Regulation on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) and repealing Council Regulation (EC) No 1698/2005, 17 December 2013, *OJ* 20 December 2013, 1305/2013 L347/487.
[756] European Parliament and European Council, Regulation on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011, 15 May 2014, *OJ* 20 May 2014, 508/2014 L149/1. Article 34 of this Regulation states that under certain conditions support can be given for the permanent cessation of fishing activities in order to preserve maritime heritage. Article 34(6). An example of a call for proposals within the Maritime and Fisheries Fund was the call for proposals for Thematic Routes on Underwater Cultural Heritage as discussed *supra* in section 5.2.
[757] For more information on the European Structural and Investment Funds see European Commission, *European Structural and Investment Funds 2014-2020: official texts and*
[758] European Council, Conclusions on Cultural Heritage as a Strategic Resource for Sustainable Europe, 21 May 2014, OJ 14 June 2014, 2014/C 183/08. (Council Conclusions 2014/C 183/08)

within their respective spheres of competence, to recognise the value of cultural heritage, reinforce dialogue with cultural heritage stakeholders, contribute to mainstreaming cultural heritage in both national and European policies and to promote education and the raising of public awareness. In its 2014 Conclusions, the Council also calls on the Member States to, *inter alia*, promote long term, evidence-based and society/citizen-driven heritage policy models and to enhance transnational cooperation with the relevant stakeholders for cultural heritage. The Commission is asked to analyse the economic and social impact of cultural heritage in the EU and to support networking and pooling of resources between heritage experts, practitioners and civil society organisations at EU level.[759]

As a response to these Conclusions, the European Commission published a Communication with regard to creating an integrated approach to cultural heritage throughout Europe.[760] In this Communication the Commission contemplated the role of the EU with regard to cultural heritage protection and management. This Communication expresses that European heritage is a shared resource and a common good that gives substance to what it has meant to be a European citizen throughout time. As cultural heritage can be vulnerable to over-exploitation and under-funding, the Commission believed it to be our common responsibility to look after this. In order to strengthen the position of the EU in the preservation, restoration and valorisation of cultural heritage a number of challenges are identified including the need to encourage modernisation of the heritage sector, to seize opportunities offered by digitisation, to reach out to new audiences in particular young people and to improve the training of heritage professionals. In order to achieve these objectives, there is a need for more opportunities to be offered to the European heritage sector for larger-scale networking and peer learning within and between EU Member States. [761]

An explicit reference to UCH is made in the Communication. It is provided that Europe's rich UCH is largely hidden, is in danger because of the increasing human activities at sea and that its economic potential is unrealised. The Commission sets out plans to make maps available of these sites, to protect them by ensuring that they are included in Marine Spatial Plans and to help realise their full potential in terms of attracting coastal tourism industries that can provide for employment opportunities. It is noted that both the EU and its member States are active in

[759] Council Conclusions 2014/C 183/08, 36-38.
[760] Commission Communication COM(2014) 477 final. This Communication was accompanied by a mapping report that sums up all policies, programmes and activities of the EU that have incorporated certain cultural heritage actions. *Mapping of Cultural Heritage actions in European Union policies, programmes and activities*, last update August 2017, http://ec.europa.eu/assets/eac/culture/library/reports/2014-heritage-mapping_en.pdf.
[761] Commission Communication, COM(2014) 477 final, 6-7.

international organisations that deal with cultural heritage policy such as the Council of Europe and UNESCO.[762]

On 8 September 2015, the European Parliament adopted the Resolution towards an integrated approach to cultural heritage for Europe. In the context of this integrated approach, the European Parliament made a number of recommendations directed at the Commission including to designate a European Year of Cultural Heritage.[763] This Resolution further recognises the importance of European funding for cultural heritage and welcomes the idea of the Council to draft guidelines for new participatory governance models for cultural heritage, which should promote heritage as a shared resource and should strengthen the link between regional, national and European plans. The European Parliament once again stressed the economic potential of cultural heritage and pointed to its value as a tool for regional and local development. All stakeholders involved in the governance of cultural heritage need to balance out the importance of conserving heritage in a sustainable manner against developing its economic and social potential.[764] Finally, the potential of the digitisation of cultural heritage is highlighted. This can serve as a tool to preserve the past as well as be a source for education, research, better social inclusion, the creation of quality jobs and wider access for disabled people or people living in remote areas to cultural heritage. This evolution requires adequate funding in order to ensure wider dissemination of the heritage. A warning is issued, however, that the opportunities offered by digitisation and other new technologies can never replace access to the original heritage and should not result in negligence in the conservation of originals or in disregarding the traditional forms of promoting culture.[765]

In 2016, the European Commission issued a Joint Communication with the purpose of creating a strategy for international cultural relations.[766] The EU wishes to promote diversity through international cultural relations and cultural diplomacy.[767] The Joint Communication proposes a Strategy for International Cultural relations for the EU, which focusses on furthering cultural cooperation with other countries. One of the three priorities of this Strategy is to reinforce the cooperation in the field of cultural heritage.[768] The Communication recognises that cultural

[762] Commission Communication, COM(2014) 477 final, 11
[763] European Parliament, Resolution Towards an Integrated Approach to Cultural Heritage for Europe, Strasbourg , 8 September 2015, P8_TA(2015)0293, (2014/2149(INI)), point 3. (Parliament Resolution P8_TA(2015)0293) See *infra* section 5.5. for more on the European Year for Cultural Heritage.
[764] Parliament Resolution P8_TA(2015)0293, point 6-44.
[765] Parliament Resolution P8_TA(2015)0293, point 45.
[766] European Commission, Joint Communication Towards an EU Strategy for International Cultural Relations, Brussels, 8 June 2016, JOIN(2016) 29 final. (Commission Joint Communication, JOIN(2016) 29 final)
[767] Commission Joint Communication, JOIN(2016) 29 final, 2.
[768] Commission Joint Communication, JOIN(2016) 29 final, 3.

heritage is an important manifestation of cultural diversity that deserves protection.[769] Given the fact that there is a global demand for expertise and that many Member States are willing to share the knowledge that they have, possibilities exist for joint action to take place with partner countries in order to develop sustainable strategies for the protection of heritage. The Communication to this end refers to the opportunities that exist under Horizon 2020. The Commission said that it will also contribute to any international efforts, which are led by UNESCO, in order to set up an efficient reaction mechanism for the protection of cultural heritage sites.

As a final point, it should be noted that the Communication proclaims that the Commission is planning on drafting a legislative proposal in order to regulate the import of cultural goods in the EU. This proposal is an instrument meant to combat the financing of terrorism through the illicit trafficking in cultural goods. It will potentially introduce a certification system as well as give guidance to stakeholders, such as museums and the art market.[770] The training of customs officers at border controls should support the early detection of stolen artefacts. Cooperation among art market professionals is encouraged.[771]

### 5.5. A European Year of Cultural Heritage

The European Institutions have designated 2018 as the European Year of Cultural Heritage.[772] In 2014 the Council invited the Commission to consider presenting a proposal for a 'European Year of Cultural Heritage'.[773] The European Parliament recommended that this year should be the year

[769] Commission Communication, COM(2014) 477 final.
[770] Commission, Communication on an Action Plan for Strengthening the Fight against Terrorist Financing, Strasbourg, 2 February 2016, COM(2016) 50 final, 13.
[771] Commission Joint Communication, JOIN(2016) 29 final, 11-12.
[772] The idea of a European Heritage Year was introduced in the Namur Declaration of April 2015 adopted by the Ministers of Culture of the Council of Europe. This idea was discussed on numerous occasions, such as on the public discussion in Bonn organised by the '*Deutsches Nationalkomitee für Denkmalschutz* ' on the eve of the 40th anniversary of the European Year of Architectural Heritage (29 June 2015), at the General Assembly of Europa Nostra's Brussels office in Oslo where the entire membership of Europa Nostra discussed what could be the purpose of a European year for cultural heritage and the actions that could be developed. Stakeholders were consulted in the EYCH 2018 open working group resulting in a concept paper 'Sharing Heritage '10' to be created, which was taken into account when the proposal for the heritage year was prepared. This proposal was discussed by the members of the EU Reflection Group 'EU and Cultural Heritage' which includes experts from the national administrations of several States. Following this, on 28 October 2015 a seminar was organised in Brussels, namely 'A European Year for Cultural Heritage: sharing heritage, a common challenge'. This proposal was further discussed at the meeting of the 'EU and Cultural Heritage' reflection group during several meetings in 2015 and 2016. European Commission, Proposal for a Decision of the European Parliament and the European Council on a European Year of Cultural Heritage, Brussels, 30 August 2016, COM(2016) 543 final, explanatory memorandum, 5-6. (Commission Proposal COM(2016) 543 final)
[773] European Council, Conclusions on Participatory Governance of Cultural Heritage, *OJ* 23 December 2014, 2014/C 463/01, 3.

2018 in its Resolution of 8 September 2015.[774] The Committee of the Regions welcomed the proposal of the Council for a European Year of Cultural Heritage in its opinion of 16 April 2014.[775] The role that heritage policies have for delivering social and economic benefits had already been stressed in the Council Conclusions of 2014 and in the Commission Communication 'Towards an integrated approach for cultural heritage in Europe'. In line with the objectives of the European Agenda for Culture, the Year of Cultural Heritage must serve to promote European cultural heritage as being of crucial importance for cultural diversity and intercultural dialogue. It should, furthermore, enhance the contribution made by European cultural heritage to the economy and society and promote cultural heritage as an important element of the international dimension of the EU.[776] In August 2016, the Commission following the 2015 Resolution of the Parliament proposed that 2018 should be designated as the European Year of Cultural Heritage.[777] The Commission stated that declaring this year is an effective way of raising public awareness, disseminating information about good practices and promoting research and innovation as well as policy debate. By creating an environment for the simultaneous promotion of these objectives at Union, national, regional and local levels, a greater synergy and a better use of resources can be achieved.[778] On 1 November 2016 the proposal for a Decision on a European Year of Cultural Heritage was made by the European Parliament and the Council where the importance to highlight the historical anniversaries that take place in 2018 and that are of symbolic importance for Europe and its cultural heritage was stressed. In this 2016 proposal it was stated that 2018 marks the end of the 100th anniversary of World War I and the independence of several member States.[779]

In order to pursue the objectives set forward for the European Year of Cultural Heritage, conferences, events, information- education- and awareness-raising campaigns are organised at the European, national, regional and local level. Studies and research are undertaken and experience as well as examples of good practice are shared.[780] At the national level a coordinator was appointed responsible for organising the participation of its Member State in the European

[774] Parliament Resolution P8_TA(2015)0293.
[775] Committee of the Regions, Opinion Towards an Integrated Approach to Cultural Heritage for Europe, *OJ* 12 June 2015, 2015/C 195/04.
[776] Commission Proposal COM(2016) 543 final, explanatory memorandum, 2-3.
[777] Commission Proposal COM(2016) 543 final, article 1.
[778] Commission Proposal COM(2016) 543 final, preamble (19).
[779] European Council (Permanent Representatives Committee), Proposal for a Decision of the European Parliament and of the Council a European Year of Cultural Heritage (2018), Brussels, 11 November 2016, 2016/0259(COD), 9 and article 2(1)(ka).
[780] Commission Proposal COM(2016) 543 final, article 3(1).

year.[781] For the purpose of this initiative, the Commission cooperates with the competent international organisations, in particular UNESCO and the Council of Europe.[782]

### 5.6. Role of the European Union in regulating the import and export of cultural objects

While the EU does not have the competence to regulate the protection and management of UCH within its Member States, it is competent in other fields closely relating to UCH protection such as for example the internal market. Therefore, the EU can potentially play an important role in regulating the import, export and trade of UCH as is proclaimed in the UNESCO Convention. In its preamble, the UNESCO Convention refers to the need to codify and develop rules relating to the protection and preservation of UCH in conformity with, *inter alia*, the 1970 UNESCO Convention.[783] As was explained, the UNESCO Convention requires in article 14 that States Parties 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.*"[784] With the creation of the internal market in 1993, issues arose as member States were unable to prevent that their national treasures were exported from the EU via another Member State. Article 36 TFEU allows that restrictions or even prohibitions are made on imports, exports or goods in transit justified on the ground of protecting "*national treasures possessing artistic, or archaeological value*".[785] In order to address the issue of an illegal flow of national cultural treasures, the EU adopted two instruments. The first deals with the export of cultural goods, where the second regulates the return of cultural objects.

The first instrument, Regulation No 116/2009,[786] lays down the provisions relating to the export of cultural heritage. The Regulation determines that an export license is required for the export of cultural goods outside the customs territory of the Community.[787] The granting of such a license, which is valid throughout the entire Community,[788] can be refused when the cultural goods are covered by legislation that protects "*national treasures of artistic, historical or archaeological*

[781] Commission Proposal COM(2016) 543 final, article 4.
[782] Commission Proposal COM(2016) 543 final, article 6. More information on the European Year of Cultural Heritage 2018 as well as all events that are being organised in the framework of this initiative can be found on the official website, https://europa.eu/cultural-heritage/european-year-cultural-heritage_en.
[783] UNESCO Convention 1970.
[784] Article 14 UNESCO Convention 1970.
[785] Article 36 TFEU.
[786] European Council, Regulation on the Export of Cultural Goods, 18 December 2008, *OJ* 10 February 2009, 116/2009 L 39/1. (Council Regulation 116/2009 L39/1) The Regulation is implemented through European Commission, Implementing Regulation for the Purpose of Council Regulation (EC) No 116/2009 on the Export of Cultural Goods, 9 November 2012, *OJ* 28 March 2014, 1081/2012 L 93/86.
[787] Council Regulation 116/2009 L39/1, article 2(1).
[788] Council Regulation 116/2009 L39/1, article 2(3).

*value in the Member State concerned*."[789] Cultural goods, in the meaning of this Regulation, include, *inter alia*, "*Archaeological objects more than 100 years old which are the products of excavations and finds on land or under water*".[790] A list has been published explaining which authorities can issue these licenses[791] and which customs offices can handle the formalities for the exportation of cultural goods[792].[793]

The second instrument was Directive No 93/7/EEC,[794] which has been recasted by Directive 2014/60/EU that entered into force on 19 December 2015.[795] The objective of this Directive is to return cultural objects[796] that were classified or defined by a Member State as national treasures and were unlawfully removed from the territory of that Member State.[797] Each State is to appoint a central authority[798] that shall handle all claims for returning such cultural objects. To this end, this authority must cooperate with other States and exchange information on the unlawfully removed cultural objects by making use of the Internal Market Information system.[799] [800]

## 5.7. Conclusion

The EU cannot provide a binding legal framework stipulating how UCH should be protected in its territory. If EU Member States wish to go further in protecting UCH than is provided in the UNESCO Convention or if they wish to legally consolidate practical arrangements relating to the

[789] Council Regulation 116/2009 L39/1, article 2(2).
[790] Council Regulation 116/2009 L39/1, Annex I (A)(1).
[791] List of authorities empowered to issue export licences for cultural goods, published in accordance with Article 3(2) of European Council Regulation (EC) No 116/2009, *OJ* 11 March 2014, 2014/C 72/07.
[792] List of customs offices empowered to handle formalities for the exportation of cultural goods, published in accordance with Article 5(2) of European Council Regulation (EC) No 116/2009 *OJ* 11 February 2014, 2014/C 40/05.
[793] For more information on the implementation of Regulation 116/2009 and the number of licenses issued per country see European Commission, Report on the implementation of European Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods 1 January 2011 – 31 December 2013, Brussels, 1 April 2015, COM(2015) 144 final.
[794] European Council, Directive on the return of cultural objects unlawfully removed from the territory of a member State, 15 March 1993, *OJ* 27 March 1993, 93/7/EEC L 074.
[795] European Parliament and European Council, Directive on the return of cultural objects unlawfully removed from the territory of a member State and amending Regulation (EU) No 1024/2012 (Recast), 15 May 2014, *OJ* 28 May 2014, 2014/60/EU L 159/1. (Parliament and Council, Directive 2014/60/EU L 159/1)
[796] In the sense of this Directive, cultural objects are objects classified or defined by a member State, either before or after they were unlawfully removed, "*as being among the 'national treasures possessing artistic, historic or archaeological value' under national legislation or administrative procedures within the meaning of Article 36 TFEU*" Parliament and Council, Directive 2014/60/EU L 159/1, article 2(1).
[797] Parliament and Council, Directive 2014/60/EU L 159/1, article 1.
[798] List of central authorities nominated by the member States to deal with the return of cultural objects unlawfully removed from a member State and applying Article 4 of Directive 2014/60/EU, *OJ* 4 May 2016, 2016/C 160/02.
[799] Parliament and Council, Directive 2014/60/EU L 159/1, article 4-5.
[800] European Commission, *Taxation and Customs Union, Cultural Goods*, https://ec.europa.eu/taxation_customs/business/customs-controls/cultural-goods_en (consulted 17 May 2017).

mechanisms established under this Convention, they will need to directly conclude agreements with other Member States. The EU cannot impose any binding measures in this regard to harmonise the legislation of its Member States. However, while the EU has only very limited competences in the field of culture, it can nevertheless regulate in other competence fields that are interlinked with cultural heritage protection. By relying on its competence with regard to the internal market, EU institutions were able to regulate in the field of import and export of cultural heritage. This is an important aspect of heritage protection as is proclaimed in article 14 of the UNESCO Convention and the 1970 UNESCO Convention.

Regardless of the fact that it cannot adopt legally binding measures in the field of culture, the EU has contributed to the protection of UCH in many ways and will continue to do so in the future. The importance of cultural heritage has been addressed in numerous EU instruments and initiatives, including the 2007 Agenda for Culture, the 2015-2018 Council Work Plan and the Europe 2020 strategy. Additionally, cultural heritage was addressed in several communications from the Commission, conclusions from the Council and resolutions from the Parliament. Within these instruments the importance of cultural heritage is highlighted as a means to create jobs, for example within the tourist sector, ensure economic development and as an instrument to promote social cohesion within the EU. Considering their scale and effects, the EU is best placed to face a number of common challenges regarding cultural heritage protection such as the training of experts in cultural heritage, the sharing of knowledge and information on heritage, the digitisation of heritage, heritage cooperation both within the EU and with third countries, the creation of public awareness on cultural heritage, the promotion of cultural heritage education and encourage States to use long term heritage policy models. The EU aims to build bridges between the local, regional, national and EU level. It created a number of financial programmes as well as initiatives to help promote cultural heritage. One initiative that merits special attention is the European Year for Cultural Heritage, which is taking place in 2018. Considering that a number of EU States are working on the ratification of the UNESCO Convention, 2018 could be the ideal moment to highlight the importance of cultural heritage. This can potentially trigger more EU Member States to reconsider their UCH policies and perhaps even their legislation in light of the UNESCO Convention. Additionally, 2018 marks the end of the centennial commemoration of WWI, which has brought us much UCH. Through events and initiatives that are taking place in 2018, the EU assists in putting cultural heritage in the spotlight hopefully resulting in it to be better protected in accordance with internationally established standards.

## 6. Contribution of the Council of Europe to the protection of underwater cultural heritage

### 6.1. The Council of Europe

The Council of Europe was founded in 1949. The Council attaches great importance to such values as human rights, the rule of law and democracy. It has achieved progress in a number of fields including gender equality, freedom of expression, human rights protection, children's rights protection and cultural diversity. Currently 47 States are a member of the Council of Europe. These are mainly EU Member States, but include, for example, as well the Russian Federation. Additionally, there are six observer States, including the US.[801]

At the head of the Council stands the Secretary-General who is elected for a five-year term. The Secretary-General is responsible for the strategic planning and direction of the work programme and budget of the Council. A second organ is the Committee of Ministers. This Committee is the decision-making body of the Council. It comprises of the Ministers of Foreign Affairs of all Member States or their permanent diplomatic representative in Strasbourg. The Committee decides on the policy of the Council and approves the budget as well as the activity programme. Other organs of the Council include the Parliamentary Assembly, the Congress of Local and Regional Authorities and the European Court of Human Rights.[802]

Over the years the Council of Europe adopted a number of Conventions dealing with the protection of cultural heritage in one way or another. These include the 2005 Faro Framework Convention on the Value of Cultural Heritage for Society,[803] the 2000 Florence European Landscape Convention,[804] the 1985 Granada Convention for the Protection of the Architectural Heritage of Europe[805] and the 1954 Paris European Cultural Convention.[806] All of these Conventions deal with a certain aspect of cultural heritage protection and are to a greater or lesser extent relevant for UCH protection. None of them, however, offers a comprehensive framework for the protection of UCH. The most important Convention that was created within the Council from an UCH point of view is the European Convention on the Protection of the Archaeological Heritage (Revised), also

[801] Council of Europe, *Who we are,* https://www.coe.int/en/web/about-us/ (consulted 7 august 2018).
[802] Council of Europe, *Who we are,* https://www.coe.int/en/web/about-us/ (consulted 7 august 2018).
[803] The Faro Framework Convention on the Value of Cultural Heritage for Society of 27 October 2005, *CETS* No.199.
[804] The Florence European Landscape Convention of 20 October 2000, *CETS* No. 176.
[805] The Granada Convention for the Protection of the Architectural Heritage of Europe of 3 October 1985, *CETS* No. 121.
[806] The Paris European Cultural Convention of 19 December 1954, *CETS* No. 18.

known as the 1992 Valletta Convention.[807] This Convention, as well as the initiatives preceding it, will be discussed below.[808]

Before getting into this, a preliminary remark should be made concerning instruments of the Council of Europe in general. The legal strength of a convention is often linked to the way in which compliance by States Parties can be enforced. In this respect, there is an important difference between EU legislation and Conventions originating from the Council of Europe. In case of non-compliance with EU legislation, the European Commission can commence proceedings before the Court of Justice, which results in a binding decision. In case of non-compliance with a Convention adopted by the Council of Europe, however, the Committee of Ministers can only make a non-binding recommendation to the Member State in accordance with article 15b of the Statute of the Council of Europe. This enforcement mechanism is not as strong as the one created within the EU resulting in it being more difficult to ensure compliance by States Parties with Conventions of the Council of Europe.[809]

## 6.2. Initiatives of the Council of Europe preceding the Valletta Convention

### 6.2.1. Roper Report and Recommendation 848

In January 1977 the matter of UCH was raised in the Parliamentary Assembly of the Council of Europe. The Assembly asked its Committee on Culture and Education to conduct a study on this subject. The findings of this Committee were published in 1978 in the so-called Roper Report.[810] This Report included a recommendation, namely Recommendation 848 on the Underwater Cultural Heritage. This Recommendation urged Member States of the Council of Europe to review their national legislation and where necessary revise it in order to comply with a number of minimum legal requirements provided in an Annex to the Recommendation.[811] A number of these requirements have proven to be of particular significance for the later international UCH legal

[807] Valletta Convention.
[808] See *infra* sections 6.2. and 6.3.
[809] Council of Europe, *About the Committee of Ministers*, www.coe.int/T/CM/aboutCM_en.asp#P131_10512 (consulted 7 August 2018).
[810] Parliamentary Assembly of the Council of Europe, 'The Underwater Cultural Heritage: Report of the Committee on Culture and Education (Rapporteur: Mr. John Roper)', Doc. 4200-E, Strasbourg, 1978. This was one of the first detailed studies on UCH and its legal protection. The Report concluded that progress on the matter could be made at a European level, which might be the basis for a wider international agreement. Indeed, this report has proven to be highly influential. DROMGOOLE 2013, 37-38.
[811] These requirements were based on recommendations made by Lyndel Prott and Patrick O'Keefe following an analysis of the legislation of European States relating to UCH, which demonstrated that there was a lot of variety and inadequacy in this legislation and that it generally did not apply beyond the territorial sea. DROMGOOLE 2013, 38.

protection scheme.[812] These include the requirement that all objects that have been underwater for a period longer than 100 years should be protected; that the national jurisdiction of States should be extended up to 200nm; and that the law of salvage and wreck law should not be applied to protected items.[813]

In the Roper Report, Prott and O'Keefe pointed out that the traditional law of salvage was an inappropriate tool to apply to UCH as it encourages the unregulated recovery of UCH. The 100 year time-criterion was based on the approach used by a number of Scandinavian States and was recommended as it could limit the impact of excluding cultural heritage from the law of salvage. The most controversial point, however, was the extension of jurisdiction up to 200 nm. The 200 nm referred to the concept of the EEZ that at the time was being developed at UNCLOS III. The term 'cultural protection zone' was used by O'Keefe and Prott in their Report to indicate that the purpose of this zone was not to allow economic exploitation, but to merely ensure cultural protection so that it could clearly be distinguished from the EEZ and the continental shelf. The idea was to award States full legislative and enforcement jurisdiction over UCH in this zone. In order for this to succeed, it was recommended in the Roper Report that such a cultural protection zone could be adopted in a European treaty, which might eventually lead to the emerging of a rule of international customary law.[814]
Recommendation 848 recommended the Committee of Ministers to draw up a European Convention for the protection of UCH.[815] In 1979 the Committee of Ministers followed up on this Recommendation and set up an Ad Hoc Committee of Experts (CAHAQ) to fulfil this task. This finally resulted in the Draft European Convention of 1985.

### 6.2.2. Draft European Convention 1985

The 1985 Draft European Convention has proven to be a useful text for other international instruments dealing with UCH. However, the Draft European Convention was never adopted due to objections from Turkey relating to the territorial scope of the Convention.[816] The material scope of the draft Convention was very wide and included "*all remains and objects and other traces of human existence located in or in part in the sea, lakes, rivers, canals […]*".[817] It provided that the

[812] Recommendation 848 does not give a clear definition of what is meant by UCH, but does provide that this definition should at least extend up to what is covered by the antiquities legislation on land. Recommendation 848, annex, minimum requirement i.
[813]Recommendation 848, annex, minimum requirements ii, iv and v.
[814] DROMGOOLE 2013, 37-40.
[815] Recommendation 848, 6(a).
[816] DROMGOOLE 2013, 40.
[817] Article 1(1) Draft Convention 1984, J. BLAKE, "The Protection of Underwater Cultural Heritage", *The International and Comparative Law Quarterly* 1996, (819) 825. (BLAKE 1996)

Convention shall provide protection for "*underwater cultural property being at least 100 years old*".[818] There is a small difference between the formulation here and the one used under Recommendation 848. In the 1985 Draft Convention the property must be 100 years old, where in the Recommendation it must have been submerged for 100 years.[819] The Draft Convention explicitly mentioned the possibility for States to provide the same level of protection to younger property.[820]
A number of the principles that were later included in the UNESCO Convention can already be found in the Draft Convention. The Draft advocates the principle of *in situ* preservation and obliges States Parties to take all appropriate measures in order to conserve any recovered property as well as to record it.[821] Cooperation is thereto promoted. When a find is of particular interest to other States, the Parties to the Draft Convention were obliged to consider providing information on the discovery and to cooperate in its excavation and conservation.[822] States needed to ensure that all discoveries were reported to their competent authorities[823] and a register needed to be made including known cultural property as well as new discoveries.[824] A Standing Committee was meant to keep the implementation of the Convention under review.[825]

As for the application of the law of salvage, the Draft did not follow Recommendation 848. It provided that it will not interfere with property rights, the law of salvage or any other rules of admiralty law.[826] The drafters of the Convention were thus clearly influenced by the approach taken under UNCLOS III and adopted a provision similar to article 303(3) UNCLOS.[827]

Finally, the most controversial aspect of the Draft Convention proved to be its territorial scope. Three possible solutions were considered: to limit the jurisdictional scope to the territorial sea (12nm), to extend the scope over the contiguous zone as well (24nm) or to extend it over the continental shelf or EEZ (200 nm as was proposed under Recommendation 848).[828] During the negotiations the second option gained the most support which, in essence, resembles the

[818] Article 1(2) Draft Convention 1984.
[819] The latter approach is the one that has been adopted in the UNESCO Convention. If the UNESCO Convention were to apply to UCH that is 100 years old rather than that has been submerged for 100 years, its scope of application would be much wider already allowing for the protection of most WWII wreck sites at this point in time.
[820] Article 1(2) Draft Convention 1984. This possibility was not explicitly copied in the UNESCO Convention.
[821] Article 5 Draft Convention 1984.
[822] Article 4 (1) Draft Convention 1984; STRATI 1995, 88.
[823] Article 6(1) Draft Convention 1984.
[824] Article 7(1) Draft Convention 1984.
[825] Articles 19-20 Draft Convention 1984. STRATI 1995, 89.
[826] Article 2(7) Draft Convention 1984.
[827] STRATI 1995, 89.
[828] BLAKE 1996, 825.

approach adopted by article 303(2) UNCLOS. The 200 nm cultural protection zone was rejected by several States as they felt that it was superseded by the outcome of UNCLOS III.[829]

Despite the fact that this Draft Convention was never adopted, it has made a vital contribution to the further development of international law in this field. Not only did it illustrate that the need to create a treaty dealing with the protection of UCH outside of territorial waters was recognised but it also provided the valuable groundwork necessary for creating such a framework. As was evidenced later during the negotiations on the UNESCO Convention, the failure of this 1985 European Convention was an indication that achieving a comprehensive protective regime in the post-UNCLOS III era would be a difficult challenge.[830]

## 6.3. The Valletta Convention

### 6.3.1. Adoption and general provisions

After the failure of the 1985 European Convention, the Council of Europe ceased its attempts to create a Convention dedicated to the protection of UCH. This did not mean, however, that the Council no longer recognised that there was a need to protect UCH nor that it no longer wished to offer it further protection. In the late 1980's the Council of Europe began working on the Revision of the European Convention on the Protection of the Archaeological Heritage of 1969. Originally, this Convention only implicitly applied to UCH. Due to the failure of the 1985 Convention, however, it was decided to explicitly include UCH in the revised Convention. Finally, the European Convention on the Protection of the Archaeological Heritage (Valletta Convention) was signed in Valletta, Malta on 16 January 1992. It entered into force on 25 May 1995.[831]

In its preamble, the Valletta Convention recognises that the European archaeological heritage is under a serious threat because of "planning schemes, natural risks, clandestine or unscientific excavations and insufficient public awareness"[832] and affirms that "appropriate administrative and scientific supervision procedures"[833] need to be instituted. This reflects the growing realisation in the 1980's that economic development can threaten archaeological heritage and that in order to offer effective protection public awareness as well as efficient administrative structures are

[829] DROMGOOLE 2013, 43.
[830] DROMGOOLE 2013, 44.
[831] All States bordering the North Sea have ratified the Valletta Convention. Council of Europe, *European Convention on the Protection of the Archaeological Heritage (Revised)*, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=143&CM=8&DF=&CL=ENG (Consulted 8 August 2018).
[832] Preamble provision 9 Valletta Convention.
[833] Preamble provision 10 Valletta Convention.

necessary on top of a legislative framework.[834] The aim of the Revised Convention was to be consistent with the ICOMOS Charter, which provides that "*archaeological knowledge is based principally on the scientific investigation of the archaeological heritage*"[835] and that excavation should be considered as a last resort for gaining information.[836]

A Committee of Experts can be established that has the task of monitoring the application of the Valletta Convention. This Committee will report to the Committee of Ministers on the situation of archaeological heritage protection in States Parties and on the implementation of the principles in the Convention. Furthermore, it will propose measures to the Committee of Ministers for the implementation of the provisions from the Valletta Convention. [837]

### 6.3.2. Definition of archaeological heritage

The Valletta Convention aims to protect archaeological heritage "as a source of the European collective memory and as an instrument for historical and scientific study."[838] Archaeological heritage is defined very widely as including all remains, objects or other traces of mankind originating from past epochs that fulfil three conditions: 1) their preservation and study must assist in retracing the history of mankind and the relationship of mankind with its natural environment; 2) excavations, discoveries and other methods of research on mankind and its related environment must be the main sources of information and 3) it must be located within the jurisdiction of Parties.[839] This final condition was inserted to emphasise that the extent of State jurisdiction will depend on the individual States. This means that this area can be coextensive with the territorial sea, the contiguous zone, the continental shelf, the EEZ or a cultural protection zone.[840] By leaving it to the States Parties to decide on the territorial application of the Convention, the drafters of the Valletta Convention avoided one of the main issues that led to the failure of the 1985 Draft

[834] BLAKE 1996, 827.
[835] ICOMOS Charter, article 5.
[836] Explanatory Report Valletta Convention article 1. On the topic of excavations the explanatory report provides that "*Excavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed*." Explanatory Report Valletta Convention, article 3. This statement already gave some indication as to how the commercial exploitation of UCH was going to be dealt with in future Conventions.
[837] Article 13 Valletta Convention.
[838] Article 1(1) Valletta Convention.
[839] Article 1(2) Valletta Convention.
[840] Explanatory Report Valletta Convention, article 1. As will be demonstrated in chapter three and four of this dissertation, Belgium has extended its national UCH legislation to apply on its continental shelf and in its EEZ as well. The same will most likely be true for Germany once its new UCH legislation applicable in its EEZ enters into force. Similarly, in the Spanish law of 1985 authorisation for activities directed at UCH located on the continental shelf is required. In Ireland section 3 of the National Monuments Act 1987 applies to areas "*on, in or under the seabed to which section 2(1) of the Continental Shelf Act 1986 applies*". It should be noted that no examples seem to exist of these States attempting to enforce their legislation against foreign flagged vessels and nationals that operate beyond the 24 nm zone. DROMGOOLE 2013, 256-266.

Convention. This resulted in broad support from Member States for the Valletta Convention. It is interesting to note that amongst the first States to ratify were Greece, Turkey, France, Germany, the UK and the Netherlands.[841] These States traditionally have had very specific views on coastal State jurisdiction versus flag State jurisdiction.

Two very important aspects relating to the definition of archaeological heritage were brought forward by the drafters in the Valletta Convention. Firstly, it was stressed that the context in which an element is discovered is as important as the element itself.[842] The context of an archaeological object can offer a great deal of additional value for archaeologists that conduct research on it. Secondly, the Convention emphasises, by using the phrase "elements of the archaeological heritage" that it are not merely objects and remains that are of importance, but that any type of trace that can help clarify the past of mankind is of importance.[843] These traces can for example be a discoloration in the soil or an ancient human footprint.[844] Whenever such trace meets the criteria set out under paragraph 2 of the Valletta Convention, it will be considered as an element of archaeological heritage.[845] A non-exhaustive list is given of objects that could potentially fall under this definition and it is explicitly stated that this archaeological heritage can be situated on land as well as under water.[846]

A difference between the revised Valletta Convention and the previous initiatives originating from the Council of Europe is that no age criterion is included in the definition. It is simply required that the remains originate from past epochs without any specific time indication.[847] It could, nevertheless, be presumed that the phrasing of this definition would exclude any material from the current epoch. According to Dromgoole rather than applying a time-criterion, it is more likely that the decision on whether a particular remain will fall within the scope of the Convention will be influenced by the question "whether or not the preservation and study of the remains will 'help to retrace the history of mankind and its relation with the natural environment'".[848]

[841] DROMGOOLE 2013, 47.
[842] Article1(3) Valletta Convention.
[843] Article 1(1) Valletta Convention.
[844] DROMGOOLE 2013, 84.
[845] Explanatory Report Valletta Convention article 1.
[846] Article 1(3) Valletta Convention.
[847] This is interesting from an UCH point of view as it would allow for shipwrecks from both WWI and WWII to fall within the scope of the Convention.
[848] DROMGOOLE 2013, 85.

### 6.3.3. Protection of archaeological heritage

All States should institute a legal system for the protection of archaeological heritage. This includes, inter alia, that provision should be made for maintaining an inventory of this heritage, for designating protected monuments and areas,[849] for the creation of archaeological reserves[850] and for the mandatory reporting of chance discoveries to the competent authorities.[851] States should likewise introduce procedures in order to authorise and supervise archaeological activities including excavation.[852] This should be done in such a way that it prevents illicit excavations and ensures the use of non-destructive methods when possible.[853] States Parties should ensure that excavations are only conducted by qualified persons[854] that have been specially authorised thereto.[855] No archaeological heritage should be left uncovered or exposed during or after an excavation when no arrangements have been made for its preservation, conservation and management.[856] Many conservators would consider such a lack of conservation measures as vandalism.[857] States Parties are responsible for implementing measures in order to ensure the physical protection of the archaeological heritage. The Valletta Convention expresses a preference for conserving and maintaining archaeological heritage in situ.[858] Measures must be taken, however, in order to provide for appropriate storage places for archaeological heritage that has been removed from its original location.[859]

[849] Both the maintenance of an inventory and the designation of protected monuments and areas are crucial elements in the planning process as it allows project developers to take account of the archaeological heritage in the early stages of the project. Explanatory report Valletta Convention article 2.
[850] These reserves should be created even when no visible remains are present on the ground or under water in order for material evidence to be studied in the future. Article 2 Valletta Convention.
[851] Article 2 Valletta Convention.
[852] Worldwide it is common to require that a person intending to engage in archaeological activities obtains a permit. Explanatory Report Valletta Convention article 3.
[853] Article 3(i) Valletta Convention.
[854] This does not entail that members of the general public cannot be involved, but that excavations should be conducted under the control of a qualified person who has the responsibility over the operation. Explanatory Report Valletta Convention article 3.
[855] Article 3(ii) Valletta Convention.
[856] Article 3(i)(b) Valletta Convention.
[857] Explanatory Report Valletta Convention article 3.
[858] An evolution that has taken place between the first Valletta Convention and the revised one. A shift occurred from excavating and recovering heritage in order to investigate it to preferring the use of less intrusive techniques. Excavation is considered to be a destructive activity and thereto the Valletta Convention expresses a preference for preserving heritage *in situ*. DROMGOOLE 2013, 45.
[859] Article 4 Valletta Convention.

### 6.3.4. Reconciling activities at sea with archaeological heritage protection

The Valletta Convention considers the difficulty of reconciling activities at sea with the protection of UCH.[860] Thereto, a number of provisions are included in the Convention obliging States Parties to consider the presence of archaeological heritage when allowing for activities to take place at sea. In order to reconcile the requirements of good archaeology with development plans, States should ensure the participation of archaeologists in planning policies and in the various stages of development schemes.[861] This provision is very important as in the planning stage it is easy to make modifications without spending a great deal of time and money as might be the case in a later phase when archaeological heritage is discovered during works necessary for the development project.[862] Furthermore, archaeologists and town or regional planners should consult with each other in order to permit that development plans having an adverse effect on archaeological heritage are modified.[863] Under certain circumstances it might be decided that a project should be executed even when this entails damaging some parts of the archaeological heritage. In this situation, following ICOMOS, the heritage must be excavated. The Valletta Convention provides in this regard that consultation should take place between archaeologists and town and regional planners to permit the allocation of sufficient time and resources for an appropriate study to be made of a site and the findings to be published.[864] The process of consultation can only function properly when up-to-date surveys, inventories and maps of archaeological sites are available.[865] Environmental Impact Assessments should take archaeological sites into consideration.[866] When during development works elements of archaeological heritage are discovered provision should be made for their conservation, when feasible *in situ*.[867]

The Valletta Convention considers the importance of providing sufficient financial means to accommodate the research and conservation of archaeological heritage. On the one hand States Parties must arrange public support for archaeological research[868] and on the other hand they must increase the material resources for rescue archaeology. The latter obligation includes that

[860] The Valletta Convention considers the effects of activities incidentally affecting UCH to a much further extent than the UNESCO Convention does. Under Valletta States are given specific obligations on how UCH should be taken into account when authorising activities at sea. It should be noted that this Convention seems to be mainly focussed on development projects.
[861] Article 5(i) Valletta Convention.
[862] Explanatory Report Valletta Convention article 5.
[863] Article 5(ii)(a) Valletta Convention.
[864] Article 5(ii) Valletta Convention and Explanatory Report Valletta Convention, article 5.
[865] Explanatory Report Valletta Convention article 5.
[866] Article 5(iii) Valletta Convention.
[867] Article 5(iv) Valletta Convention.
[868] Article 6(i) Valletta Convention.

provision should be made in major public or private development schemes to cover the costs of necessary archaeological operations and that provision should be made in the budget of these development schemes for a preliminary archaeological study or prospection in the same way as would be the case for impact studies relating to environmental and regional planning precautions.[869] Paragraph ii of article 6 places the burden of providing funds for archaeological activities necessitated by the development project on those responsible for this project. Even though the Valletta Convention considers archaeological heritage as "a source of the European collective memory", the cost for its protection should not be borne by the public when the cause for such costs lies in a benefit obtained following private interests. This is an application of the so-called polluter-pays, or in this case, disturber-pays principle. [870] In the UNESCO Convention no similar provision has been included for the reason that this Convention does not deal with development projects, being activities incidentally affecting UCH. The UNESCO Convention only provides that adequate funding must be provided prior to any activity directed at UCH.[871]

### 6.3.5. Promoting public awareness

The Valletta Convention provides that States should facilitate the study of archaeological discoveries and the dissemination of the acquired knowledge.[872] Public awareness concerning the value of archaeological heritage and the promotion of public access to this heritage is essential.[873] The Valletta Convention urges States to afford mutual technical and scientific assistance to one another.[874]

### 6.3.6. Illicit circulation of archaeological heritage

The Valletta Convention makes provisions in order to prevent the illicit circulation of archaeological heritage.[875] Illicit circulation in this context should be interpreted as meaning

[869] Article 6(ii) Valletta Convention.
[870] This approach can be seen as well in the UNESCO Recommendation concerning the Preservation of Cultural Property endangered by Public or Private Works of 19 November 1968), in the Council of Europe Recommendation No. R (89) 5 and in the ICOMOS Charter on the Protection and Management of Underwater Cultural Heritage 1996. Explanatory report Valletta Convention, article 6, 6.
[871] Rule 17 Annex UNESCO Convention.
[872] Article 7 Valletta Convention.
[873] Article 9 Valletta Convention. When access to a site is denied in order to preserve the heritage, alternative methods to display the site should be investigated. Two examples put forward by the explanatory report are full-scale replicas or interpretative displays. Explanatory Report Valletta Convention, Article 9.
[874] Article 12 Valletta Convention.
[875] It should be noted that article 10 does not oblige States to take positive actions such as seeking for information on illicit excavations or suspicious offers. States are only obliged to take action when such excavations or offers come to their attention. Explanatory Report Valletta Convention, Article 10.

"*dealing in objects coming from illicit excavations or unlawfully from official excavations.*"[876] To this end, States Parties must ensure that their competent authorities pool all information on illicit excavations. They must as well inform the competent authorities of the State Party of origin of any suspicious offers and they must take steps to ensure that museums and similar institutions whose acquisition policy is under the control of the State does not acquire such illicit heritage.[877]

### 6.3.7. Importance of the Valletta Convention

The Valletta Convention has proven to be very successful. Anno 2018, 45 of the 47 members of the Council of Europe ratified the Convention. According to Dromgoole, heritage managers and European archaeologists consider this Convention to be an "*effective standard-setting instrument*". However, it should be noted that the approach used by the Valletta Convention is being superseded by a new generation of instruments approved by the Council of Europe such as the 2000 European Landscape Convention and the 2005 Framework Convention on the Value of Cultural Heritage for Society, which both apply to UCH in general terms.[878]

The Valletta Convention was of importance from an UCH point of view as it established the formal recognition that the protection of UCH is as important as the protection of terrestrial heritage. At the same time, however, the fact that this Convention applies the same approach to both terrestrial and UCH entails that it does not address the specific issues linked to heritage located under water. The provisions of the Valletta Convention depart from the needs of terrestrial heritage focussing on a broad range of threats rather than on the specific issue of activities targeting UCH. The Valletta Convention does, for example, little to address one of the core difficulties relating to UCH protection, namely the regulation of activities directed at UCH outside of territorial waters. States Parties are merely given the option to apply the Convention extra-territorially.[879] Furthermore, the Valletta Convention does not deal with the issue of the law of salvage and finds or any issues relating to State craft, which were prominent in the UNESCO Convention. Additionally, the Valletta Convention is for a large part based on the classical town and country planning system as is illustrated under its preamble where it is provided that "the need to protect the archaeological heritage should be reflected in town and country planning".[880] For sea areas rarely an equivalent exists of these town and country planning systems. Finally, the

[876] Explanatory Report Valletta Convention, article 10. When illicitly excavated heritage is imported or exported, the provisions of the 1970 UNESCO Convention can apply as well.
[877] Article 10 Valletta Convention.
[878] DROMGOOLE 2013, 47.
[879] DROMGOOLE 2013, 48.
[880] Preamble Statement 10 Valletta Convention.

Valletta Convention is also limited in its territorial application as it is a regional Convention and will therefore not directly assist with the protection of UCH at a global level.[881]

### 6.4. Conclusion

While the Council of Europe was unsuccessful in creating a specific convention dealing with the protection of UCH, its preliminary work has influenced initiatives such as the UNESCO Convention to a large extent. With the revision of the Valletta Convention UCH was included explicitly under this Convention. It sets out a number of valuable principles for UCH protection such as the preference for *in situ* preservation, specific rules on funding for development projects affecting heritage, provisions on illicit circulation of heritage and rules for the conservation, preservation and management of cultural heritage. This Convention is widely ratified by the Member States of the Council of Europe and thus applies within these States. As a large number of them have not yet ratified the UNESCO Convention, the Valletta Convention at least offers a basic set of protection principles for UCH.

Unfortunately, the Valletta Convention as such is not a worthy alternative for the UNESCO Convention. As it addresses terrestrial heritage and submerged heritage in the same way, it does not deal with specific issues relating to UCH. Moreover, the Valletta Convention only applies to the maritime zones in which the coastal State has jurisdiction over UCH and leaves it up to the States Parties to decide which zones these are. This entails that many States only apply he Convention within their territorial sea and perhaps contiguous zone. The Valletta Convention thus does not provide a comprehensive framework for heritage located within the EEZ and on the continental shelf, and does not address heritage located within the Area at all. Furthermore, as this is a regional Convention, it is limited to a specific area and does not apply worldwide. Therefore, it may be concluded that while the Valletta Convention does have its value for UCH protection, this value is limited due to a number of reasons. States Parties to this Convention thus still need to consider ratifying the UNESCO Convention.

## 7. Conclusion

Over the last decades policy makers and legislators became increasingly aware of the importance of protecting UCH from the many threats that it is faced with. This tendency manifested itself at the international level as well. Under UNCLOS, this issue was addressed to a limited extent in articles 149 and 303. While these provisions impose a general obligation to protect objects of an archaeological and historical nature, a lot of questions remain unanswered not in the least relating

[881] DROMGOOLE 2013, 48.

to their territorial application. Other issues such as the lack of a competent authority in the Area and the overarching status that is given to the law of salvage and other rules of admiralty result in these provisions being unsuitable for fully protecting UCH. It should, however, be noted that for many States UNCLOS remains the only international instrument explicitly dealing with the protection of UCH up till today by which they are bound.

The first international convention completely dedicated to the protection of UCH came in the form of the UNESCO Convention. This Convention has the potential of making a significant contribution to the protection of UCH worldwide. While at the moment it has not yet been widely ratified, a number of non-States Parties have expressed that they will apply the Rules contained in the Annex within their national legislation as these are generally accepted archaeological standards for activities directed at UCH.
One of the main merits of the UNESCO Convention is that it created a legal framework for protecting UCH located outside a State's national jurisdiction. While offering a comprehensive framework for the protection of UCH, this Convention is not without its flaws. States have expressed their concerns on the regime for State craft as well as their fears that the Convention can potentially result in an extension of coastal state jurisdiction. Nevertheless, as the Convention proclaims and as was demonstrated under national studies in, *inter alia,* the Netherlands and the UK, it is possible to interpret the Convention fully in conformity with international law.
The UNESCO Convention is far from reaching its full potential. Over the last couple of years, the principles of the Convention were further elaborated and brought into practice within the Meeting of States Parties and the Advisory Body. Numerous instruments were created assisting States in implementing the regime set out in the Convention such as the operational guidelines, the manual for activities directed at UCH and the model for a national act for the protection of UCH. While the Convention at the moment 'only' has 60 parties, major maritime powers such as the Netherlands and Germany have indicated that they will be ratifying the Convention soon. Additionally, the UN General Assembly encourages States to become a party to the Convention in its resolutions. This could be a strong incentive for States to ratify it in the near future. Only when sufficient States apply the regime and principles set out by the Convention, its true value will become clear and any issues that today still exist on the Convention might be resolved.

Not only at the international level, but at the regional level as well awareness is growing on the importance of protecting UCH. The EU, while not having competence over cultural heritage, can be a huge contributor to its protection. It has and should in the future continue to help with awareness raising, education, digitisation of heritage, training of experts and the promotion of long-term heritage policy models. The EU needs to emphasise the importance of cultural heritage in, *inter alia,* its resolutions, communications, agenda's, decisions and various initiatives such as the Year for Cultural Heritage. It should offer support to its Member States through its various

financing programmes. Member States need to fully take advantage of the possibilities offered by the EU to further their own framework for protecting UCH.

Finally, the Council of Europe has done some crucial preliminary work in attempting to draft a convention on UCH protection in which some of the foundations for the UNESCO Convention were already laid down. Even though the Council was unsuccessful in adopting this Convention, it has since then explicitly included UCH in the revised Valletta Convention. While this Convention does not offer an adequate framework for fully protecting UCH as it does not address the specific issues relating to such heritage, it is not without its value. The Valletta Convention, being ratified by 45 of the Council's Member States, including many that have not yet ratified the UNESCO Convention, can offer a valuable baseline for protecting UCH located within the national jurisdiction of these Member States. Furthermore, this Convention deals with certain aspects such as development projects and funding which were for the most part left out of the UNESCO Convention. States Parties can therefore not lose sight of the Valletta Convention when developing a national framework for UCH protection.

In conclusion, it can be stated that at the international, and even regional, level a number of instruments are available for States allowing them to protect UCH. The main challenge for the next couple of years, especially regarding the UNESCO Convention, will be to get States to ratify and fully implement this Convention in order to create a coherent framework worldwide for the protection of UCH. Through the work of the Meeting of States Parties and its further development at the national levels, this Convention has the potential of being a real success in the future.

# Chapter two: the legal regime for sunken warships and other State craft

## 1. Introduction

Sunken State craft, being warships or other vessels and aircraft owned or operated by States that were used for public services at the time of their sinking, are a very important part of UCH. Any interference with such craft is subject to significant political sensitiveness. States that traditionally had great maritime fleets wish to protect their interests in their sunken State craft for many reasons. These vessels often have great archaeological and historical significance offering valuable insights into our past. This is why it was felt crucial by a number of States that these wrecks were to be included in the regime of the UNESCO Convention, something that led to significant discussions during its negotiations. Secondly, States are adamant in wishing to protect their sunken State craft from interference by other States because many of these vessels sank with enormous human fatalities resulting in them to be maritime graves. States wish to protect the sanctity of these gravesites and ensure that they are treated with proper respect. Thirdly, States may wish to protect their sunken State craft as, especially in more recently sunk wrecks, information of a sensitive nature which the flag State wishes to keep private might still be present. Finally, the fact that munition, oil and other dangerous substances are still present in the wreck might be an additional reason why States wish to see these wreck left undisturbed.

Under international law, State craft have been given a special status. One of the most important aspects of this status is that they enjoy sovereign immunity ensuring that the rights of the flag State over its State craft are respected. Traditional maritime powers feel strongly about the fact that they retain ownership rights over their sunken State craft indefinitely, unless they have expressly abandoned them, and that these wrecks continue to enjoy sovereign immunity even after they have sunk. This principle has, however, not yet been consolidated under international law, nor do all States agree with this point of view. This has resulted in extensive discussions to take place on this in practice.

This chapter will assess the legal status of sunken State craft under international law and in State practice. It consists of two main parts. In the first part, an assessment will be made on whether sovereign immunity continues after State craft have sunk and whether the flag State retains its ownership rights over such sunken craft indefinitely. Hereto regard is paid to statements that were issued by a number of maritime powers including the US, the UK, Germany, Spain and the Russian Federation as well as to a number of agreements that were concluded on the protection of sunken State craft. Two national pieces of legislation that specifically deal with the protection of sunken military craft will be assessed, namely the UK's Protection of Military Remains Act (PMRA) and the

US' Sunken Military Craft Act (SMCA). Special consideration will also be given to the treatment of sunken State craft by US' admiralty courts, which are often faced with salvage claims over sunken State craft. An analysis is made of whether some form of customary international law on the treatment of sunken State craft can be deduced from State practice. Finally, in the first part of this chapter regard will be paid to the manner in which sunken State craft are protected by the UNESCO Convention.

The second part of this chapter addresses the very specific issue of protecting sunken military vessels as 'maritime war graves'. This chapter assesses how 'maritime war graves' are currently being protected under international instruments such as the UNESCO Convention and in State practice including in national legislation, statements and agreements. This way it can be determined whether there is a special regime for treating 'maritime war graves' and what this regime entails.

## 2. Legal status of sunken warships and other State craft

### 2.1. Sovereign immunity of sunken State craft

When assessing the notion 'State vessels'[882] at the international level and determining which legal regime applies to them, regard must be paid to UNCLOS. This Convention does not use the term 'State vessel' as such but rather refers to "*warships and other government ships operated for non-commercial purposes*".[883] Under UNCLOS warships are presented as a specific subclass of "*government ships operated for non-commercial purposes*" which in turn is a subclass of ships in general.[884] A warship is defined as "*a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.*"[885] Under this definition, four requirements are set out with which a ship must comply in order to be considered as a warship: 1) the ship must belong to the armed forces of a State; 2) the ship must bear the external marks of its nationality; 3) the ship must be under the command of an officer as described in article 29 UNCLOS; and 4) the ship must be manned by a crew which is under the

[882] It should be noted that the findings under this chapter for State vessels can be applied to State aircraft as well. Reference will be made to them on occasion, but the lack of an express mention of aircraft does not entail that the considerations set forth do not apply to them.
[883] See *inter alia* Part II, Section 3, subsection C UNCLOS.
[884] B. OXMAN, "The Regime of Warships Under the United Nations Convention on the Law of the Sea", *University of Miami School of Law Institutional Repository* 1984, (809) 813.
[885] Article 29 UNCLOS.

discipline of the regular armed forces. As will be evidenced below issues arise with this definition when dealing with sunken warships.

One of the most important characteristics of warships and other government ships used for non-commercial purposes is that they enjoy sovereign immunity. This reflects a long-standing rule of international law which was consolidated under UNCLOS. The concept of sovereign immunity under public international law generally entails that a State is immune from the jurisdiction of other States and the enforcement of their laws, unless that State has given its express consent allowing the application and enforcement of the foreign law.[886] In the framework of government vessels used for non-commercial purposes, including warships, this entails that these vessels are submitted to the exclusive jurisdiction of the flag State. This is governed by articles 95 and 96 of UNCLOS that provide for complete immunity from jurisdiction for warships and "*ships owned or operated by a State and used only on government non-commercial service*"[887] in the high seas. This immunity applies as well in the EEZ of another State as long as its application is compatible with the rights and duties of the coastal State in its EEZ as set forth under part V UNCLOS.[888] Finally, following article 32 UNCLOS, government vessels used for non-commercial purposes enjoy sovereign immunity in the territorial sea of a third coastal State as well, under the condition that the rules of innocent passage are respected.[889] Despite the fact that this is a public international law principle, it has crept into the private international law field of salvage as well through for example the 1910 Brussels Convention and the 1989 Salvage Convention.[890] As a corollary to the rule of immunity, warships and other State vessels are exempted from the application of these international salvage conventions. In the 1910 Brussels Convention article 14 provides that the Convention "*does not apply to ships of war or to Government ships appropriated exclusively to a public service*". In the Salvage Convention article 4 states that "*this Convention shall not apply 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 unless that State decides otherwise*".[891]

While it is generally accepted that operating warships and other State vessels used for non-commercial purposes enjoy sovereign immunity,[892] discussion exists on whether this immunity

[886] HERSHEY 2012, 376-377.
[887] Article 96 UNCLOS.
[888] Article 58(2) UNCLOS.
[889] DROMGOOLE 2013, 136.
[890] HERSHEY 2012, 376-377.
[891] FORREST 2012, 82-83.
[892] When a ship is captured during wartime the rights over that ship are transferred to the captor. This was for example the case for the Russian warship 'Admiral Nakhimov' that was captured by Japan prior to its sinking in 1905. This resulted in Russia losing its ownership rights and sovereign immunity over the wreck. M. AZNAR-GOMEZ, "Legal Status of Sunken Warships "Revisited"", *Spanish Yearbook of International Law* 2003, (61) 73. (AZNAR-GOMEZ 2003)

continues once such a vessel has sunk and becomes a shipwreck. International Conventions pre-dating the UNESCO Convention, including UNCLOS, remain silent on this issue. Nevertheless, flag States can have a number of legitimate reasons concerning security and national intelligence to maintain an interest in their sunken warships and other State craft and for wishing to protect them from interference.[893] These reasons can include the desire to protect new technologies, to protect information of national importance and/or to protect the wreck as a maritime (war) grave.[894]

Among international legal scholars two viewpoints on the retention of sovereign immunity by sunken State craft can be distinguished. A number of academic commentators are of the opinion that once a State vessel has sunk, it no longer enjoys sovereign immunity. The main argument in support of this reasoning is that once a ship has sunk, it is no longer a ship as it is no longer capable of navigation. More specifically for warships reference is made to article 29 UNCLOS. After a warship has sunk, it no longer fulfils the conditions set out under this provision requiring that the warship has to be "*under the command*" and "*manned*". These conditions can only be fulfilled when the ship is operational.[895] Since a wreck is no longer considered to be a ship, let alone a warship, it is no longer subject to the exclusive jurisdiction of its flag State and therefore no longer enjoys immunity.

A number of legal commentators, on the other hand, proclaim that sunken vessels do retain their status as ships, refuting the main argument of the commentators adhering the viewpoint expressed above.[896] Dromgoole, however, illustrates one of the main issues with this point of view, namely that this approach would apply to all shipwrecks. This entails that all wrecks regardless of whether or not they were used for non-commercial purposes, including those located in the high seas, would remain under the exclusive jurisdiction of the flag State. This would allow the flag State to prohibit salvage operations directed at any of its wrecks located in the high seas. While being valuable from a cultural heritage protection point of view, this position is not generally accepted.[897] Therefore, claiming that sunken State vessels retain their sovereign immunity based on the fact that they should still be considered as ships once they have sunk, seems to fall short of reality. Dromgoole argues that a more promising argument to justify the continuation of sovereign immunity is that the wrecks are State property. This indeed seems to be the basis upon which flag

[893] FORREST 2010, 336.
[894] See also *supra* section 1 of this chapter.
[895] CAFLISH 1982, 22; According to Migliorino, a sunken warship, having lost its previous warship characteristics, is subject to the same rules as any other sunken wreck. As a result, the freedom of the recovery of sunken military vessels applies at the high seas. L. MIGLIORINO, "The Recovery of Sunken Warships in International Law" in B. VUKAS (ed.), *Essays on the Law of the Sea*, Sveucilisna naklada Liber, Zagreb, 1985, (244) 249. For further references see STRATI 1995, 235 (nr28).
[896] STRATI 1995, 220 and 235 n.29 for references.
[897] DROMGOOLE 2013, 137-138.

States rely to claim immunity over their sunken State vessels. Using property rights as a basis for claiming immunity is, however, not without its problems. Forrest, for example, questions whether long-lost vessels should retain immunity as they no longer fulfil a governmental function.[898] Additionally, some States have claimed immunity for State vessels that were in public service at the time of sinking, but that were not the property of that State.[899] Any reasoning based on State ownership does not provide a justification for these types of claims.[900]

Considering the discussion that exists amongst legal scholars, it is crucial to assess State practice in this field. This can offer greater insights into how sunken State vessels used for non-commercial purposes are treated and protected.

## 2.2. State practice regarding sunken State craft

### 2.2.1. Statements on the legal status of sunken State craft

Over the years, States, especially traditional flag States, have expressed their opinion on the legal status of sunken State craft and how these should be treated according to them. One of the first statements in this sense was the 1995 joint Statement.[901] Because of the lack of a multilateral treaty addressing the treatment of sunken warships and military aircraft, in 1995 the governments of France, Germany, Japan, the Russian Federation, the UK, Northern Ireland and the US issued a joint statement. This joint statement provided for a clear division of rights between the coastal State in whose waters the wreck is located and the flag State of the wreck. Coastal States do not obtain ownership rights over sunken warships even though these are located in or on the seabed in maritime zones over which the coastal State exercises sovereignty or jurisdiction. The coastal State does control access to these wrecks when they are located within its territorial sea or contiguous zone. Most coastal State governments will, however, honour requests from the sovereign flag State to allow visits to their vessels. Any salvage operation directed at a State vessel regardless of where it is located is prohibited without the express consent of the flag State. Under this statement a number of principles that would later be included in the UNESCO Convention were already put forward. For example, State vessels are considered to be historical artefacts of particular importance that are entitled to special protection. These vessels are of special significance from a scientific point of view. Any recovery or excavation directed at them must be

[898] C. FORREST, "An International Perspective on Sunken State Vessels as Underwater Cultural Heritage", Ocean *Dev. & Int'l L.* 2003, (41) 45. (FORREST 2003)
[899] See *infra* section 2.2.
[900] DROMGOOLE 2013, 138.
[901] Department of State 1995 see R. NEYLAND, "Sovereign Immunity and the Management of United States Naval Shipwrecks" in S.R. JAMES, and C. STANLEY (Eds.), *Underwater Archaeology Cincinnati*, Society for Historical Archaeology, available at http://diver.net/bbs/posts002/82258.shtml. (NEYLAND Sovereign Immunity)

done following a research design and site surveys, and it must be ensured that the site will be disturbed only minimally in accordance with research requirements. Furthermore, adequate financial resources must be foreseen in advance as well as a comprehensive plan of conservation. Professional reports must be made on the operation.[902]

In 2001 the US issued a presidential statement presenting the US' policy on the protection of warships.[903] This Statement provides that "*the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed*".[904] According to this statement, the US believes that it is a "*rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State*".[905] The Statement goes on explaining that regardless of when State craft sunk, being of US or foreign origin, the mere passage of time cannot result in title to it to be extinguished. This entails that even for ancient sunken State craft, which will most likely fall within the definition of UCH of the UNESCO Convention, title remains with the original flag State unless that State has expressly abandoned it or transferred its title over it. A warning is included in the Statement directed at salvors or anyone that engages in unauthorised activities directed at sunken State craft. Express permission from the sovereign flag State must be sought when disturbing or recovering sunken State craft and such activities can only be conducted when respecting professional scientific standards and with the utmost respect for human remains.[906] Finally, the US commits itself "*to use its authority to protect and preserve sunken State craft of the United States and other nations, whether located in the waters of the United States, a foreign nation, or in international waters.*"[907] This is a very broad commitment and the statement does not further address the question of how exactly the US will protect and preserve all sunken State craft worldwide. However, the terms of this Statement were later codified in the 2004 SMCA, which will be discussed below.[908]

It should be noted that the US has not always acted according to its current policy of not interfering with State craft without the consent of the flag State. In 1974, the US raised a portion of a sunken Soviet submarine that was located in international waters, 750 miles northwest of Hawaii. This recovery was undertaken by a ship named the 'Glomar Explorer' as part of the so-called Project

[902] NEYLAND Sovereign Immunity.
[903] "Statement on United States Policy for the Protection of Sunken Warships", *Weekly Compilation of Presidential Documents'* (2001), 195-196, available at www.gpo.gov. (US Statement 2001)
[904] US Statement 2001, 195.
[905] US Statement 2001, 195.
[906] The Rules contained in the Annex to the UNESCO Convention can be referred to when discussing professional scientific standards.
[907] US Statement 2001, 196.
[908] See *infra* section 2.2.3.2.

Jennifer. This project took place only 7 years after the wreck was lost. The Soviets[909] had not expressly abandoned the wreck and had not given their permission for such recovery.[910] Likewise, the US not always adhered to its current position of requiring express abandonment for State craft. This will be further elaborated when discussing the practice in admiralty courts below.[911]

Similar viewpoints as were put forward by the 2001 US' Presidential Statement were expressed by other States as well. In 2003, the Japanese government issued a communication in relation to Japanese wrecks littering the pacific oceans[912] in which it stated that "*According to international law, sunken State vessels, such as warships and vessels on service, regardless of location or of the time elapsed remain the property of the State owning them at the time of their sinking unless it explicitly and formally relinquishes its ownership.*"[913] This statement provides that State craft should not be salvaged without the express consent of the Japanese Government.[914] In 2003, the UK declared the following in a communication: "*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.*"[915] The UK is of the opinion that without its express consent no intrusive action can be taken in relation to its sovereign immune State craft.[916] Other States, such as Germany, the Russian Federation, France and Spain have expressed similar views.[917] All of these maritime

[909] The reaction of the Sovjet Union to the recovery was very calm. The strongest objection related to the disposition of the remains of ten Sovjet crewmen who were allegedly raised during the operation. The CIA was condemned by the Russians for burying the bodies at sea. As the CIA expected that the action would cause some controversy, it had made plans to ensure that the burial of these bodies at sea was done properly. The funeral service was performed in accordance with the Sovjet naval manual. The service was read both in English and in Russian and recorded on tape. No formal protest came against the Glomar expedition as such, even though the USS ambassador in Washington had advised the Sovjet government to do so. It is believed that the underlying reason for this was that such protest would have been too embarrassing for the Sovjet Union, since they lacked the technological capabilities to salvage the submarine themselves and because its sinking in 1968 had never been reported by the media in the Sovjet Union. M. COLLINS, "The Salvage of sunken Military Vessels", *The International Lawyer* 1976, (681) 683.
[910] D. BEDERMAN, "Rethinking the Legal Status of Sunken Warships", *ODIL* 2010, (97) 100. (BEDERMAN 2010)
[911] See *infra* section 2.2.4.
[912] FORREST 2012, 83-84.
[913] Communication from the Government of Japan, 13 September 2003 partially cited in R. PIXA, *In Defense of Perpetual Title to Sovereign Wrecks,* 2009, available at http://archive.hnsa.org/conf2004/papers/pixa.htm#13. (Communication Japan 2003)
[914] Communication Japan 2003.
[915] Communication from the UK Foreign and Commonwealth Office, 4 July 2003 partially cited in R. PIXA, *In Defense of Perpetual Title to Sovereign Wrecks,* 2009, available at http://archive.hnsa.org/conf2004/papers/pixa.htm#13. (Communication UK 2003)
[916] Communication UK 2003.
[917] Communication from the German Foreign Ministry, 30 October 2003 (Communication Germany 2003), Communication from the Government of the Russian Federation, 3 October 2003, (Communication Russia 2003) Embassy of Spain, Washington, DC, Note No. 128, 19 December 2002 (Statement Spain 2002) in R. PIXA, *In Defense of Perpetual Title to Sovereign Wrecks,* 2009, available at http://archive.hnsa.org/conf2004/papers/pixa.htm#13 and Department of State (Office of Ocean Affairs), "Protection of Sunken Warships, Military Aircraft and Other Sunken

powers believe that the express consent from the sovereign flag State should be obtained before engaging in activities, such as salvage, directed at sunken State craft. It should be noted that in their statements France, Germany and the UK both refer to the fact that the flag State retains title over its State craft as well as to the fact that sunken State craft enjoy sovereign immunity. Spain, Japan, Russia and the US on the other hand do not mention the fact that their sunken State craft are entitled to sovereign immunity. Dromgoole, however, points out that it is debatable whether this reflects a real difference in viewpoint.[918] Interestingly, the statements referring to sovereign immunity are the ones that address both ships owned by the State at the time of sinking as well as ships merely operated by the State at the time of sinking. Similarly, under UNCLOS immunity is given to "*ships owned or operated by a State and used only on government non-commercial service*"[919] As Forrest points out "*immunity can only pertain to a state vessel if the state does indeed still own that vessel*".[920] The question here arises what justification can be given to claim that shipwrecks that were used for non-commercial services at the time of sinking, but that were not owned by the government, are entitled to sovereign immunity.[921] The US' Abandoned Shipwreck Act guidelines provide that "*Shipwrecks entitled to sovereign immunity are wrecks of warships and other vessels (such as privately owned vessels chartered or otherwise appropriated by a sovereign nation for military purposes) used only on government non-commercial service at the time of sinking."*[922] Following this reasoning, no ownership by the State would need to be proven in order to claim that a sunken vessel is entitled to sovereign immunity. The condition to allow a sunken vessel to retain sovereign immunity would in this case be that the vessel was a warship or that it was "*chartered or otherwise appropriated by a sovereign nation for military purposes*" and was used only for non-commercial purposes at the time of sinking.

### 2.2.2. Bilateral agreements on sunken State craft

Problems relating to sunken military craft or other State craft used for non-commercial purposes are most likely to arise when the wreck is located in the territorial waters of a third State. In this case tension exists between the sovereignty that the coastal State has in its territorial sea and the idea that the wreck enjoys sovereign immunity and therefore falls within the exclusive jurisdiction of the flag State. Flag States, although reluctant to admit that in this case there might be an issue with the extent of sovereign immunity, do seem to acknowledge that the coastal State ultimately

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Government Property", *Federal Register* Vol. 69, No. 24, 5 February 2004, available at www.gpo.gov/fdsys/pkg/FR-2004-02-05/html/04-2488.htm, DROMGOOLE 2013, 145.

[918] DROMGOOLE 2013, 145-146.

[919] Article 95 UNCLOS.

[920] FORREST 2003, 42.

[921] DROMGOOLE 2013, 145-146.

[922] Department of the Interior, "Abandoned Shipwreck Act, Final Guidelines, Notice", *Federal Register* Vol. 55, No. 233, 4 December 1990, part III, 50116. (ASA 1987 Guidelines)

has the right to control access to the wreck in its territorials sea. It remains, however, controversial to what extent the flag State should be consulted prior to allowing interference directed at its sunken State craft to take place and whether the flag State could prohibit such interference. In most cases the coastal State will contact the flag State when it wishes to take action directed at State craft located in its waters and any issues are most likely to be resolved diplomatically.[923] For example, consultations between the Belgian and British authorities took place on the wreck of the HMS Wakeful. This is a British military wreck that was torpedoed shortly after the German invasion in May 1940. At the time that the ship was torpedoed, there were about 650 British soldiers on board of which only a handful made it to the coast. Although not officially recognised in the PMRA, this wreck is considered to be a maritime war grave for a large number of soldiers. It is located in a fairway in the Belgian territorial sea. Because of this location, the wreck hinders navigation in this area. Belgium wanted to excavate it in order to deepen the fairway. The British authorities, however, objected to this. Belgium respected their opinion as the wreck still belonged to the British government. The compromise was reached that the wreck would simply be moved rather than excavated. In the end, however, the fear of the wreck breaking in the middle was so big that the decision was made to leave it and merely remove its masts and chimney, allowing the fairway to be deepened.[924] There are, without a doubt, many other examples of coastal States contacting flag States regarding sunken State craft located in their territorial waters. However, whether this is done because coastal States feel that they have a legal obligation to do so or whether they contact the flag State for reasons of diplomatic courtesy remains unclear.[925]

In a number of cases, agreements in one form or another were concluded between the coastal and flag State in order to lay down the respective rights of these two States over a particular wreck.[926] In 1952, the UK and Italy drafted an Exchange of Notes addressing the HMS Spartan, a British cruiser that sank off the coast of Italy during German bombing in 1944.[927] This agreement allows the Italian government to remove the wreck for scrap under the condition that "*all documents and correspondence, cyphers, cypher machines, books, safes, steel, chests, steel boxes and cash*" are returned to the British government.[928] The agreement determines that when British warships need to be removed, the Italian government shall offer advice to the British government prior to commencing the salvage operation. When the operation is undertaken by the British government, it will be conducted "*within the time limit and under the conditions which shall be*

[923] DROMGOOLE 2013, 139-140.
[924] Written question asked by M. LAHAYE, 5 August 2002, *De Kamer Bulletin* No. B138, 17367; Y. NAESEN, "Britten nog altijd gekant tegen opruimen zeemansgraf", *Het Nieuwsblad*, 12 March 2003, www.nieuwsblad.be/cnt/nbra12032003_028.
[925] DROMGOOLE 2013, 139-140.
[926] Depending on which instrument is used the agreements are legally binding or not.
[927] Term 5 Exchange of Notes HMS Spartan 1952.
[928] Term 4 Exchange of Notes HMS Spartan 1952.

*determined by the Italian Maritime authorities*".[929] The rights of both States are clearly laid down in this Exchange of Notes. In 1997 a Memorandum of Understanding was concluded between Great Britain and Canada regarding the British warships HMS Erebus and HMS Terror that were lost in 1847 in the Canadian territorial sea. Under this Memorandum Britain assigned custody and control over the wrecks and their content to the Canadian government. Britain, however, did not waive its ownership rights over the wrecks nor their sovereign immunity. Britain did accept that any investigation or excavation of these wrecks or any of their contents would be executed under Canadian control.[930] Two more agreements worth mentioning are the ones that were concluded between the US and France respectively relating to the CSS Alabama and the La Belle. The first agreement dates from 1989 and concerns the CSS Alabama which sank of Cherbourg in 1864.[931] A lot of discussion preceded this Agreement. The US, being the successor to the Confederate States of America, claimed title over the wreck, stating that title to warships cannot extinguish because of the mere passage of time. France claimed that since the wreck was located in its territorial sea, it was French property. In the end, on 19 May 1989, France gave in and notified the US that it had decided that title over the Alabama and its artefacts remained with the US. The US on its part felt that any recovery of the CSS Alabama should best be done through cooperation. As a result of this, the CSS Alabama Agreement was concluded.[932] Under this Agreement a Scientific Committee, composed of two representatives of both France and the US as well as experts designated by each government, was established.[933] The task of this Committee is to review measures aimed at the CSS Alabama and to make decisions by mutual agreement between the representatives of both States.[934] In any case, "*Neither Party shall take measures adversely affecting the wreck or its associated artefacts without the agreement of the other Party*".[935] The competent French authorities may, however, either on their own authority or upon request by US' authorities, take measures when the conservation of the wreck is compromised. The French authorities do need to notify US' authorities promptly of any such action.[936] The second agreement between France and the US was concluded in 2003 in order to protect the wreck of La Belle. La Belle was a French exploration vessel that sank off the coast of Texas in 1686. Firstly, in the Agreement it is emphasised that France did not abandon the wreck nor did it transfer title over it. Therefore,

[929] Term 6 Exchange of Notes HMS Spartan 1952.
[930] Term 2 Memorandum HMS Erebus and HMS Terror 1997.
[931] Agreement between the Government of the United States of America and the Government of the French Republic concerning the Wreck of the CSS Alabama, October 1989, reproduced in GARABELLO and SCOVAZZI 2003, 261-262. (Agreement CSS Alabama 1989)
[932] J. ROACH, "France concedes United States has Title to CSS Alabama", *The American Journal of International Law* 1991, 381-383.
[933] Article 1 Agreement CSS Alabama 1989.
[934] Article 2 Agreement CSS Alabama 1989.
[935] Article 3 Agreement CSS Alabama 1989.
[936] Article 3 Agreement CSS Alabama 1989.

France retains title over La Belle.[937] It was decided that the wreck of La Belle would remain in the custody of the Texas Historical Commission for a period of at least 99 years.[938] The Agreement further determines that an administrative arrangement would be concluded between the Musée National de la Marine in France and the above mentioned Texas Commission on the curation, research, documentation and exhibition of La Belle.[939] Both these agreements rely on cooperation between the coastal and flag State for the protection of sunken State craft. By the time the La Belle Agreement was concluded, it was recognised that for these types of sites cooperation is the "*most constructive way forward*".[940] Following the La Belle Agreement, there was an Exchange of Notes between the US and Japan in 2004.[941] This Exchange of Notes dealt with a Japanese mini-submarine which sank in 1941 near Pearl Harbor. Within this Exchange of Notes Japan confirmed, as requested by the US, that it will not object the view of the US that the wreck and any artefacts associated with it are the property of the US. The Japanese government does desire that the US protects the interests of the Japanese government and its citizens relating to this wreck.[942]

No consistent practice can be deduced from these agreements consolidating the respective rights of coastal States and flag States over sunken State craft located in the territorial waters of a third coastal State. It is clear, however, considering the lack of any clear binding international rule that cooperation is crucial in order to determine the best approach for the protection and management of such State craft.

### 2.2.3. National legislation on the protection of sunken State craft

#### 2.2.3.1. Protection of Military Remains Act (UK)

In 1986 the PMRA was adopted in the UK.[943] The PMRA aims to protect wrecks that were in military service at their time of sinking.[944] The Act defines the notion 'in military service' as "*in service with, or being used for the purposes of, any of the armed forces of the United Kingdom or any other country or territory*"[945] The question arises whether this notion only refers to warships in the sense

[937] Agreement La Belle 2003 Article 1(2).
[938] Agreement La Belle 2003 Article 2(2).
[939] Agreement La Belle 2003 Article3(1).
[940] DROMGOOLE 2013, 143.
[941] Exchange of Diplomatic Notes on Japanese Mini-Submarine between the United States and Japan, February 2004, available at www.gc.noaa.gov/documents/2004-midget_sub_agree.pdf. (Exchange of Notes Mini-Submarine 2004)
[942] Exchange of Notes Mini-Submarine 2004
[943] Protection of Military Remains Act 1986 (1986 c.35). (PMRA)
[944] Section 1(2) PMRA. The PMRA applies to "*any aircraft which has crashed […] while in military service*" as well. Section 1(1) PMRA.
[945] Section 9(2)(a) PMRA. An aircraft was in military service when it was "*being taken from one place to another for delivery into service with any of the armed forces of the United Kingdom.*" Section 9(2)(b) PMRA.

of article 29 UNCLOS or whether this can potentially include commercial vessels that were deployed during war time as well? In 2005 an interesting case arose before the High Court of Justice Queen's Bench Division Administrative Court concerning the merchant vessel SS Storaa.[946] The Secretary of State had decided not to designate the SS Storaa vessel under the PMRA on the ground that it was not 'in military service' when it perished. The daughters of Petty Officer James Varndell, who died when the SS Storaa was torpedoed in 1943, contested this decision before the Court of Appeals.[947] In 2006, the Court of Appeals reaffirmed the judgement of the High Court.

The SS Storaa, which was the property of the Ministry of War Transport at the time of its sinking,[948] was not chartered or requisitioned to the armed forces, nor was it directly operated by the armed forces.[949] The High Court, however, considered the fact that when the SS Storaa was torpedoed by German E-boats in 1943, it had been sailing in a convoy comprised of 19 merchant vessels headed by the HMS Whitshead.[950] Furthermore, the High Court took into account the fact that the Storaa was armed as well as the degree to which the Storaa was controlled by the Admiralty[951] and "*the facts and circumstances of the particular convoy in which the STORAA was required to travel*"[952]:

> "*It was voyaging under compulsion in dangerous waters, laden with cargo, in a convoy under the protection of a naval vessel, and was armed so as to be able to engage in conflict with the enemy. It was also carrying Royal Naval personnel, namely members of the armed forces having the duty to protect the vessel and the convoy. It was following a route which had been determined by the armed forces (the Admiralty) and "in all matters relating to the navigation or security of the convoy" the Master of the STORAA was obliged to obey all directions given by the Admiralty.*"[953]

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[946] *R (oao Rosemary Fogg and Valerie Ledgard) v. Secretary of State for Defence*, High Court of Justice Queen's Bench Division Administrative Court, 13 December 2005, [2005] EWHC 2888 (Admin). (*Rosemary Fogg* 2005)
[947] *R (oao Rosemary Fogg and Valerie Ledgard) v. Secretary of State for Defence*, Court of Appeal, 5 October 2006, [2006] EWCA Civ 1270. (*Rosemary Fogg* 2006)
[948] *Rosemary Fogg* 2005, §23.
[949] The Secretary of State argued that, in addition to vessels flying the white ensign, vessels which are operated and controlled by any of the armed forces or are requisitioned or under charter to the military, are likely to be "*in service with the armed forces*" *Rosemary Fogg* 2005, §55.
[950] *Rosemary Fogg* 2005, §2.
[951] *Rosemary Fogg* 2005, §63 and 71.
[952] *Rosemary Fogg* 2005, §92. The High Court also took account of the cargo that was being transported by the SS Storaa. The Court thereto stated that "*a proper assessment of the facts requires more than consideration being given to the destination of the cargo. […] a direct connexion between the cargo and the armed forces could be highly relevant. But there must be an assessment in connection with the origin and purpose of the voyage, as well as the manner of performing delivery including the factors governing the route and circumstances under which the voyage was undertaken.*" *Rosemary Fogg* 2005, §100. The SS Storaa was allegedly transporting tank parts and boxed aircraft. During Court proceedings it became clear, however, that uncertainty existed about the exact content of the cargo.
[953] *Rosemary Fogg* 2005 §62.

The High Court referred to a statement made by Lord Parry who emphasised that the original objective of the PMRA was to protect the sanctity of "*the remains of those who sacrificed themselves in the service of the country or who had been killed at sea.*"[954] If the interpretation given to the notion 'in military service' by the Secretary of State automatically excluding wrecks such as that of the SS Storaa from the application of the PMRA, was to be accepted, the High Court found that the PMRA would operate in an uneven manner. The Court illustrated this by making a hypothesis. If the torpedo had struck the HMS Whitshead, which was leading the convoy, causing it to sink with the loss of life of those on board, the PMRA would potentially have been applicable to this wreck. In other words, an identical event under identical circumstances would have led to different legal consequences.[955] This inequality combined with the specific circumstances in which the SS Storaa perished as set out above led the Court to decide that the Secretary of State should reconsider its original decision implementing the new interpretation given by the High Court to the notion '*in military service*'.[956] The Secretary of State took this judgement to heart and in 2007 made the decision to designate the SS Storaa under the PMRA.[957] Under the PMRA two other commercial vessel were designated. The first is the SS Mendi, which was chartered by the UK as a troopship and sank after an accidental collision in 1917.[958] The second is the cargo liner SS Armenian. In 1915 the SS Armenian was chartered to carry over 1400 mules across the Atlantic from the US to Bristol. These animals were intended to serve as replacements for the horses that were lost by British troops during fights in France. On this voyage, the SS Armenian encountered the German submarine U-24, which opened fire at the SS Armenian after it refused to stop. 29 crew members, mainly American muleteers, lost their lives as the ship sank.[959]

[954] *Rosemary Fogg* 2005, §12.

[955] The High Court took its hypothesis even one step further and provided the following: "*had the same coaster which picked up survivors from the STORAA picked up survivors from the Whitshead and proceeded to Newhaven, but been successfully torpedoed, with the loss of life of the Royal Naval "survivors" from Whitshead, their remains would have qualified for protection had they died with the Whitshead, but their death on board the coaster would not qualify for protection*." *Rosemary Fogg* 2005, §89.

[956] Important to note is that the PMRA extends to activities in time of war, but not all action taken by a vessel during war will fall in the Act. *Rosemary Fogg* 2005, §88.

[957] BBS News, *WWII wreck gets war grave status*, 5 April 2007, available at http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/6531445.stm. For a detailed exposition on the case of the SS Storaa see M. WILLIAMS, "Merchantman or quasi-warship? R v Fogg and Secretary of State for Defence and Short", *Journal of International Maritime Law* 2007, 112-124.

[958] Historic England, *SS Mendi*, https://historicengland.org.uk/whats-new/first-world-war-home-front/what-we-already-know/sea/ssmendi/ (consulted 1 October 2017).

[959] G. WINTON, *Theirs Not to Reason Why – Horsing the British Army 1875-1925*, Helion and Company, Solihull, 2013, 369; T. ALLEN and P. SOUKUP, *SS Armenian*, www.wrecksite.eu/wreck.aspx?11109, consulted 18 October 2017.

Under the PMRA, the Secretary of State may designate a vessel as a vessel to which the Act applies.[960] A place, whether in the UK, UK waters or in international waters, is a protected place if "*it comprises the remains of, or of a substantial part of, an aircraft, or vessel to which this Act applies*".[961] Alternatively, the Secretary of State may designate an area containing (a substantial part of) a vessel that has sunk while in military service as a controlled site.[962] The PMRA thus applies two different protective regimes, namely that of a protected place and that of a controlled site. For both protected places and controlled sites a number of offences are identified in the Act regarding unauthorised interference with the remains lying therein.[963] Offences directed at controlled sites are subject to strict liability. For acts directed at protected places on the other hand, the question of whether these constitute offences depends on "*whether the defendant believed, or had reasonable grounds for suspecting, that the place comprises 'any remains of an aircraft or vessels which has crashed, sunk or been stranded while in military service'.*"[964] The underlying reason for this distinction is that the original objective was to use the instrument 'controlled sites' to protect wrecks of which the exact location was known while 'protected places' were to be used to protect wrecks of which the exact co-ordinates were unknown. Therefore, divers might interfere with wrecks located in protected places without knowing the identity of the wreck and that it is protected under the PMRA.[965]

Because of the wording of the PMRA, the designation as a protected place is considered to be the less stringent option of the two. The interpretation that has been given to the provisions of the PMRA and that seems to be accepted by the UK Ministry of Defence (MOD), is that visiting protected places on a 'look but don't touch and don't enter basis' is accepted, while the same visit would require a permit for controlled sites.[966] While in a protected place it is prohibited to damage or (re)move the remains of an aircraft or vessel,[967] for controlled sites the PMRA goes one step

[960] In order for the Secretary of State to designate a vessel it must appear to him that the vessel sank or was stranded on or after 4 August 1914 and that if it sank or was stranded while "*in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom, that the remains of the vessel are in United Kingdom waters.*" Section 1(3) PMRA.

[961] Section 1(6)(a) PMRA.

[962] In order for the Secretary of State to designate an area as a controlled site, it must appear to him that less than 200 years have passed since the sinking or stranding of the wreck and that if it sank or was stranded while "*in service with, or while being used for the purposes of, any of the armed forces of a country or territory outside the United Kingdom, that the remains are in the United Kingdom or in United Kingdom waters.*" Section 1(2) and (4) PMRA.

[963] Dromgoole notices that it is interesting that none of these offences relate to human remains specifically, especially since protecting human remains was the primary reason for adopting the PMRA. S. DROMGOOLE, "The United Kingdom" in S. DROMGOOLE (ed.), *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, Martinus Nijhoff Publishers, Leiden, 2006, (313) 330. (DROMGOOLE 2006)

[964] Section 2(1)(b) PMRA; DROMGOOLE 2006, 330.

[965] DROMGOOLE 2006, 330-332.

[966] DROMGOOLE 2006, 330-332. It is the Secretary of State that has the authority to grant licenses to authorise salvage or diving activities both for protected places and controlled sites. Section 4(1) PMRA.

[967] For vessels lying in a protected place it is forbidden to tamper with the remains, damage, move, remove or unearth them. Section 2(2)(a) PMRA.

further and prohibits the conduct of diving operations for the purpose of investigating or recording details of any remains of an aircraft or vessel present on site without a permit.[968] As a general provision, the PMRA provides that it is prohibited to carry out an excavation for the purpose of discovering whether any place in UK waters comprises the remains of an aircraft or a vessel that has sunk while in military service.[969]

The PMRA applies to both UK and foreign wrecks lying inside UK waters and to UK wrecks lying in international waters. Currently 79 vessels have been designated under the PMRA and are protected places and 12 controlled sites have been established.[970] Amongst the designated vessels are a number of German U-boats located in UK waters.[971] Protecting the wrecks of other States under national legislation can potentially be the basis for reciprocal respect and might result in that third State protecting British wrecks lying in its waters in return. The same is true for wrecks located in international waters. The PMRA, unfortunately, does not protect any wrecks of third States lying in international waters from interference by British nationals and British vessels.[972] Enforcing the protection of designated shipwrecks located outside of UK territorial waters proves to be challenging.[973] This is evidenced by the looting of the HMS Repulse and HMS Prince of Wales, both wrecks designated as protected places under the PMRA. These ships sank in 1941 in front of the coast of Malaysia and are being plundered by scrap metal merchants. The UK government has therefore turned to the Malaysian authorities asking them for help in stopping these plundering activities.[974] The 2001 MOD consultation report on the application of the PMRA mentions that there was a lobby in favour of designating the HMS Repulse and HMS Prince of Wales, among other vessels, as controlled sites.[975] This did, however, not happen. One of the first conclusions of the consultation report was that no sites should be designated as controlled sites in international waters. Such a designation would prevent British relatives of the men that perished when a vessel

[968] Section 2(3)(a) PMRA.
[969] Section 1(3) PMRA.
[970] The Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2017, 9 February 2017, 2017 No. 147, available at www.legislation.gov.uk/uksi/2017/147/made. (PMRA Designations 2017)
[971] These include the U-12, U-714, U-1018, U-1063 and the UB-65. A controlled site has been designated containing the UB-81. PMRA Designations 2017.
[972] C. FORREST, "Towards the Recognition of Maritime War Graves in International Law" in U. GUERIN, A. REY DA SILVA and L. SIMONDS (eds.), *Underwater Cultural Heritage from World War I*, Paris, UNESCO Publishing, 2015, (126) 132. (FORREST 2015)
[973] J. HARRIS, "The protection of sunken warships as gravesites at sea", *Ocean & Coastal L.J.*2001, (75) 124-125. (HARRIS 2001)
[974] J. RYALL and J. GUNTER, "Celebrated British warships being stripped bare for scrap metal", *The Telegraph* 25 October 2014,
www.telegraph.co.uk/news/worldnews/asia/malaysia/11187603/Celebrated-British-warships-being-stripped-bare-for-scrap-metal.html
[975] Ministry of Defence, *Military Maritime Graves and the Protection of Military Remains Act 1986: Consultation Report by the Ministry of Defence*, November 2001, available at www.jnapc.org.uk/PMRA%201986%20-%20Consultation%20Report%20by%20MoD%202001.pdf, 1. (MOD Consultation Report Military Graves 2001)

sank from visiting and diving on these sites, while this would not restrict similar activities conducted by other nationals.[976] Furthermore, it was decided to limit the number of controlled sites in territorial waters as well, since such designations can interfere considerably with other activities, especially fishing.[977] Prior to this consultation report, it was felt that the MOD preferred controlled sites, since these are subjected to strict liability for offences. The diving community, however, was relieved to hear that designation as protected places is now favoured.[978] Nevertheless, the MOD has warned that controlled site designation will be used in case "*vessels were subject to sustained disturbance"* or if they are "*considered dangerous*".[979]

#### 2.2.3.2. Sunken Military Craft Act (US)

The 2001 US Presidential Statement was legislatively codified in the 2004 SMCA.[980] Similar to the 2001 Statement, this Act departs from the assumption that the rights and title of the US over its sunken military craft can only extinguish following an express divestiture of title by the US and not by the passage of time, regardless of when the craft sank.[981] The term '*sunken military craft*' for the purpose of the SMCA must be interpreted as meaning "*any sunken warship, naval auxiliary, or other vessel that was owned or operated by a government on military noncommercial service when it sank*" and "*the associated contents of a craft*".[982] Without a permit, activities that disturb, remove or damage sunken military craft are prohibited.[983] This prohibition only applies to US' citizens, nationals or resident aliens, unless such application is in accordance with principles of international law or follows from an agreement concluded between the US and a foreign State.[984]

The SMCA includes a (partial) prohibition on the application of the law of salvage and finds to sunken State craft. On the law of salvage, the SMCA provides that without the express permission of the US no salvage rights or rewards will be granted for US' sunken military craft regardless of where they are located, including in the maritime zones of foreign nations.[985] Likewise, no such rights or rewards will be granted with respect to foreign sunken military craft located within US

[976] MOD Consultation Report Military Graves 2001, 1. In international waters, the Act will only apply to British-controlled ships, British citizens, a person who is a British subject, a British protected service and certain companies. Section 3(1) PMRA.
[977] MOD Consultation Report Military Graves 2001, 7, §21.
[978] DROMGOOLE 2006, 332.
[979] MOD Consultation Report Military Graves 2001, 8, §25(b).
[980] Sunken Military Craft Act, 2004, 10 U.S.C. §§ 113 *et seq*. (SMCA)
[981] Section 1401 SMCA.
[982] Section 1408(3) SMCA.
[983] Such activities can also be authorised by regulations issued following the SMCA or by other legislative instruments. Section 1402(a) SMCA.
[984] Section 1402(c) SMCA.
[985] VARMER 2014, 43.

waters without the express permission of the foreign State.[986] US waters in the sense of this Act include its internal waters, territorial sea and contiguous zone.[987] The law of finds does not apply to US' sunken military craft regardless of where they are located, nor does it apply to any foreign sunken military craft located in US waters.[988] The prohibition on the application of the law of finds seems to be an absolute one as, unlike for the law of salvage, no provision is made allowing the (foreign) State to allow for the application of this instrument.

By including military craft from foreign States in the SMCA, the US surely hopes that other States will afford US sunken State craft located in those States' territorial waters the same level of respect. Additionally, the SMCA encourages the negotiation and conclusion of bilateral and multilateral agreements with foreign States addressing sunken military craft in a manner consistent with the SMCA.[989]

### 2.2.4. Sunken State craft within United States' Admiralty courts

The US has a long tradition of salvage actions being brought before admiralty courts. These cases often deal with the recovery of (artefacts from) State craft. US' courts have had to consider the notion of abandonment of State craft and sovereign immunity on multiple occasions. In other States such court cases are much less frequent, or even non-existent. The US' admiralty cases are thus of great significance in this specific context and deserve to be observed more in detail.

In the past, US' courts did not always apply an express abandonment standard to sunken warships or other State craft. In a number of cases dealing with Spanish State vessels, US courts found that Spain had implicitly abandoned[990] its galleons lying in front of the US' coast.[991] Similarly, in a number of cases dealing with the wrecks of British State vessels, these were found to be abandoned without an express statement from the UK. In the 1985 *Klein* case the 11th Circuit Court

[986] Section 1406 (d) SMCA
[987] VARMER 2014, 43.
[988] Section 1406(c) SMCA.
[989] Section 1407 SMCA.
[990] *"[t]o show abandonment, a party must prove (1) intent to abandon, and (2) physical acts carrying that intent into effect. . . . Abandonment may be inferred from all of the relevant facts and circumstances. . . . A finding of abandonment must be supported by strong and convincing evidence, . . . but it may, and often must, be determined on the basis of circumstantial evidence . . . ". ZYCH*, 755 F. Supp. 214.
[991] This was, for example, the case in *MDM Salvage v. Unidentified, Wrecked and Abandoned Sailing Vessel,* 631 F. Supp. 308 (S.D. Fla. 24 March 1986) for a 1733 Spanish galleon discovered in Florida's territorial waters; in *Cobb Coin,* 549 F. Supp. 540 for a Spanish vessel that sank in 1715 when the fleet in which it was sailing got stuck in a hurricane (the wreck was discovered in Florida's territorial waters); in *Platoro,* 614 F.2d 1051 for a 1554 Spanish galleon lying in Texas' territorial waters and in *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 24 Jan. 1989) for two Spanish Galleons, namely Nuestra Senora Del Pilar and Nuestra Senora Del Buen Viaje located in the territorial waters of Guam.

of Appeals found the 18th century English warship HMS Fowey to be an abandoned wreck. The Court of Appeals stated that the US was successful in arguing that as the wreck is buried in the soil of the Key Biscayne National Park owned by the US and the US has had constructive possession over the wreck since 1975, it was the rightful owner of the HMS Fowey.[992] In *Sub-sal, Inc. v. The HMS De Braak*, the District Court in Delaware in 1992 considered the British brig-of-war to have been abandoned and, since it was located in Delaware waters, it was considered to be the property of Delaware.[993]

Not only foreign, but US' State craft as well have been considered to be implicitly abandoned by the US' courts. This was demonstrated, amongst others, in *State by Ervin v. Massachusetts Co.*[994] and *Baltimore, Crisfield & Onancock Line, Inc. v. United States.*[995] Both cases dealt with an obsolete vessel that was felt to be abandoned by the US' Navy to later be used for target practice without any formal act made following Congressional legislation. In the 1956 *Ervin* case, which dealt with the wreck of the USS Massachusetts, the Supreme Court of Florida concluded that "*the evidence at final hearing shows that the former owner of the battleship, the United States, has left it undisturbed for many years, and the court finds that it was abandoned many years before this suit was begun.*"[996] In the *Baltimore, Crisfield & Onancock Line* case the Fourth Circuit Court of Appeals in 1944 found that in order to evade liability under the Wreck Act and Public Vessels Act the US could abandon the USS Texas without taking "*positive action to that end by sending itself written notice or some similar act.*"[997] This case demonstrates how the US' government can evade liability under the Wreck Act[998] by abandoning its shipwrecks without a formal mandate from Congress.[999] Such an implicit abandonment standard can thus be beneficial, under certain circumstances, for the government as well.

US' courts have, however, not always been equivocal in applying an implicit abandonment standard in order to determine whether State craft were abandoned. In *Steinmetz*[1000] the District Court of New Jersey found in 1991 that the US had not implicitly abandoned the wreck of the CSS

[992] *Klein*, 758 F.2d 1514
[993] *Sub-sal, Inc. v. The HMS De Braak,* Docket No. C.A. 84-296-CMW (D. Del. 4 Feb. 1992).
[994] *State by Ervin v. Massachusetts Co*, 95 So. 2d 902 (Fla. Supreme Court 12 June 1956), *State by Ervin v. Massachusetts Co* cert. denied, 355 U.S. 881 (Fla. Supreme Court 25 Nov. 1957). (*Ervin*)
[995] *Baltimore, Crisfield & Onancock Line, Inc. v. United States,* 140 F.2d 230 (4th Cir. 17 January 1944). (*Baltimore, Crisfield & Onancock Line case*)
[996] *Ervin*, 95 So. 2d 903.
[997] *Baltimore, Crisfield & Onancock Line case,* 140 F.2d 234.
[998] 33 U.S. Code § 409 - Obstruction of navigable waters by vessels; floating timber; marking and removal of sunken vessels.
[999] BEDERMAN 2010, 104.
[1000] *United States v. Steinmetz*, 763 F.Supp. 1293 (District Court New Jersey, 13 May 1991); *United States v. Steinmetz*, 973 F 2d (212) 222-223 (3th Cir, 21 August 1992), Cert. denied, 113 S.Ct. 1578, (Supreme Court, 22 March 1993). (*Steinmetz*)

Alabama. Instead, an express act of abandonment seemed to be required.[1001] According to Dromgoole and Gaskell the government asserted title over this wreck both to make a point regarding sovereignty over sunken warships regardless of their age, as well as to protect the sanctity of the human remains that are still present in the wreck.[1002] The District Court explicitly stated that the CSS Alabama "*is also a sacred place, a watery grave containing the bodies of the officers and men who went down with their ship*"[1003]. In the 1981 *Hatteras case,*[1004] dealing with the US' Civil War vessel the USS Hatteras lying below the surface of the Gulf of Mexico, the District Court of Texas stated that "*the Secretary's formal declaration did not constitute a lawful abandonment of the vessel by the United States.*"[1005] Similarly, in *International Aircraft Recovery*, the 11th Circuit Court of Appeals in 2000 found that a US' Navy torpedo bomber that crashed in international waters during WWII had not been abandoned by the US.[1006] It should be noted that in all three these cases the US' government came before court in order to assert its rights over the wreck, resulting in the courts to uphold the rights of the US in its sunken State craft.

Two recent landmark cases involving Spanish historical warships are of particular interest. In the past, the US' courts on several occasions found Spanish historical State craft to have been implicitly abandoned. However, in both the *Sea Hunt*[1007] and the *Mercedes*[1008] case the Spanish claim was upheld and the vessels were considered not to have been abandoned.

The *Sea Hunt case* dealt with the wrecks of two Spanish frigates, namely Juno and La Galga. After running into a hurricane, La Galga sank in front of the coast of Virginia in 1750. Most of its crewmembers and passengers were able to reach land and survived. Juno encountered a storm in 1802 and sank in front of the coast of Virginia with the loss of at least 432 lives.[1009] A commercial salvage company, Sea Hunt Inc. obtained a permit in 1997 from the Virginia Marine Resources Commission allowing it to conduct salvage operations and recover artefacts from both wrecks.[1010]

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[1001] FORREST 2012, 83-84.
[1002] DROMGOOLE and GASKELL 1999, 184-186.
[1003] *Steinmetz*, 763 F. Supp. 1293
[1004] *Hatteras Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094 (S.D. Texas, 25 Feb. 1981), aff'd 698 F.2d 1215 (5th Cir.1982), cert. denied, 464 U.S. 815 (1983). (*Hattereas*)
[1005] *Hatteras*, 1984 A.M.C. 1101.
[1006] *International Aircraft Recovery L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d (1255) 1258-1260, (11th Cir. 17 July 2000) cert. denied *International Aircraft Recovery v. United States*, 121 S.Ct. 1079 (20 Feb. 2001). (*International Aircraft Recovery*)
[1007] *Sea Hunt, Inc. v. Unidentified, Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 27 Apr. 1999), aff'd in part, rev'd in part, 221 F.3d 634 (4th Cir. 21 July 2000). (*Sea Hunt*)
[1008] *Odyssey Marine Expl., Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M.D. Fla. 22 Dec. 2009), aff'd, 657 F.3d 1159 (11th Cir. (Fla.) 21 Sept. 2011), cert. denied, 132 S.Ct. 2379 (US 14 May 2010). (*Odyssey*)
[1009] *Sea Hunt*, 47 F.Supp.2d 680-681.
[1010] *Sea Hunt,* 47 F.Supp.2d 680; J. AMRHEIM, "The Sea Hunt Case: Your Government Saving Our Maritime Heritage", *Wreck Diving Magazine* 2010, (64) 66.

The State of Virginia claimed title to both these wrecks under the 1987 ASA.[1011] When Spain found out that its wrecks were commercially being exploited, it issued a diplomatic note of protest.[1012] The exploitation, however, continued and finally Sea Hunt Inc. initiated an *in rem* salvage action before the District Court of Norfolk in 1998.[1013] Sea Hunt Inc. claimed that the wrecks had been abandoned by Spain and that it was entitled to recover artefacts from the wrecks because of the permit that it had received in 1997.[1014] The District Court ruled that Spain had in fact abandoned La Galga when it entered into the 1763 Definitive Treaty of Peace Between France, Great Britain and Spain.[1015] Juno was found not to be abandoned.[1016] The Fourth Circuit of Appeals[1017] reversed the decision of the District Court in part in 2000 and found that La Galga had not been abandoned by Spain, as was the case for Juno.[1018] The Court of Appeals stated that "*Because Spain has asserted an ownership claim to the shipwrecks […] express abandonment is the governing standard."*[1019] This express abandonment has to be proven by Sea Hunt Inc. and Virginia by providing "*clear and convincing evidence"*.[1020] The 1763 Treaty provided in the transfer of most of Spain's territories in the New World to Great Britain. However, the Fourth Circuit Court of Appeal ruled that since the treaty provisions do not contain any specific reference to include shipwrecks,[1021] this treaty cannot constitute clear and convincing evidence of an express abandonment of La Galga by Spain. The Court also felt strongly about the fact that Spain wished to protect the wrecks as sacred military gravesites.[1022] The US supported Spain's legal position by submitting an *amicus curiae* brief in this case. The US provided that it defended Spain's ownership rights over these vessels as a part of its obligations under the 1902 Treaty of Friendship and General Relations between the US and Spain[1023] as well as a part of "*general principles of international comity*".[1024] In the *amicus curiae* brief the US referred to its own warships by providing that it "*is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking*

[1011] *Sea Hunt*, 47 F.Supp.2d 680.
[1012] This is Diplomatic Note No. 43/48 of 8 May 1998. AZNAR-GOMEZ 2003, 84.
[1013] DROMGOOLE 2013, 147.
[1014] *Sea Hunt*, 47 F.Supp.2d 682.
[1015] *Sea Hunt*, 47 F.Supp.2d 690-692.
[1016] *Sea Hunt*, 47 F.Supp.2d 692.
[1017] *Sea Hunt*, 221 F.3d 634.
[1018] *Sea Hunt*, 221 F.3d 647-648.
[1019] *Sea Hunt*, 221 F.3d 640.
[1020] *Sea Hunt*, 221 F.3d 644
[1021] The Court gave other arguments based on the text of article XX of the 1763 Treaty as well to conclude that the Treaty did not constitute prove of the abandonment of La Galga. *Sea Hunt*, 221 F.3d 644-646.
[1022] A *Sea Hunt*, 221 F.3d 647. In this case, especially Juno constitutes a significant war grave.
[1023] Treaty of Friendship and General Relations 1902, *UNTS* 411, 11.
[1024] *Sea Hunt*, 221 F.3d 647. Article X of this treaty states that "*In cases of shipwreck, damages at sea, or forced putting in, each party shall afford to the vessels of the other . . . the same immunities which would have been granted to its own vessels in similar cases.*" *Sea Hunt*, 221 F.3d 462.

*treasures of the sea.*"[1025] The UK as well supported Spain in this case by issuing a diplomatic note providing that article XX of the 1763 Treaty "*cannot be interpreted as involving an express abandonment by Spain of its rights to the shipwreck of 'LA GALGA'".*[1026] By supporting Spain, the US and the UK were able to express and fortify their own position concerning their warship wrecks located outside their territorial waters. Important to notice in this case is that it does not appear that the question of sovereignty of Juno and La Galga had any part in the decision of the Court. In fact, the application of the express-abandonment standard was based on the Columbus-America case,[1027] which did not deal with government, but with private claims.[1028] Following the Columbus-America case, the reason why express abandonment is required for Juno and La Galga is because the owner, here Spain, claimed its ownership rights over the wrecks before court. This rule appears to apply both to private and government vessels and has no link with sovereign immunity.[1029] It should be noted that this was the first time that Spain asserted its rights over its sunken warships before a US' court. This indicates that there is a growing willingness from States to protect their sunken warships from unauthorised intervention.[1030] This willingness is also evidenced by the statements discussed above made by a number of States recognising express abandonment as the applicable standard for their State vessels.[1031]

The second landmark case relating to a sunken government ship was the so-called *Mercedes case* in 2011.[1032] In 2007, Odyssey Marine Exploration (OME) discovered a wreck lying in international waters about 100 miles west of the Strait of Gibraltar.[1033] OME recovered approximately 594.000 coins and a number of other artefacts from the wreck and brought them into the jurisdiction of the District Court in Tampa, Florida in 2009 in order to initiate an *in rem* action.[1034] With this action, OME hoped to obtain the possessory rights and title over the artefacts that it had recovered as well as those left in the wreck under the law of finds. Alternatively, it sought a '*liberal salvage award*' for the services it performed under the law of salvage.[1035] Spain filed a claim against the *res* stating that 1) OME had discovered the wreck of the Nuestra Senora de las Mercedes, a Spanish frigate that exploded in 1804 with the loss of many lives, 2) Spain had not abandoned its sovereignty of the wreck, 3) under the applicable treaties and Executive Branch directives the Spanish warship should be afforded the same respect as is given to US' warships, and 4) under the

[1025] *Sea Hunt*, 221 F.3d 647.
[1026] *Sea Hunt*, 221 F.3d 646.
[1027] *Columbus-America*, 974 F.2d 450.
[1028] DROMGOOLE 2013, 148.
[1029] *Sea Hunt*, 221 F.3d 641.
[1030] DROMGOOLE 2013, 153.
[1031] See *supra* section 2.2.1.
[1032] *Odyssey,* 675 F. Supp. 2d 1126; 657 F.3d 1159; 132 S.Ct. 2379 (US 14 May 2010).
[1033] *Odyssey,* 675 F. Supp. 2d 1130.
[1034] *Odyssey,* 675 F. Supp. 2d 1134-1137.
[1035] *Odyssey,* 675 F. Supp. 2d 1131.

US' Foreign Sovereign Immunities Act (FSIA), the Court had no jurisdiction over the *res*.[1036] The District Court ruled that the wreck was in fact that of the Mercedes and agreed with the Spanish claim that the FSIA[1037] "*grants immunity to a foreign state's property in the United States from attachment, arrest and execution except as provided in specific provisions of the Act*."[1038] The Court recommended OME to return the recovered items to Spain.[1039] In 2011 the 11th Circuit Court of Appeals upheld the decision of the District Court agreeing that the Mercedes wreck was indeed immune from arrest.[1040]

There is an important difference between the Sea Hunt case and the Mercedes case. In the Mercedes case Spain did not argue purely on the basis of ownership rights, but on the basis that the wreck was immune from the jurisdiction of the US' courts. Both the District Court and the Court of Appeals agreed with the fact that the wreck was immune and that they had no jurisdiction over it. This case clearly demonstrates that intervening based on sovereign immunity has a procedural advantage over intervening on the basis of ownership rights alone: when it is decided that the court is without subject matter, this can lead to a summary dismissal of the salvor's *in rem* proceedings.[1041] This way discussion on whether a government ship can be implicitly abandoned and the assessment of whether a wreck has been abandoned expressly can be avoided. It should be noted that in both these cases Spain, being the flag State of the vessels, presented and defended its interests before court. Question remains whether courts would rule in the same manner if the sovereign State did not come forth.

### 2.3. The treatment of State craft as a part of international customary law

As was demonstrated above in the US' case law, in national legislation and by assessing the statements made by States, two reasons are cited why sunken State craft should not be interfered

[1036] *Odyssey,* 675 F. Supp. 2d 1131.
[1037] Section 1609 of the Foreign Sovereign Immunities Act (Jurisdictional immunities of foreign States, 28 U.S.C. §§1602 *et seq.*) states the following: "*Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611*". The Court, based on the report and recommendations of judge Pizzo, found that none of the exceptions mentioned by OME were applicable and that therefore the Court was "*without jurisdiction to adjudicate the claims against Spain's property*" *Odyssey* 675 F. Supp. 2d 1130.
[1038] *Odyssey,* 675 F. Supp. 2d 1139.
[1039] *Odyssey,* 675 F. Supp. 2d 1148. In its conclusion the District Court expressed strong feelings towards protecting the remains of those that died when the Mercedes exploded about two hundred years ago: "*International law recognizes the solemnity of their memorial, and Spain's sovereign interests in preserving it. Sea Hunt, 221 F.3d at 647. This Court's adherence to those principles promotes reciprocal respect for our nation's dead at sea.*" *Odyssey,* 675 F. Supp. 2d 1148.
[1040] *Odyssey*, 657 F.3d 1159.
[1041] DROMGOOLE 2013, 150.

with without the express consent of the flag State. The first is that States retain title over their sunken State craft regardless of the time that has passed since their sinking which can only extinguish through express abandonment and the second is that sunken State craft enjoy sovereign immunity. A number of flag States argue that both these assertions reflect rules of international law. It is, however, uncertain whether at the moment this is already the case. Dromgoole states that this uncertainty partly originates from the question whether there is sufficient consistent and widespread State practice motivated by the idea that such practice is in accordance with a legal obligation to conclude that customary law in this sense exists. Additionally, and perhaps even more fundamentally, there continues to be confusion concerning the rights of flag States and coastal States with regard to sunken State craft located within the territorial sea of a coastal State.[1042] The discussion that took place concerning State vessels when drafting the UNESCO Convention illustrates this confusion.[1043] The fact that the UNESCO Convention provides that the flag State, when this State is a party to the Convention, should be informed of the discovery of its State vessels located within the territorial sea of a third State party does not consolidate the idea that express consent from the flag State is required prior to any interference with its State craft. However, as was explained, considering that the provisions of the UNESCO Convention must be interpreted in conformity with the principles of international law, it does not exclude such an interpretation either. Taking into account the fact that a number of States have issued statements in favour of express abandonment and/or sovereign immunity combined with the growing willingness from States to protect their sunken historical State craft, as was evidenced in the Sea Hunt and Mercedes case, it may be concluded that State practice in this sense might continue to grow in the near future. Therefore, it is conceivable that a rule of international customary law might one day come about stating that permission from the flag State must be obtained prior to inferring with its State craft regardless of where these craft are located.[1044] On the other hand, such practice would need to be accepted by coastal States that are not traditional flag States as well. In light of this, a recent discussion concerning the wreck of the San José, a Spanish galleon that sank in front of the coast of Colombia in 1708 during battle, should be mentioned. On its final voyage the San José was sailing as the flagship of a treasure fleet. On 8 June 1708 the fleet got into a battle with a British fleet during which the powder magazine of the San José detonated and destroyed the ship killing most of its crew.[1045] It is believed that the ship was carrying gold, silver and gems worth between 4 and 17 billion dollars which was meant to finance the war efforts of the Spanish king. The wreck of the San José is therefore rightfully referred to as

[1042] DROMGOOLE 2013, 153.
[1043] See *infra* section 2.4. on State craft in the UNESCO Convention.
[1044] DROMGOOLE 2013, 153.
[1045] For more on the San José and its final voyage see C.R. PHILIPS, *The treasure of the San José – Death at Sea in the War of the Spanish Succession*, Baltimore, The John Hopkins University Press, 2007 and S. GOMEZ, *El Galeón San José y la batalla de Barú*, www.todoababor.es/articulos/sjose_baru.htm (consulted 7 August 2018).

the 'holy grail' of shipwrecks.[1046] Litigation has been surrounding this wreck for many years. A Washington-based salvage company, Sea Search Armada (SSA) claimed that they had discovered the wreck of the San José in 1981 on the Colombian continental shelf. A deal was made with the Colombian government providing that SSA would obtain 35% of the recovered treasure from this wreck. While initially the Colombian government agreed to this, it later passed an act, the Seizure Act, determining that asides from a 5% finders' fee for the salvage company, the recovered treasure belonged to Colombia. This resulted in a number of court cases in which SSA attempted to regain its part of the treasure.[1047] During these litigations initiated by SSA, Spain, being the flag State of the San José, did not appear in Court to claim its rights to the wreck. However, in 2015 the Colombian Navy and the archaeology institute learned about the location of the wreck of the San José, which was closer to the Colombian coast than SSA had initially claimed. Colombia refuses to reveal the exact position of the wreck and merely provides that it is located within its territorial waters. At this point, Spain decided to come forth and claim its rights over the wreck.[1048] In December 2015 the Minister of Foreign Affairs and Cooperation of Spain met with the Colombian Minister of Foreign Affairs concerning the protection and legal ownership of the San José. The Spanish Minister declared that the wreck is that of a Spanish warship and is therefore entitled to sovereign immunity. Additionally, the wreck is also a maritime grave for hundreds of Spaniards that lost their life when it sank and must be respected as such. The Spanish claim is supported, *inter alia*, by the outcomes of the Sea Hunt and Mercedes cases. Colombia, however, does not accept the Spanish claim and feels that it holds title over the wreck of the San José since it is located in Colombian waters. The Colombian Minister of Foreign Affairs also pointed to the legal differences between the two States since Colombia is not a signatory to UNCLOS nor to the

[1046] M.F. TEDESCO, "Between the Devil and the Deep Blue Sea: The shortcomings of Forcing Courts to Choose from the law of salvage and and law of finds in Treasure Salvage Cases", *USF Maritime Law Journal* 2016-2017, (155) 156 (TEDESCO 2016-2017); S. LINNING, "US salvage firm risk battle at sea over £12billion treasure on Spanish galleon sunk by the Royal Navy more than 300 years ago", Mailonline 19 June 2016 available at www.dailymail.co.uk/news/article-3649329/US-salvage-firm-risk-battle-sea-12billion-treasure-Spanish-galleon-sunk-Royal-Navy-300-years-ago.html.

[1047] *Sea Search Armada v. Republic of Colombia*, 821 F. Supp. 2d 268 (D.D.C. 24 Oct. 2011) (No.10-2083); Sea Search Armada v. Republic of Colombia., 522 Fed. App'x, 1 (D.C. Cir. 2013). In 1989 Sea Search Armada (SSA) commenced a court case before the Circuit Court of Barranquilla against the Colombian government to assert its property rights over the treasure of the San José. This Circuit Court ruled in favour of SSA awarding them an equal share (50%) of the treasure. In 2007, after a lengthy appeals process, the Colombian Supreme Court affirmed the judgement of the Circuit Court. In 2010, SSA filed suit before US' District Court making three claims: breach of contract, conversion and the recognition and enforcement of the judgement of the Colombian Court's judgement in favour of the SSA. The District Court, however, granted a motion to dismiss these claims as requested by the Colombian government on all three counts. The first two counts were dismissed because they were time-barred. The third count was refused based on the fact that the ruling from the Colombian Court was not cognizable under the D.C. Uniform Foreign Money Judgments Recognition Act. On appeal, the US' Circuit Court affirmed the dismissal of all three claims made by SSA. At the moment, the SSA seems to have exhausted all its judicial remedies in the US and has filed complaints with the Inter-American Commission on Human Rights. TEDESCO 2016-2017, 160-163.

[1048] FOX News World, *Colombia Works to Salvage Spanish Treasure Ship Loaded with Estimated $1 Billion in Gold, Jewels*, 6 July 2017, www.foxnews.com/world/2017/07/06/colombia-works-to-salvage-spanish-treasure-ship.html.

UNESCO Convention.[1049] Currently, Colombia is looking into salvaging the wreck of the San José and has made a deal thereto with a private investor. The Colombian president Santos has stated that the proposal that was made complies with the highest standards scientifically, technologically and financially required for the recognition of cultural heritage. A museum will be built to display the finds.[1050] Spain has sought to find an amicable agreement with Colombia over the wreck but has also stated, according to BBC News, that it is prepared to defend its interests at the UN if necessary.[1051] This discussion is without a doubt to be continued. In light of the question if customary law exists on the issue of flag States retaining title over their sunken State craft and the sovereign immunity of these wrecks, this case illustrates that there is no generally accepted set of rules in place. The Colombian government claims that following their national legislation they are entitled to claim title over the wreck of the San José and refuse to accept the Spanish claim in this regard. Any rights that are given to Spain concerning this wreck in the future will most likely be the consequence of an amicable agreement and diplomatic considerations, but will not follow from the Colombian government acknowledging that they have some sort of binding legal commitment to do so. Even the fact that this wreck is considered as a maritime war grave, does not prevent the Colombian government from claiming title over it.

Therefore, it may be said that at the moment no rule of international customary law has emerged providing clear rights for flag States over their sunken State craft located in the territorial waters of a third State. It is thus crucial that flag States express their views on this topic towards the international community and act accordingly if they ever want to see such a rule of international customary law crystallised.

### 2.4. State craft in the UNESCO Convention

State craft that has been submerged for over 100 years, like all other types of wrecks and aircraft that have been submerged for so long, can be protected as UCH in the UNESCO Convention. As was explained in the first chapter, depending on in which maritime zone the State craft is located a different regime has been set out: article 7(3) for State craft located in the archipelagic waters

[1049] Colombian chancellery, *Declaración del Ministro de Asuntos Exteriores y de Cooperación de España, José Manuel García-Margallo, y la Ministra de Relaciones Exteriores de Colombia, María Ángela Holguín Cuéllar, al término de la reunión bilateral*, 12 December 2015, available at www.cancilleria.gov.co/newsroom/news/declaracion-ministro-asuntos-exteriores-cooperacion-espana-jose-manuel-garcia-margallo; Colombian chancellery, *"Seguimos conversando con España sobre el Galeón San José": Canciller Holguín*, 7 March 2016, available at www.cancilleria.gov.co/newsroom/news/seguimos-conversando-espana-galeon-san-jose-canciller-holguin-gira-europa.

[1050] BBC News, *Colombia to salvage Spanish galleon San José Wreckage*, 6 July 2017, www.bbc.com/news/av/world-latin-america-40523866/colombia-to-salvage-spanish-galleon-san-jos-wreckage.

[1051] BBC News, Colombia asks for Help Recovering Treasure from Spanish Galleon, 14 July 2017, www.bbc.com/news/world-latin-america-40613663.

or territorial sea, article 10(7) for those located in the EEZ or on the continental shelf and article 12(7) for those located in the Area. As a general rule it can be said that the rights of the coastal State over such a wreck diminish as the wreck is located further from the coast, while the rights of the original flag State increase.[1052] As was already explained, a number of traditional flag States had/have issues with the way in which State vessels are managed in the UNESCO Convention, especially when located in the territorial sea of a third coastal State. While the UNESCO Convention explicitly provides that "*nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft*",[1053] it is clear from the exposition given under this chapter that there is uncertainty as to what exactly are the rules applicable to sunken State craft under international law. The UNESCO Convention retains this *status quo* by not further elaborating what these "*rules of international law and State practice"* and *"any State's rights"* entail.[1054]

That creating rules on State craft was going to be problematic was evident from the very beginning of the negotiations on the UNESCO Convention. The issue of State vessels and warships was discussed to such an extent that "*it almost looked as if a Convention on the protection of warships was to be negotiated*".[1055]

In the 1994 ILA draft and the 1998 UNESCO draft, State vessels and aircraft were initially excluded from the scope of the Convention. During later negotiations, however, it was felt by several experts that State craft should be included in the UNESCO Convention as this represents an important part of UCH. Other experts, however, did not want to include any reference to this type of vessels and aircraft in the Convention, leaving the control over them to the general rules of public international law. At one point the chairman of the negotiations suggested that the Convention would apply to warships and other government ships that have been submerged for over 100 years.[1056] This suggestion was retained in the draft Conventions following that of 1998 and in the final text of the UNESCO Convention. This resulted in the specific regimes for State craft to be created.[1057]

Once it was decided to include State craft in the UNESCO Convention, one of the main issues was how to define this type of vessels and aircraft. In the discussions on this topic there were two groups of State representatives that supported opposite viewpoints. On the one hand, there were

[1052] See also section 4 of chapter one.
[1053] Article 2(8) UNESCO Convention.
[1054] This assumption is based on the fact that the text already explicitly refers to sovereign immunity and that therefore these 'State's rights' must entail something else which is most likely to be ownership rights. O'KEEFE 2002, 52-53.
[1055] BOESTEN 2002, 170-173.
[1056] Report UNESCO CLT-96/CONF.605/6, 5-6.
[1057] O'KEEFE 2002, 76. For more on the specific regime for State craft see chapter one.

the representatives of the traditional maritime powers such as the UK, Spain and the Netherlands that in the past had military vessels sailing all over the world and on the other hand representatives from the past colonies, especially in the Americas, on whose coasts a lot of these vessels were wrecked. The traditional maritime powers were in favor of a wide definition of State vessels as they wanted to ensure that their sunken State craft did not fall under a regime that awards substantial powers to the coastal State in whose waters it lies. On the other side, the former colonies argued that there was no good reason to establish two different regimes and that all shipwrecks should be protected in the same way. During the Meeting of March/April 2001 a potential solution was seen in using article 29 UNCLOS as a reference point. As was explained this provision defines warships as "*a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.*"[1058] Two issues were however identified regarding this definition. The first was that this definition is not suitable for ancient vessels and would therefore not be accepted by archaeologists.[1059] It might proof challenging to determine whether the commander of the vessel was "*in the appropriate service list or its equivalent*" at a particular time, nor is it clear what constituted the "*regular armed forces discipline*" in previous centuries. The most contentious point is of course the characterisation of the vessels used by European maritime powers to transport treasure from American and East Indian colonies. Spanish and Portuguese treasure galleons, Dutch spice fleets and British East Indiamen were armed and sometimes sailed under the command of commissioned naval officers. Because of these characteristics, one could be inclined to believe that these wrecks were warships. On the other hand, however, these vessels were essentially used for trade and transport and any military function was merely incidental. The question thus arises whether this entails that the activities of these vessels were commercial and that the vessel itself can therefore not be qualified as a warship.[1060] For ancient vessels, such as 16$^{th}$ and 17$^{th}$ century privateers, it is problematic to distinguish between private and State interests. This is even more so the case for ships such as Viking longboats. Additionally, qualification problems might even arise for more recently sunken wrecks. In recent wars, it has occurred that commercial ships were used for military purposes, as was for example the case for the SS Storaa. This makes it hard to clearly distinguish between warships and non-warships.[1061] The second issue that arose in regard to the definition given in article 29 UNCLOS was that the traditional maritime powers insisted on a broader definition, including not merely warships but other State vessels as well. The UK eventually

[1058] Article 29 UNCLOS.
[1059] GARABELLO 2003, 110.
[1060] BEDERMAN 2010, 98-99.
[1061] See for example the *Rosemary Fogg* case on the *SS Storaa*. (FORREST 2012, 82)

made a proposal[1062] that turned out to be the basis for any subsequent proposals, even though it was found to be too broad by others such as Italy, Egypt and Argentina.[1063]

The 2001 expert meeting was dominated by the issue of State vessels. A separate working group was created which came up with several proposals to address the issue of State vessels and aircraft. They, however, all failed to get a consensus report. Three discussion points came forward from this working group: "*1. Whether to provide for a disclaimer as part of an article dealing with warships, 2. The issue of obligations of states with regard to foreign warships in their territorial sea and, 3. The subject of maritime graves, especially war graves.*"[1064] Discussions on these points resulted in the insertion of the definition of State vessels and aircraft as it exists today in the UNESCO Convention.[1065] In the final version of the text of the UNESCO Convention State vessels and aircraft are defined as "*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*".[1066] By not defining the notion of warship, the UNESCO Convention was able to surpass the issue of trying to find a definition that encompasses all warships, regardless of their age, and of distinguishing between commercial vessels as such and commercial vessels that were used during war time and might be considered as sunken warships under certain circumstances. The definition for 'State vessel and aircraft' of the Convention sets out a number of conditions with which a wreck must comply in order to qualify as a State vessel or aircraft and thus fall within the special regime provided for such wreck.

The first of these criteria is that the wreck must have been "*owned or operated by a state and used, at the time of sinking, only for government non-commercial purposes*".[1067] The notion 'State' and 'non-commercial purposes' will have to be assessed in light of the time of sinking taking all circumstances into account.[1068] As it is not required that the wreck must be owned by the flag State at the time that it falls under the UNESCO Convention, the former flag State will still enjoy the

[1062] The UK proposed the following definition: "*State vessels and aircraft means warships, naval auxiliaries and other vessels or aircraft owned or operated by a State and used, for the time being, only on governmental non-commercial service. Sunken State vessels and aircraft include the remains of the sunken State vessels or aircraft and their content*." GARABELLO 2003, 111.
[1063] GARABELLO 2003, 110-111.
[1064] BOESTEN 2002, 167-169.
[1065] BOESTEN 2002, 167-169.
[1066] Article 1(8) UNESCO Convention.
[1067] Article 1(8) UNESCO Convention.
[1068] O'Keefe mentions the wreck of 'La Juliana', as an example. This was a Catalonian merchant ship that was pressed into service by Phillip II of Spain for the Spanish Armada. It was wrecked in Ireland in 1588. Whether this vessel was operated by the Spanish State and whether it was in non-commercial service will have to be determined in light of the time in which it sank. O'KEEFE 2002, 46-47.

rights provided for under this Convention even when it has sold or abandoned its sunken State craft.[1069]

The second criterion provides that the wreck must be "*identified as such*".[1070] This entails that wrecks that cannot be identified as State craft in the sense of article 1(8) UNESCO Convention will be subjected to the general regime for the protection of UCH as set forth in the UNESCO Convention. Even though this provision does not help resolve the question of whether a shipwreck is that of a State vessel or not, it does place the burden of proof on the flag State that has to be able to clearly identify a wreck as being a State vessel if it wishes the special regime of the Convention to apply. This ensures that in case the status of a shipwreck is questionable, it is included in the general regime. The regime for State vessels is, therefore, likely to only apply in exceptional circumstances. The advantage of this is that it ensures that the UNESCO Convention has the widest possible scope, while still allowing States to have a different protection regime for State vessels if they wish so and can prove the nature of the wreck.[1071]

Finally, the last criterion in the definition is that the wreck must meet the definition of UCH. The 100-year threshold will thus apply to State vessels as well meaning that warship wrecks from World War II will not fall within the scope of the UNESCO Convention for the next years to come.

The issues relating to State vessels and the regime that was finally set up within the UNESCO Convention for these wrecks were reason for a number of States to abstain from voting on the UNESCO Convention or even vote against it. The Russian Federation voted against the Convention, among other reasons because it had some concerns on the inviolability of warships. France and the UK abstained from voting because they were dissatisfied with the provisions on warships. Sweden, particularly regretting the lack of consensus on warships, abstained from voting as well. The US, that acted as an observer during the negotiations, explained that even though it supported a great part of the Convention, if it had a vote, it would have voted against the Convention. One of the reasons for this was that it objected to the provisions on warships.[1072]

[1069] DROMGOOLE 2013, 155. This seems to even go one step beyond what traditional flag States believe to be the rules of international law. Once a State has expressly abandoned its sunken State craft, it loses its rights in the wreck. In the UNESCO Convention, however, even after a State has abandoned its sunken State craft, it can still claim its rights as the former flag State of the wreck.

[1070] The word 'as such' in this sense refers to the first part of article 1(8) UNESCO Convention, namely "*vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes".*

[1071] FORREST 2012, 86.

[1072] Oral Report of the Chairperson of Commission IV, 12 November 2001, 31C/ INF.24, 8-9.

## 3. Protecting sunken warships as 'maritime war graves'

### 3.1. Introduction

As was explained in the general introduction to this chapter, States may wish to protect their sunken State craft from interference by third States and nationals for a number of reasons.[1073] One of the most important reasons prompting States to offer such protection is the fact that these sunken vessels are often the final resting place of the men that perished when the ship sank. On 31 May and 1 June 1916 the largest naval battle of WWI took place in front of the coast of Jutland, Denmark. 25 ships went down with the loss of life of 8.645 sailors. This tragic event was only one of the many naval battles that were fought during World War I and II that resulted in the loss of many lives. Even though the centre of both World Wars lied in Europe, sunken State vessels lost because of these wars can be found all over the world, for example in Australia (the Emden), French Polynesia (the Seeadler), Tanzania (SMS Kőnigsberg), Turkey (AE2), Chile (HMS Monmouth and HMS Good Hope), Malaysia (HMS Repulse and HMS Prince of Wales), the US (USS Arizona) and the Falkland Islands (the Scharnhorst and the Gneisenau).[1074] While in theory all types of sunken vessels can potentially be maritime graves, for obvious reasons most of them are the wrecks of sunken warships. These can be referred to as 'maritime war graves', although not an official term. No international instrument exists recognising the term 'maritime war graves' or offering specific protection for these types of gravesites. Nevertheless, as will be demonstrated under this section, States often do attach significant importance to honouring and respecting the 'maritime war graves' of the men that died while serving their country. As was already explained, especially for older wreck, it is often difficult to assess whether a ship should be considered as a warship. Therefore, offering a clear-cut definition for 'maritime war graves' is challenging and the line between maritime graves in general and 'maritime war graves' is often blurry. Furthermore, many questions concerning maritime graves remain unanswered such as 'do human remains still have to be physically present in order for a wreck to be considered as a grave? And if so, what constitutes a human remain?' The UNESCO Convention protects human remains but does not define this concept.[1075] Do human remains only entail the flesh and bones of the men that went down with the wreck or are clothes and personal items considered as human remains as well?[1076] No clear answers to these questions are provided under international law.

[1073] It should be noted that this was not always the case. For example, in the sixties of the previous century many of the wrecks of Jutland were blown up for scrap metal. This was often done without the consent from the flag State. These flag States did not appear to have objected to these activities and the fact that these wrecks contained the remains of the men that perished with them did not seem to be a concern. FORREST 2015, 127.
[1074] FORREST 2015, 126-127.
[1075] See chapter one section 4.2.5. as well as *infra* section 3.5. on the protection of human remains in the UNESCO Convention.
[1076] HERSHEY 2012, 367.

While being a topic that gives rise to many questions, it is however in light of assessing the protection of sunken State craft, crucial to have a look at the ways in which 'maritime war graves' are protected in State practice. Furthermore, especially since no international instrument exists addressing this issue, it needs to be determined whether some form of international customary law can be deduced from this State practice and national legislation.

### 3.2. Balancing out interests in order to protect 'maritime war graves'

When States wish to offer respect to maritime graves, a number of factors must be taken into consideration. As will be evidenced in this section, different approaches can be used when dealing with 'maritime war graves'. These approaches vary from protecting the gravesite *in situ* to recovering the remains and returning them to their State of origin. States will need to assess on a case-by-case basis which approach is to be preferred. Furthermore, when the gravesite is a wreck that has been submerged for over 100 years, the principles of the UNESCO Convention favouring *in situ* preservation should be taken into account as well by its States Parties. Finally, other considerations such as the navigational hazards that wreck sites might pose and environmental damage caused by them can potentially play an important role as well. Shipwrecks may contain oil or other dangerous substances that due to the deterioration of the wreck can leak into the marine environment, causing considerable damage. The two World Wars left a large number of potentially hazardous wrecks, containing oil, munition or other poisonous or noxious cargoes. In 2005, a survey demonstrated that of the 8.569 wrecks worldwide that potentially pose a threat of oil pollution, over 75 per cent are remains from World War II.[1077] These wrecks are environmental 'time-bombs' because of the corrosion and disintegration of the hulls. In such situations governments face the difficult task of deciding on a plan of action. When deciding on a plan of action States need to consider a number of factors including whether the wreck has any historical value, if it is a gravesite and the fact that some of these wrecks have been on the bottom of the sea for many years and are now a part of the marine environment. Therefore, both the positive as well as the negative effects on the environment of removing a wreck should be considered. Important to keep in mind is that the removal should apply to the hazard that emanates from the wreck and not necessarily to the wreck itself.[1078] The majority of the wrecks that pose a pollution or navigational hazard are located in the territorial sea of a State. Flag States seem to have recognised that access to these sites falls under the control of the coastal State, even though the flag State may retain the ownership and/or sovereign immunity over the wreck. According to Forrest, the special status of such a wreck does not preclude the coastal State from intervening to remove it to prevent damage to the marine environment. This includes the possibility to order

[1077] FORREST 2012, 80.
[1078] FORREST 2012, 88.

owners to have the wreck removed or, in case it has to be removed by the State authorities of the coastal State, to recover the costs of the removal from the ship owner.[1079]

In order to illustrate the importance that States attach to protecting 'maritime war graves', a number of examples are given of situations in which States had to balance their interest in protecting a wreck site as a maritime war grave against other interests such as the protection of the environment. This demonstrates in what ways States have attempted to show respect for these wreck sites.

The HMS Royal Oak, which sank in 1939, is the largest official maritime war grave of the UK. It has been designated as a controlled site under the PMRA.[1080] In the early 1990s oil was leaking from the wreck at a slow rate. In 1996, however, this oil started to pollute the beaches of Orkney.[1081] At that time the wreck leaked about 1.5 tonnes of oil per week,[1082] which caused considerable damage to the environment. The MOD as well as the residents of Orkney were reluctant to disturb the war grave but at the same time the Orkney authorities were forced to address the issue of the coastlines being polluted. The Defence Minister, Dr. Lewis Moonie, stated the following about this issue: "*it is abhorrent that human remains in war graves are disturbed unless there is overriding imperatives of marine or environmental safety*".[1083] In order to solve the environmental issues relating to the oil spill, many options were explored including securing metal plates to the hull of the ship and the placing of 500 sandbags over the areas leaking oil. These solutions, however, were only of a temporary nature.[1084] In 1999 another attempt was made to stop the leaking when a metal umbrella-shaped canopy was placed over the hull of the wreck. When deciding on this action, the sanctity of the war grave was a very important factor to consider. The placing of the canopy was preceded by a two year Navy research investigating ways to avoid cutting open the wreck. Steve Willmot, a Royal Navy press officer based at Falsane, stated that "*The fact that the ship is a war grave is one of the most important points we had to consider*" and that "*The Royal Oak was the first major naval casualty of the Second World War and involved an immense loss of life. It wasn't just a question of sending divers down to the wreck, drilling a few holes and pumping off what came out. We had to maintain the integrity of the war grave. Everything we've done is*

[1079] FORREST 2012, 85.
[1080] The fact that this shipwreck and maritime war grave is important to people and that the event during which it perished lives on in their minds is illustrated by the number of books that have been written on this wreck: see www.hmsroyaloak.co.uk/books.html.
[1081] J. MICHEL *et.al*., "An issue Paper Prepared for the 2005 International Oil Spill Conference: Potentially Polluting Wrecks in Marine Waters", *International Oil Spill Conference Proceedings* 2005, (1)14. (MICHEL 2005)
[1082] FORREST 2012, 80-82.
[1083] MICHEL 2005, 16.
[1084] MICHEL 2005, 14-17.

*with the approval of the Royal Oak Survivors Association and families of the dead.*"[1085] Environmentalists took the position that they would like to see the oil drained swiftly. David Flanagan a spokesman for Orkney Islands Council, however, felt that the best solution had been found for the HMS Royal Oak. He stated that "*There has been mixed opinion but we're pleased with the way this has been handled. In some ways I think local people see the sheen of oil as a memorial to the dead of the ship and as long as that sheen doesn't cause any environmental problems they won't mind*".[1086] Unfortunately, the canopy was unsuccessful.[1087] Part of the oil was later removed from the wreck by Briggs Marine under the direction of the MOD Salvage & Marine Operations Direction (S&MO). The team of Briggs Marine was aware of the history that surrounds the wreck and its importance as the final resting place of the crew. Therefore, every precaution was taken in order to disturb the Royal Oak as little as possible.[1088] At this time oil is still present in the wreck of the HMS Royal Oak. However, this oil is located deep within the ship. In order to gain access to it, large holes would have to be cut in the wreck. This would go against the commitment of the S&MO to remove as much oil as possible, while trying to minimise damage to the wreck as it wishes to respect the ship's status as a war grave. Since research has shown that the chance of a certain collapse of the wreck which would result in the release of the remaining oil in a single event is very small, it was decided to delay the further removal of the oil until less intrusive methods of oil extraction are available.[1089]

Another example concerns the USS Mississinewa, which sank in the Ulithi lagoon in the Federated States of Micronesia in 1944 with the loss of 63 lives. The vessel had over 300 million gallons of oil on board when it was lost. In 2001, oil was reported to be leaking from the wreck into the lagoon. In order to deal with this issue, in 2001 and 2002 two assessment missions were conducted in order to determine the source of the leak, to secure the leak if possible and, in 2002, to remove part of the oil. In 2003 another large part of the oil from the Mississinewa was removed.[1090] The fact that the USS Mississinewa is a war grave was taken into account during these operations. In the US' Navy Salvage report on the USS Mississinewa the following was stated about that matter: "*All participants in both the 2001 and 2002 assessment missions and the 2003 oil removal project*

[1085] X, "Navy tackles oil leak from battleship war grave" in *The Independent*, 31 January 1999, www.independent.co.uk/news/navy-tackles-oil-leak-from-battleship-war-grave-1077356.html.
[1086] *Ibid*.
[1087] MICHEL 2015, 16.
[1088] X, "'Royal Oak' Oil Removal Continues" in *Maritime Journal*, 1 August 2004, www.maritimejournal.com/news101/pollution-control/royal_oak_oil_removal_continues.
[1089] Scapa Flow - Historic Wreck Site, *Wreck of HMS Royal Oak*, www.scapaflowwrecks.com/wrecks/royal-oak/wreck.php (consulted 7 August 2018).
[1090] US Navy, *U.S. Navy Salvage Report USS Mississinewa oil removal operations*, May 2004, S0300-B6-RPT-010, available at www.navsea.navy.mil/Portals/103/Documents/SUPSALV/SalvageReports/Mississinewa%20Oil%20Removal%20Operations.pdf, 3-7. (US Navy Salvage Report USS Mississinewa)

*were acutely aware that the sunken vessel is the war grave for 63 of the ship's complement of 264 persons. The U.S. Government provided assurances to all concerned local and regional government officials, as well as to survivors' groups, that operations called for no activity in the vicinity of any ship's spaces that would have been manned. Therefore, no human remains would be disturbed."*[1091]

Another noteworthy example is that of the USS Arizona. For this historically very valuable shipwreck, the choice was made to allow the shipwreck to further leak oil in order to avoid interference with it. The USS Arizona is an American battleship that was bombed in 1941 by a Japanese aircraft in Pearl Harbour.[1092] 1177 crew men lost their lives that day.[1093] The USS Arizona continues to leak oil every day and if the hull were to collapse, a very large quantity of oil would be released.[1094] After researching whether the oil spill caused environmental problems, the US' Navy decided that for the time being, nothing would be done about the leak. The oil spots on the water have been described as the black tears of the USS Arizona reminding people of the sacrifice made by the crewmen that still lie in the wreck.[1095] The USS Arizona demonstrates the importance of allowing comrades that fought together in battle to lie together in the grave. Crewmembers that were assigned to the USS Arizona on 7 December 1941, the day it perished, are entitled to ask for their cremated remains to be interred inside the barbette of gun turret four by the divers of the National Park Service. The men that were crewmembers before that infamous day have the right to have their ashes scattered over the shipwreck. This is enforced by the USS Arizona Reunion and Survivor Association. By mid-2006, 28 crewmembers had already been interred into the wreck in simple private ceremonies.[1096]

In all cases mentioned above, the importance of the site as a maritime war grave was taken into account to a high extent during the operations directed at it. In some cases, the fact that the wreck is a maritime war grave was even a reason to decide not to prevent it from further leaking oil into the marine environment. In fact, for the USS Arizona and the HMS Royal Oak, the oil is even considered to be some sort of visual reminder of the grave site that lies beneath the waters. This demonstrates the enormous value that governments and the public at large attach to preserving the sanctity of such grave sites. Other cases, however, have demonstrated that the fact that a shipwreck can be considered as a war grave is not always sufficient for the authorities to decide

[1091] US Navy Salvage Report USS Mississinewa, 6.
[1092] University Libraries, *USS Arizona – That Terrible Day*, www.library.arizona.edu/exhibits/ussarizona/history/history.html (consulted 7 August 2018).
[1093] *USS Arizona Memorial - Pearl Harbor Hawaii*, http://pearl-harbor.com/arizona/arizona.html (consulted 7 August 2018).
[1094] United States' National Park Service, *Frequently Asked Questions,* www.nps.gov/valr/faqs.htm (last update 31 July 2018).
[1095] B. DANFORTH, The Black Tears of the USS Arizona, 9 May 2016, https://pearlharbor.org/black-tears-uss-arizona/.
[1096] United States' National Park Service, *Frequently Asked Questions,* www.nps.gov/valr/faqs.htm (last update 31 July 2018).

on non-intrusive measures. The story of the U-864 serves as an example. This German U-boat sank in 1945 taking the lives of 73 crew members. In 2003 the wreck was located by the Royal Norwegian Navy lying about 2nm west of the Island of Fedje. On board of the ship was a large quantity of mercury present which was leaking from the wreck.[1097] Initially, the Norwegian coastal authorities recommended to encase the wreck and cover the seabed to prevent the spread of the pollution. Later on, however, the decision was made by the Norwegian government to recover the vessel. It was planned that this procedure were to take place in 2010 by the salvage company Mammoet.[1098] This operation was, however, postponed in order to conduct further studies. The idea of salvaging the wreck has given rise to some public protest. A website was set up stating that Norway refuses to recognise the wreck as a war grave and asks people to send e-mails to the Minister of Fisheries and Coastal affairs in Norway asking her what the plans are for the remains of the 73 sailors.[1099]

Two final examples deal with shipwrecks that do not pose an environmental hazard, but at which works needed to be directed because of other reasons. The first example concerns a U-boat wreck that had become a navigational hazard. The World War I German vessel UB-38 ran into a minefield in 1918 and sank in Dover strait with the loss of 27 lives.[1100] Because of its location, the wreck formed a navigational hazard for other ships. Therefore, in 2008, the UK's Foreign Office contacted the German government on this matter. The German government stated that the U-boat could not be brought above water or be destroyed.[1101] In 2008 the wreck was then moved about 2 miles to deeper water, while avoiding to disturb the remains of the crew present in that wreck.[1102] This story resembles the one of the HMS Wakeful as was mentioned above,[1103] which could be cited as an example here as well.

A final example in this section relates to a number of shipwrecks that laid along the route of a new gas pipeline. A couple years ago, plans were made to lay a major Nord Stream gas pipeline between Germany and Russia,. Andres Tarand, an Estonian member of the European Parliament claimed that this pipeline would, however, disturb a number of Sovjet 'war graves' dating from 1941. The Russians are very sensitive about 'war graves' and memorials. A Nord Stream spokesman explained that only one wreck lies near the route of the pipeline and that this wreck will not be disturbed.[1104]

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**1097** A. DAHM, "Mammoet awarded Submarine Salvage Contract" in *KHL*, 12 November 2008, https://www.khl.com/news/mammoet-awarded-submarine-salvage-contract/28938.article.

1098 X, "Norway to raise Toxic Nazi Submarine Wreck" in *The Local*, 30 January 2009, www.thelocal.de/20090130/17089.

1099 *Help the crew of U-864*, www.karl-doenitz.com/karl_doenitz_july_4_2009_008.htm (consulted 7 August 2018).

1100 *WWI U-boats UB38*, https://uboat.net/wwi/boats/?boat=UB+38 (consulted 7 August 2018).

1101 DROMGOOLE 2013, 140.

1102 FORREST 2012, 80-82.

1103 See *supra* section 2.2.2.

1104 X, "Pipelines from Russia - Dead Souls" in *The Economist*, 15 May 2008, www.economist.com/europe/2008/05/15/dead-souls.

In 2009, however, after consulting with the German authorities, one of the scuttled warships was excavated to make way for the pipeline. This ship was, however, not that of a war grave, but was deliberately sank in 1715 by the Swedish Navy to serve as a barrier.[1105]

Important to notice from these examples is that governments and companies do try to take into account the sanctity of 'war graves' when issues arise concerning the wreck. This can be done by searching for alternative methods which are less intrusive, by only removing the problem (often being oil or other toxic substances) rather than the wreck itself or by not interfering with the wreck at all. Survivors organisations can play an important role in the sustainment of the wreck and any memorial tradition that surrounds it, as is clear from the USS Arizona and HMS Royal Oak. As indicated, there are of course exceptions where governments do not recognise a wreck as being a war grave or where they feel that it cannot remain undisturbed on the seabed. In such cases protest from family members and survivors associations can arise. It is a difficult, but not always impossible, challenge to find a balance between preserving the environment, or providing for other activities at sea, and the preservation of the sanctity of a war grave. As can be deduced from the examples in this section, States are often willing to put additional effort in certain activities in order to respect their 'war graves'.

### 3.3. Protecting 'maritime war graves' as a separate category?

The question whether human remains lying in warships should be protected to a higher extent than human remains lying in commercial vessels is a contested issue. During the negotiations on the UNESCO Convention, Uruguay suggested that in the Convention no reference should be made to military maritime graves as such to ensure that proper respect is given to all human remains whether civilian or not. A number of delegates from the African States stressed the same point especially referring to the high number of black slaves that perished while being transported. Other States, such as Italy, Germany and the UK argued that military graves should be afforded particular respect. Their remarks were, however, not retained in the final text of the UNESCO Convention as no specific mention is made of the notion 'military graves' or 'war graves'.[1106]

An argument in favour of protecting 'maritime war graves' to a higher extent would be that these men died while serving their country and that their bravery should be commemorated. As Forrest points out "*The burial of those who died in battle defending their families, their friends, their sovereign or their country has heightened ceremonial and emotive contexts.*"[1107] It is important for

[1105] Nord Stream, *First Shipwreck Parts Salvaged from Bay of Greifswald*, 15 July 2009, www.nord-stream.com/press-info/press-releases/first-shipwreck-parts-salvaged-from-bay-of-greifswald-245/.
[1106] GARABELLO and SCOVAZZI 2003, 114.
[1107] FORREST 2015, 128.

soldiers to see that their comrades and predecessors are honoured properly to ensure that they will not back out of their mission. When they see or can even participate in efforts to recover and protect these remains, service members will realise that if they are killed in action, those efforts will be expended to them as well. It must be remembered that in order to keep the fighting spirit high it is important to honour those who died yesterday in order to demonstrate to the soldiers of today that their efforts will be rewarded and remembered.[1108]
It is of course possible to reason in favour of the opposite point of view as well. Protecting only human remains contained in warships can be considered as discriminatory as all humans that lost their life at sea deserve to be treated with respect in their final resting place. Furthermore, merely protecting 'maritime war graves' brings some additional issues with it relating to the definition of such 'war graves'. As was pointed out above, the definition given to a warship in article 29 UNCLOS is not always suitable for assessing whether a wreck should be considered as a warship.[1109] Additionally, it is sometimes difficult to distinguish between men that served during wartime, giving their life for their country and commercial vessels that incidentally sank during war efforts with the loss of life. The *Storaa case* in which a commercial vessel was considered to have been in military service when it sank, demonstrates this. Furthermore, question would arise whether a warship needs to have sunk during wartime to be considered as a maritime war grave or whether a warship that sank during for example military exercises with the loss of life should be considered as a maritime war grave as well. Such a distinction would require a clear definition of the concept 'wartime'.

While an argument can be made justifying both viewpoints mentioned above, from a purely legal point of view it might, however, be easier to protect human remains located in a warship. Under certain circumstances the flag State will retain ownership rights and perhaps even sovereign immunity over its warships. This can offer a strong basis upon which protection of the wreck by the flag State can be justified. This might be more challenging for commercial wrecks constituting maritime graves. It should be noted, however, that in this case the human remains present in the warship wreck are protected as a corollary of the status of the wreck itself. This should not be confused with protecting a warship wreck because of the fact that it is a maritime war grave.

### 3.4. State practice regarding the protection of 'maritime war graves'

#### 3.4.1. The sanctity of human remains in statements made by maritime powers

As was discussed above, a number of States issued statements proclaiming their view on sunken State vessels by referring to the express abandonment standard and, in a number of them, to

[1108] HARRIS 2001, 116.
[1109] See *supra* section 2.1.

sovereign immunity.[1110] In most of these statements reference was made to the fact that the wrecks of State vessels often contain the remains of the men that lost their lives when the vessel perished. The fact that certain sunken State vessels are maritime graves was cited as a reason why they should not be intervened with without the express consent of the flag State. Germany, the UK and Japan provided that these sunken State vessels are potential maritime graves and should be respected as such. Spain as well pointed to the possibility that these wrecks "*are the resting place of military and/or civilian casualties*".[1111] The US sums up a number of reasons why sunken State vessels should not be disturbed without flag State consent, including that these are gravesites.[1112] The Russian Federation considers sunken Russian warships to be "*places of special governmental protection*".[1113] While not explicitly stating that these wrecks might be maritime graves, this phrase could of course be interpreted in this sense.

### 3.4.2. Approaches to human remains under bi- and multilateral agreements

A number of agreements have been concluded between States in order to regulate interference with shipwrecks. A number of these agreements that relate to State vessels located in the territorial waters of a third State were already discussed above, including the agreement on the HMS Spartan and La Belle.[1114] Before coming back to these agreements and their approach towards respecting the human remains lying in the wreck, two other important agreements should be assessed. These agreements deal with two very famous shipwrecks, namely the MS Estonia and Titanic. Neither of these wrecks is, however, a maritime war grave. Nevertheless, as these vessels both sank with the loss of numerous lives, the aspect of respecting them as maritime graves is rather profound in both agreements. Therefore, these agreements can offer additional insights in how maritime graves, including 'war graves', can be protected and respected.

The MS Estonia and Titanic both lie in the high seas and are protected under international agreements. The MS Estonia was a cruise ship that sank in the Baltic Sea in 1994. Hundreds of passengers lost their life at what is referred to as one of the worst maritime disasters of the 20th century. Their remains are confined in the hull of the wreck. In 1995, only one year after the vessel sank, Estonia, Finland and Sweden concluded an agreement to protect the wreck of the Estonia as

[1110] See *supra* section 2.2.1.
[1111] Statement Spain 2002.
[1112] Other reasons given by the US in its statement include that "*these sunken State craft may contain objects of a sensitive national security, archeological, or historical nature. They often also contain unexploded ordnance that could pose a danger to human health and the marine environment if disturbed, or other substances, including fuel oil and other hazardous liquids that likewise pose a serious threat to human health and the marine environment if released.*" US Statement 2001, 195.
[1113] Communication Russia 2003.
[1114] See *supra* section 2.2.2.

the final resting place of those that had perished.[1115] This agreement proclaims that the human remains contained in the wreck are to be given the appropriate respect.[1116] According to the preamble, the wreck as the final resting place of the victims should be protected from any disturbing activities. For this purpose, the Parties agreed that the Estonia shall not be raised.[1117] Furthermore, article 4 of the agreement indicates that the contracting States must institute legislation to criminalise any activity that disturbs the peace of this maritime grave, especially diving or other activities conducted to recover victims or property from the wreck or the seabed.[1118] The agreement on the Estonia is one of absolute non-disturbance. The best explanation for such a strict policy can be found in the period in which the agreement was drafted, namely only one year after the vessel had sunk. The agreement was used to soothe the grief of those that had lost their loved ones. The pressing social incentives had a significant effect on the approach chosen to protect the Estonia. Because of this policy of non-disturbance, the Estonia became an untouchable memorial for those who lost their lives.[1119]

The approach used for the Estonia stands in contrast to the one adopted in the agreement on the shipwrecked vessel RMS Titanic concluded in 2003.[1120] The pressing social and political concerns that had played a key role while drafting the Estonia agreement were much less prominent when drafting the Titanic Agreement. The RMS Titanic sank in 1912 in the North Atlantic and was rediscovered in 1985. At the time of drafting the Titanic agreement, only a small number of survivors were still alive which allowed the international agreement to compromise between the preservation of the wreck as a memorial to those who perished and the interests of studying the wreck as an artefact of great cultural, historical and scientific value.[1121] The agreement proclaims that appropriate respect should be awarded to the remains of the men, women and children who lost their lives when Titanic sank.[1122] States must take the necessary measures to implement a system of project authorisations for, amongst others, the entry into the hull of RMS Titanic so that the human remains are not disturbed.[1123] The preferred manner in which to preserve the Titanic

[1115] Agreement Between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden Regarding the M/S Estonia, 23 February 1995, available at https://treaties.un.org/doc/Publication/UNTS/Volume%201890/volume-1890-I-32189-English.pdf. (Agreement Estonia 1995)

[1116] Article 1 Agreement Estonia.

[1117] Article 3 Agreement Estonia.

[1118] Article 4 Agreement Estonia.

[1119] HERSHEY 2012, 385-387.

[1120] When Titanic sunk, about 1523 persons lost their lives. *Titanic* Agreement. It should be noted that the Titanic agreement 2003 has not yet entered into force. It was concluded between Canada, France, The US and the UK. In order to enter into force, however, two States need to ratify the Convention. The UK ratified it in 2003, but remains up till today the only State that has done so. NOAA, *R.M.S. Titanic – International agreement*, www.gc.noaa.gov/gcil_titanic-intl.html (consulted 8 August 2018).

[1121] Article 2(a) *Titanic* Agreement 2003.

[1122] Article 2(a) *Titanic* Agreement 2003.

[1123] Article 4(1) *Titanic* Agreement 2003 and Rule 2 Annex *Titanic* Agreement 2003.

and the human remains located therein is by leaving them *in situ*.[1124] The Titanic and its artefacts may only be recovered or excavated when this is justified by "*educational, scientific, or cultural interests, including the need to protect the integrity of RMS Titanic and/or its artifacts from a significant threat.*"[1125]

In the exchange of notes between the UK and Italy concerning the HMS Spartan it is agreed that "*the Italian Government undertake that all necessary steps will be taken to deliver to the Naval Attaché of this Embassy the bodies of any British Naval personnel which may be found in the course of the salvage operations.*"[1126] This policy of recovery and return, according to Hershey,[1127] appears to be suitable for wrecks that sank in the recent past.[1128] The non-disturbance policy consolidated in the Estonia agreement stands, however, in stark contrast to this idea. Another example is the agreement concluded between the UK and South Africa on the HMS Birkenhead, a British ship that perished due to bad weather conditions in 1852 with the loss of about 450 men. In this agreement provision was made for a non-disturbance policy for any human remains present in the wreck and surrounding it, while still respecting the existing salvage arrangements that were concluded by the South African government.[1129] It should be noted, however, that for the Birkenhead over 100 years had passed between the sinking and the drafting of the agreement. The agreement states that "*The wreck of the Birkenhead shall, as a military grave, continue to be treated at all stages with respect. In particular, the South African Government shall seek to ensure that the salvors treat reverently and refrain from disturbing or bringing to the surface any human remains which may be discovered at the site of the wreck or in its vicinity.*"[1130] Despite the fact that there were many civilians on board, the wreck is classified as a military grave. Another approach was seen in the agreement concerning the wreck of the La Belle concluded between France and the US. The agreement does not provide for any specific protection for human remains found in the Belle but establishes a mechanism allowing such protection to be given at a later point in time: "*The treatment and burial of human remains […] shall be as agreed between the Ambassador of France to the United States or his designee and the Commission.*"[1131] In 1996, the remains of a sailor were discovered in the wreck of La Belle in a rather good state of preservation. After conducting research on the remains, they were buried in 2004 in Austin, Texas.[1132] In the agreement concluded

[1124] Rule 1 Annex *Titanic* Agreement 2003.
[1125] Article 4(2) *Titanic* Agreement 2003.
[1126] Term 5 Exchange of Notes HMS Spartan 1952.
[1127] HERSHEY 2012, 388.
[1128] The Exchange of Notes on the HMS Spartan was concluded only eight years after it sank.
[1129] Exchange of Letters HMS Birkenhead 1989, 322.
[1130] Exchange of Letters HMS Birkenhead 1989, 322.
[1131] Article 3(3) Agreement La Belle 2003; 'The Commission' refers to the Texas Historical Commission, an agency of the State of Texas. Preamble Agreement La Belle 2003.
[1132] Texas beyond history, *Skeleton on La Belle: Tracing the Life of a French Sailor*, available at www.texasbeyondhistory.net/belle/skeleton.html (consulted 8 August 2018).

for the British wrecks HMS Erebus and HMS Terror over which control and custody was assigned to the government of Canada it is determined that "*Canada will seek to ensure that anyone dealing in any way with either of the wrecks and their contents treat reverently, and refrain from disturbing or bringing to the surface, any human remains that are discovered at the sites of the wrecks or in their vicinity. Any human remains that must be removed in order to conduct archaeological work, or that are inadvertently recovered, will be re-interred with respect and reverence, and in consultation with Britain.*"[1133] The treatment of human remains here is very similar to that in the HMS Birkenhead agreement. Rather than prohibiting the recovery of human remains, however, this agreement provides for an exception when the removal of the human remains is necessary in light of archaeological work or when they are inadvertently recovered. In this case provision is made for respectful treatment of the remains by burying them in consultation with Britain.

These agreements clearly demonstrate that several methods can be used for the protection of maritime graves. Approaches may range from preserving the wreck as an untouchable memorial, as was the case for the Estonia, to allowing interference with the wreck and the human remains in certain circumstances and under certain conditions, or to even allowing for the recovery and re-interring of the human remains as was seen for the HMS Spartan. These agreements do not bring forward one single customary method of treating and respecting human remains found in shipwrecks. The drafters of future agreements will thus have to assess on a case-by-case basis which is the best manner to respectfully treat human remains discovered in warships, while at the same time not losing sight of the important historical and scientific opportunities that these human remains offer for society.[1134]

While no international multilateral agreements specifically dealing with 'maritime war graves' exist, a 2003 initiative thereto should be mentioned. This was the Draft Regional Convention on the Protection of the Underwater Cultural Heritage in the Mediterranean.[1135] In 2003, Italy presented a draft at the final round table of the International Conference on "*Cooperation in the Mediterranean for the Protection of the Underwater Cultural Heritage*", in Siracusa. This draft aimed to further elaborate the UNESCO Convention for the Mediterranean region. Unfortunately, no further steps were taken to finalise and negotiate this agreement.[1136] Article 6 of the UNESCO Convention which encourages States to "*enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural*

[1133] Term 6 Memorandum HMS Erebus and HMS Terror 1997.
[1134] HERSHEY 2012, 399-400.
[1135] Draft Agreement Mediterranean 2003.
[1136] T. SCOVAZZI "Un futuro accordo sulla protezione del patrimonio culturale sottomarino nel Mediterraneo" in T. SCOVAZZI (ed.), *La protezione del patrimonio culturale nel Mare Mediterraneo*, Milano, Giuffrè, 2004, 162-166; A. VRDOLJAK and F. FRANCIONI, *The Illicit Traffic of Cultural Objects in the Mediterranean*, EUI Working Papers, AEL 2009/9, available at http://cadmus.eui.eu/bitstream/handle/1814/12053/AEL_2009_09.pdf , 85-86.

*heritage.*"[1137] was explicitly referred to as the legal basis for this agreement. Interesting to note is that in the draft agreement, the protection of military graves is referred to explicitly. Article 6(3) of the draft states: "*The Parties shall ensure that proper respect is given to military graves located in maritime waters*". This indicates that Italy did feel that special respect should be paid to military graves. Even though this agreement was never concluded, it can serve as a model for other States that wish to conclude a regional agreement in order to further the protection of their UCH and even their 'maritime war graves'. Such agreements could potentially be very helpful for monitoring and enforcing measures taken to protect 'maritime war graves' and could further facilitate cooperation between States for this purpose. On top of that, the idea of 'ensuring proper respect' to be paid to human remains could be further elaborated into practical measures so that a more consistent practice can develop as to in what ways maritime (war) graves are best protected.

### 3.4.3. Approaches to 'maritime war graves' under national legislation

In the UK, the 1986 PMRA was enacted following public concern about the 'maritime war graves' after the Falklands campaign of 1982. The main aim of this Act was in fact to protect the sanctity of such 'maritime war graves'.[1138] One of the criteria that is used when determining whether a wreck should be designated under the PMRA is whether lives were lost when the vessel sank.[1139] While the protection of 'maritime war graves' was one of its primary objectives, the PMRA can in fact be applied to a wider range of vessels that were in military service when they sank. The fact that no persons perished when the ship sank is in itself not a reason to exclude the wreck from the scope of the PMRA. Other criteria are being used as well to assess whether a wreck should be designated under the PMRA including the historical significance of the wreck; whether there is evidence of its sustained disturbance; whether designation is likely to put an end to this disturbance and whether diving on the site attracts significant public criticism.[1140] While the PMRA does not use the term maritime war grave, it can assist in protecting them regardless of their location. For UK vessels this Act can apply worldwide. It should, however, be borne in mind that for wrecks located outside UK territorial waters, the PMRA is only legally binding for British nationals and British flagged vessels. Foreign flagged vessels and third State nationals are only bound by the provisions of the PMRA in UK waters, where the UK is competent for the wrecks lying therein. Nevertheless, other States might be willing to assist in the protection of British sunken State craft and might instruct their nationals to do the same. An example of this is the case of the shipwrecks of the HMS Aboukir, HMS Cressy and HMS Hogue. The wrecks of these vessels were designated under the 2017 order designating vessels and controlled sites under the PMRA. These

[1137] Article 6 UNESCO Convention.
[1138] DROMGOOLE 2013, 139.
[1139] DROMGOOLE 2006, 488.
[1140] DROMGOOLE 2006, 488.

British WWI vessels are located off the Dutch coast and are the 'war graves' of about 1.500 soldiers that lost their lives. A number of years ago, there were some issues with these wrecks, namely that they were being destroyed for scrap metal by Dutch salvage vessels. In 2001, the presidents of the associations of the European Naval veterans, representing organisations from the Netherlands, Germany, France, Italy, Belgium, Austria and Britain wrote a letter to the Times newspaper addressing this violation by stating the following: "*we, the presidents of associations of European naval veterans forming the International Maritime Confederation, suggest that no such desecration would take place in graves on land. We urge that our sailors should be allowed to rest in peace.*"[1141] The British MOD discussed this issue with the Dutch government, which asked its police forces to investigate the case.[1142] Several Dutch organisations protested against the destruction of these wrecks as well because of their cultural and ecological value. Government officials at that time struggled to deal with this problem, since the wrecks were not yet officially protected.[1143] In 2014, these shipwrecks which sank in 1914 reached the 100-year threshold of the UNESCO Convention. All States that have ratified the UNESCO Convention are thus bound to protect them. Furthermore, as was said, they have been designated under the PMRA since 2017.

Another State, asides from the UK, that has specific legislation in place for dealing with sunken military remains is the US. These remains are addressed in the 2004 SMCA. In the US it is conceived improper to disturb sunken warships, but especially those that contain the remains of deceased soldiers. The US acknowledges that it has a duty towards those that died on the battlefield.[1144] The US' Navy has a non-abandonment policy for ship and aircraft wrecks, which is based on the property clause of the Constitution and articles 95 and 96 of UNCLOS. Permission must be sought from the US to salvage its warships. When the wreck contains the remains of deceased servicemen, the policy of the US has been to reject salvage requests. One of the main reasons for refusing such requests is that disturbance of a sunken warship is perceived as being improper when this is the final resting place of deceased military personnel.[1145] This does not per se mean, however, that the US will always leave the remains of its soldiers in the wreck site. This is illustrated by approach used for an American bomb-thrower that was discovered in 2018 in the Belgian sea. The Governor of West-Flanders, which is one of the Belgian competent authorities for UCH,[1146] has stated that

[1141] Royal Naval Association, "Anger at Dutch salvage ships 'plundering ocean graves'" in *Times*, 11 October 2011 www.royal-naval-association.co.uk/news/anger-at-dutch-salvage-ships-plundering-ocean-graves/
[1142] S. AMBROGI, *Scrap metal hunt wrecking UK warship graves-veterans*, 12 October 2011, www.reuters.com/article/britain-ships-graves-idUSL3E7LC3D220111012.
[1143] Stichting de Noordzee, *Wrakslopers roven oorlogsgraven leeg*, 15 September 2011, www.noordzee.nl/wrakslopers-roven-oorlogsgraven-leeg/; FORREST 2015, 127-128.
[1144] The policy of non-abandonment of vessels sunk in Civil War is due to the sensitivity that wrecks of warships "*are the watery graves of American war dead*" *Steinmetz* 973 F.2d. 222 n.11 (quoting brief for Appellee, 7).
[1145] HARRIS 2001, 122-123.
[1146] See chapter four for an assessment of the Belgian legislation on the protection of UCH.

the US is looking into repatriating the remains as it does not feel that a sea men's grave is always an appropriate final resting place, especially not for members of the air force.[1147]

In the SMCA, the US protects sunken military craft as well as their associated contents. The term 'associated contents' in the context of this Act includes "*the remains and personal effects of the crew and passengers of a sunken military craft that are within its debris field*".[1148] As the US applies a blanket approach in the SMCA entailing that all wrecks that comply with the definition of this Act will fall under its protective regime, all 'maritime war graves' are automatically covered as well. This stands in contrast to the PMRA of the UK where a selective approach is used to determine which wrecks will fall within the scope of this Act.[1149] Since monitoring conduct at sea is very difficult, it would appear that a selective designation of wrecks is the appropriate way to go. However, the omission of certain wrecks could cause controversy among the survivors and descendants of those that were killed. Difficult moral and ethical issues in terms of equality of sacrifice would be raised. For this reason, it appears that a statutory regulation on a blanket basis is preferable. On the other hand, the value that divers have for monitoring and reporting wrecks and to locate lost vessels, should not be underestimated. A too restrictive approach might undermine policies that are pursued by governmental agencies, for example a close co-operation with divers. In the States that apply such a blanket approach, anecdotal evidence demonstrates that diving and salvage activities still continue without the knowledge of the authorities.[1150]

In the US, other acts as well can be used to protect the wrecks of warships and the human remains contained therein, for example the 1972 NMSA. Under this Act the USS Monitor Marine Sanctuary was the first sanctuary to be designated and protected. According to Harris, the designation of the USS Monitor site indicates that 'war graves' and sunken warships are symbols of nationalism.[1151] The USS Monitor sank in December 1862 with the loss of sixteen of its crew members.[1152] Another example is linked to the 1987 ASA where under §2104 the Secretary of the Interior was given the task to create guidelines accompanying the Act. Concerning human remains in general these guidelines state the following: "*To the extent possible, human remains in shipwrecks should be left in place as burial at sea. However, when remains (whether of known or unknown persons and whether intact or decomposed) are being disturbed by unavoidable or uncontrollable human activity, they should be removed and appropriately disposed of. Where the remains are of known*

[1147] MYDE, "Vliegend fort op de bodem van de Noordzee", het Nieuwsblad, 26 June 2018, 6-7.
[1148] Section 1408(1) SMCA.
[1149] It can also be said that the UK applies a site-based approach, while the US opted for an activity-based approach. These two approaches will be further mentioned under chapter three and four of this dissertation.
[1150] WILLIAMS 2000, 157-158.
[1151] HARRIS 2001, 86.
[1152] Monitor National Marine Sanctuary, *About your sanctuary*, http://monitor.noaa.gov/about/ (consulted 8 August 2018).

*individuals, a reasonable effort should be made to contact relatives of the deceased to discuss the removal and disposition of the remains. Until human remains are removed, activities that would disturb them should be prohibited*"[1153].[1154] While not being mandatory, these guidelines do provide some interesting views on the treatment of maritime graves.

### 3.5. The protection of human remains in the UNESCO Convention

Under international law no instrument exists specifically dealing with the protection of 'maritime war graves'. In fact this term has not been defined nor explicitly recognised at the international level. During the UNESCO Scientific Conference on the Occasion of the Centenary of World War I which took place in 2014 in Bruges, the deficit of such a definition was recognised by several experts. The fact that no international regime exists for the protection of 'maritime war graves' was considered to be unfortunate in light of the protection of World War I wrecks, which was the topic of the Conference. Following this conference a number of recommendations were drafted to further the preservation, research and protection of UCH originating from WWI. These recommendations underline "*the need to recognize many of the wrecks of WWI as maritime war graves*".[1155] The issue of 'maritime war graves' was discussed during the conference in a smaller sub-group chaired by Craig Forrest. Lacking an international definition of 'maritime war graves' nor a generally accepted manner in which to protect such gravesites, it was decided to make the general recommendation cited above leaving room for interpretation by States following a case-by-case assessment. As this Conference was organised in light of the centenary of WWI and thus dealt with UCH originating from this period of time, the recommendation merely addresses WWI wrecks. This does, however, not entail that the term 'maritime war graves' is limited to wrecks from WWI.

When drafting the UNESCO Convention a number of representatives were in favour of introducing a specific provision offering protection to 'maritime war graves', while other States felt that no distinction should be made between 'maritime war graves' and maritime graves in general.[1156] In the second meeting of governmental experts on the draft Convention in 1999, one expert mentioned the need to ensure proper respect for 'war graves' at sea. Several experts were in favour of this proposal and it was agreed that the draft Convention would deal with this issue. The chairman made the suggestion that a specific clause on 'war graves' should be included in the

[1153] ASA 1987 Guidelines, guideline 7.
[1154] HARRIS 2001,122-123.
[1155] UNESCO, *Recommendations*, Safeguarding the World's Underwater Cultural Heritage, Scientific Conference on the Occasion of the Centenary of World War I, 26-27 June 2014, Bruges, Belgium, available at www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/images/UCH_Conference_Recommendations_Bruges2014.pdf, 2.
[1156] See *supra* section 3.3.

Annex.[1157] In the comments to the draft convention given at the third meeting of governmental experts in 2000, the UK proclaimed that "*it supports respect for sovereign rights over warships and other non-commercial vessels and for war graves at sea*".[1158] All these proposals were included in the report of an informal subgroup of the warships working group.[1159] The report requires that proper respect is given to all human remains that are located underwater and provides that States *"in particular shall consult and coordinate with respect to the protection of military maritime graves, irrespective of when the State vessel or aircraft was sunk*". The reference to military maritime graves was, however, deleted in the final discussion of the matter in plenary session.[1160] In the end the UNESCO Convention provides for three provisions dealing with human remains in general, namely article 1(1), 2(9) and Rule 5 of the Annex.[1161] The UNESCO Convention, while including human remains under its scope, does not result recognising sites as being gravesites. Human remains are considered as a part of the archaeological record and are protected accordingly.[1162] While for human remains that have been submerged for many centuries this approach might be appropriate, this is not necessarily the case for younger maritime grave sites where emotional factors must be taken into consideration as well.[1163] The question that arises is of course whether a Convention dealing with cultural heritage would be the ideal instrument to address the issues relating to 'maritime war graves'. A separate instrument dealing with 'maritime war graves' specifically or even with maritime graves in general seems to be more appropriate. At the moment, however, nothing indicates that States or any international organisation is considering drafting such a convention. For the time being, the best that can be hoped for is thus that some sort of soft law would emerge. According to Forrest, the commemorative events for WWI that take place until 2018 might trigger such an emergence. Until today, however, the UNESCO Convention remains the most powerful instrument at the international level for States wishing to protect their 'maritime war graves' that fall within the scope of the Convention.[1164]

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[1157] *Final Report of the Second Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage*, August 1999, UNESCO Doc. CLT-99/CONF.204, 5.

[1158] *Synoptic Report of Comments to the Draft Convention*, April 2000, UNESCO Doc. CLT-2000/CONF.201/3, 3.

[1159] The 2001 expert meeting was dominated by the issue of State vessels. A separate working group was created which resulted in several proposals being made to address the issue of State vessels and aircraft. They, however, failed to reach consensus. See *supra* section 2.4. on State craft in the UNESCO Convention.

[1160] O'KEEFE 2002, 53-55.

[1161] See chapter one section 4.2.5. for more on these provisions.

[1162] Guidelines for dealing with human remains within archaeological sites have been established in for example the Vermillion Accord adopted at the 1989 World Archaeological Congress in the US. These rules provide that respect shall be accorded to human remains and that when possible, reasonable and lawful, the wishes of the relatives or local community of the deceased concerning disposition shall be accorded. This Vermillion accord attaches significant importance to finding the balance between the proper disposition of human remains and profiting from the scientific or educational value that these remains might have. World Archaeological Congress, *The Vermillion Accord on Human Remains*, 1989, available at http://worldarch.org/code-of-ethics/.

[1163] FORREST 2015, 131.

[1164] FORREST 2015, 131.

### 3.6. War graves Commission

During the two World Wars soldiers were deployed all over the world and were killed during battles far away from home. Bringing the remains of all these men who fell during battle back home during or after the war would have been a huge and very costly operation. The difficulty of repatriating fallen soldiers to their country of origin, especially when they were stationed in faraway Countries, was one of the underlying reasons for burying the remains of the fallen on the battlefield. Another reason was that it is believed that men who fought together in battle would want to remain together in death as separating them would conflict with the feeling of brotherhood.[1165] The US practice of interring the remains of the surviving servicemen in the wreck of the USS Arizona upon their death so that they can be with their comrades illustrates this.[1166] In order to manage all the gravesites and monuments abroad a number of States established so-called 'War Graves Commissions' that have the responsibility of ensuring the proper burial and commemoration of those that died during the war.

In Germany, the Volksbund Deutsche Kriegsgräberfürsorge was founded in 1919 to manage the graves of soldiers that died during WWI. As was agreed in bilateral agreements, today the Volksbund is responsible for the care of 832 war cemeteries and graves in 45 Countries in Europe and North Africa. This is the last resting place for about 2.7 million war casualties.[1167] In the Netherlands, after the second World War, the Oorlogsgravenstichting was established in 1946 and given the task to attend to the graves of the Dutch victims from WWII, both military and civil. Today, this organisation commemorates about 180.000 victims of war and maintains about 50.000 Dutch 'war graves' worldwide.[1168] In 1923, the American Battle Monuments Commission was established by Congress to commemorate the service, sacrifice and achievements of the US' armed forces. This Commission manages 25 military cemeteries and 27 federal memorials, monuments and markers of which the majority are located in Europe.[1169] A final, but rather important, example is the Imperial (now Commonwealth) War Graves Commission, established in 1917. This Commission honours the 1.700.000 men and women of the Commonwealth forces that died during World War I and II to ensure that their memory will never be forgotten. Currently, the organisation takes care of cemeteries and memorials at 23.000 locations in 154 countries. As a principle, the Commissions believes that all the dead should be commemorated by name either on a permanent headstone or memorial, that the graves should be uniform and that no distinction should be made between the military or civil rank of the victims. For the missing soldiers whose

[1165] C. DAVIES and K. GALLOWAY, "Cultural heritage and the ritual of burial," *Cambrian Law Review* 2011, (131) 141.
[1166] United States' National Park Service, *Frequently Asked Questions,* www.nps.gov/valr/faqs.htm (last update 31 July 2018).
[1167] *Volksbund Deutsche Kriegsgräberfürsorge*, www.volksbund.de/volksbund.html (consulted 8 August 2018)
[1168] Oorlogsgravenstichting, *Over Ons,* https://oorlogsgravenstichting.nl/over-ons (consulted 8 August 2018)
[1169] American Battle Monuments Commission, *About Us*, www.abmc.gov/about-us (consulted 8 August 2018).

remains were never found and buried, specific monuments have been erected to commemorate them. For example the Menen gate in Belgium contains the names of 54.896 soldiers and the Thiepval Memorial in France bears the names of over 72.000 men who died in the valley of the Somme. Similar to those soldiers that went missing on the battlefield, sailors that went down with their ships do not have an individual grave and memorials were created for them.[1170]

The Commonwealth War Graves Commission was founded on two important principles: 1. a State retains control over and the responsibility for the remains of its servicemen; and 2. appropriate respect for and control over these remains can only be achieved through international cooperation. This was, for example, demonstrated by the international cooperation through a bilateral agreement between the Imperial War Graves Commission and Belgium and France.[1171] Such cooperation systems seem to be functioning rather well and States appear willing to allow Commissions from third States to manage the 'war graves' of and monuments for their fallen soldiers in their territory. Unfortunately, these Commissions do not protect or manage 'maritime war graves'. The Commonwealth War Graves Commission, for example, does not include 'maritime war graves' within its mandate and in fact does not even recognise the concept of 'maritime war graves'.[1172] The legal advisors of the Commission are of the opinion that it is not responsible for unrecovered human remains and that it is erroneous in law to refer to such wrecks as 'war graves' since they do not constitute a burial as such.[1173] Including 'maritime war graves' under the mandate of the War Grave Commissions could potentially be a good way to protect and manage some of the most important 'maritime war graves' lying in the waters of third States. Such a system would of course need to be negotiated with those third States and consolidated in bilateral agreements, as was the case for cemeteries and monuments on land. By using the War Graves Commissions as a starting point, these bilateral agreements would at least be based on an existing framework and it would be clear which organ is responsible for the management of the 'maritime war graves'. Of course, since these Commissions do not have any experience in managing underwater sites, which poses a lot more difficulties than cemeteries on land, a huge reorganisation would be required. On top of this, on land it is quite easy to group all the remains in one area which is then managed accordingly. For 'maritime war graves' this is far less the case since they are spread over the seabed worldwide. Creating one 'cemetery' by moving all

[1170] For the British Royal Navy, for example, the Chatham Naval Memorial commemorates 8.517 WWI sailors and 10.098 WWII sailors, the Plymouth Naval memorial commemorates 7.251 WWI sailors and 15.933 WWII sailors, the Portsmouth Naval Memorial commemorates about 10.000 WWI sailors and almost 15.000 WWII sailors, the Liverpool Naval Memorial commemorates about 1400 sailors and the Lowestoft Naval Memorial commemorates almost 2400 sailors. Commonwealth War Graves Commission, www.cwgc.org/ (consulted 8 August 2018).
[1171] Agreement between the UK and Belgium respecting British 'war graves' in Belgian territory signed at Brussel 13 June 1919, London, H.M.S.O. 1919; Agreement between the UK and France respecting British 'war graves' in France signed at Paris 26 November 1918. London, H.M.S.O. 1919.
[1172] FORREST 2015, 129-130.
[1173] English Heritage, *Marine Archaeology Legislation Project* available at www.jnapc.org.uk/MALP.pdf, 23 note 127.

shipwrecks considered to be 'maritime war graves' would be very expensive and is not desirable. On top of that, such bilateral agreements are not the correct instrument for safeguarding 'maritime war graves' located outside a State's national waters as third States' nationals and flagged vessels would not be bound by such agreements. A widely ratified multilateral treaty would be required to assure the proper treatment of such 'war graves'.

## 4. Conclusion

Traditional maritime powers are very protective of their sunken State craft. They wish to prevent individuals or third States interfering with them without their consent regardless of in which maritime zone the craft is located. The two main justifications that were put forward allowing flag States to offer such protection are the express abandonment standard for relinquishing ownership rights over State craft and the fact that these retain their sovereign immunity even after they have sunk. Maritime powers have been quite pronounced on this topic by issuing statements explaining their point of view in this matter and, for the UK and US, by including these principles within their national legislation. The *Mercedes* and *Sea Hunt* cases before US' admiralty courts demonstrate that when a State comes forward to claim its rights over its sunken State craft, such a claim can be respected either for reasons of ownership or sovereign immunity. Additionally, as the *Sea Hunt case* marked the first time that Spain appeared before a foreign court to protect its rights over its sunken State craft, these cases show an increasing willingness of flag States to actively protect their interests in such wrecks. It is crucial that States continue to express their viewpoint on this matter and to act accordingly if they ever wish to see a rule of international customary law emerge requiring that the consent of the flag State is obtained prior to any interference with State craft. At the moment, it does not seem that such a rule has already been established. The issues relating to the San José in which the Colombian government refuses to recognise the Spanish claim illustrates this. Furthermore, the agreements that were concluded on the protection of sunken State craft use different approaches when determining the respective rights of the coastal State in whose waters the State craft is located and those of the flag State. It is difficult to deduce a single customary approach for dealing with sunken State craft located in the territorial waters of a third State. Finally, while having created a separate set of rules for the protection of sunken State craft, many maritime powers feel that the UNESCO Convention falls short of fully recognising the rights of flag States over their sunken State craft and grants to much power to coastal States in this regard. Nevertheless, the UNESCO Convention should be interpreted in such a way that is in full conformity with the rules of international law and State practice relating to sovereign immunities and any other rights that States have with respect to State craft. The UNESCO Convention does not, however, define what these rights are but merely preserves the *status quo* that exists at the international level. While this might be considered as a missed opportunity, the high controversy surrounding this topic would most likely have resulted in the failure of the UNESCO Convention. A

lot of insecurity thus still surrounds the legal status of sunken State craft. Nevertheless, the growing willingness of flag States to protect their sunken State craft combined with the fact that many such wrecks are being discovered due to technological progress might result in an increase in State practice which can in the future result in a rule of customary law to be crystallised.

As is the case for the general status of sunken State craft, no single widely accepted approach can be deduced for protecting 'maritime war graves'. While States do agree that these wrecks deserve to be honoured and treated with respect, no clear rules can be identified specifying in what way such respect should be paid. As no international instruments deal with the protection of 'maritime war graves' or even recognise this concept or that matter, any indications on how these gravesites are treated must be found in State practice. While States have advocated the protection of 'maritime war graves' in statements, agreements and national legislation, the way in which 'maritime war graves' are treated differs considerably. The best course of action if mostly determined on a case-by-case basis taking into account a number of factors such as the time that has elapsed since the ship sank, the archaeological or historical value of the wreck and the presence of any substances in the wreck that might harm the environment. The approaches that are used range from recovering and returning the human remains back to their State of origin to preserving the wreck as a(n) (*quasi*) untouchable memorial. Another issue that presents itself is the difficulty of determining when a wreck in fact constitutes a maritime war grave. The definition of warship as given in article 29 UNCLOS has been found by some to be unsuitable for ancient vessels. In fact even for more recently sunk vessels confusion can arise with regard to the status of commercial vessels that were used during war efforts and sank with the loss of lives, as was the case for the SS Storaa. The lack of a clear definition of 'maritime war graves' only further complicates the creation of a uniform set of principles for their protection. However, during the negotiations on the UNESCO Convention a number of States felt that no distinction should be made between preserving maritime graves in general and 'maritime war graves' more specifically. For this reason, the UNESCO Convention addresses the protection of human remains in general without any further distinction. This Convention has, however, proven not to be the ideal instrument for regulating this issue. Human remains are for the most part considered as a part of the archaeological record and are protected accordingly. Specific issues relating to 'maritime war graves' such as the commemoration of the fallen, the return of human remains to their State of origin when necessary and the involvement of survivors associations when possible are not addressed in the UNESCO Convention. Furthermore, 'maritime war graves' that sank during WWII are offered little to no protection in the UNESCO Convention for the time being. Nevertheless, at the moment the UNESCO Convention is the strongest international instrument that States can rely on for protecting 'maritime war graves' that fall under its scope. It seems unlikely that a new convention specifically dealing with the protection of maritime (war) graves will be concluded in the near future. In light of the commemorative events of WWI that are currently taking place, the

importance of protecting ‘maritime war graves’ is once again highlighted which might result in soft law on this topic to emerge. The ‘war graves’ commissions that at the moment are only responsible for cemeteries and memorials on land might be able to assume a wider role in the future and provide a framework to start from for protecting ‘maritime war graves’.

# Chapter three: the legal protection of underwater cultural heritage in the North Sea region

## 1. Introduction

In this chapter the legislation relating to the protection of UCH of four States in their respective parts of the North Sea will be assessed. The States that were selected for this assessment are France, the Netherlands, The UK (with a main focus on England) and Germany. These States were selected based on a number of criteria. Firstly, they all border the North Sea and their combined sea territory encompasses most of the North Sea area. This chapter thus offers a clear overview of the legislation that is applicable for UCH in the largest part of the North Sea. Secondly, those States are maritime powers with a great interest in the protection of UCH both in the North Sea region as well as worldwide, considering that many of their wrecks lie scattered around the oceans. Thirdly, these States have given serious considerations to ratify the UNESCO Convention and an extensive research has been conducted assessing the effect of such ratification for their national legislation. France has already ratified the UNESCO Convention, while the Netherlands and Germany have formally indicated that they will do so in the near future. Finally, a last reason for selecting these States is the variety in the manner in which UCH is protected and managed. The UK is a common law State, where the law of salvage and finds traditionally apply. Its legislation on UCH, and especially that of England, has not been significantly updated in many years. In contrast, the other three States that will be assessed are civil law States which do not normally apply the law of salvage and finds. These states have also only recently given consideration to modernising their legislation on UCH management. The Netherlands and, at least partially, France and Germany have recently adopted or are planning to adopt new UCH legislation. Another interesting point is that in the UK, UCH protection is regulated by several acts resulting in a very fragmentised legislation. In France and the Netherlands a more comprehensive framework can be found regulating both heritage on land and in the marine area. In Germany, being a federated State, the competence for the protection of UCH is divided between the federated States which are competent for the territorial sea and the federal government which is competent for UCH in the EEZ and on the continental shelf. These differences, as well as many others as will become clear from this chapter, make it interesting to assess the legislation of these four North Sea States.

In this chapter the national legal framework for the protection of UCH in all four States will be assessed. When relevant reference will be made to their previous legislation, as well as to legal initiatives that are planned in the near future. At the end of each country section the position of the State vis-à-vis the UNESCO Convention will be discussed to reveal which issues the State has with the Convention and to indicate whether it is likely that they will (soon) ratify the Convention.

Finally, overarching conclusions will be made concerning a number of key aspects relating to UCH protection in these States, which will be used in the next chapter when assessing the Belgian legal framework for UCH protection.

## 2. France

### 2.1. Introduction

France has a long history in protecting UCH. By adopting ordinances relating to shipwrecks in 1543 and 1681, France was the first State to regulate the protection of submerged heritage.[1174] The first excavation that took place in French waters ran from 1952-1957 and was directed at the Grand Congloué. During these excavations it was discovered that this site consisted of the wrecks of two separate ships that sank in different time periods.[1175] A number of important lessons on which archaeological principles should be respected when conducting excavations were learnt from this experience, which are still reflected in the current French legislation. These principles include the preference for *in situ* preservation and the fact that an archaeologist should be present on the site.[1176]

In 1961 France adopted an act relating to the policing of maritime wrecks (1961 Act) as well as a decree (1961 decree) for its application.[1177] This decree for the first time recognised that certain wrecks are of archaeological, historical or artistic interest and should therefore be distinguished from other maritime wrecks.[1178] Nevertheless, the 1961 Act did not offer an adequate framework for the protection of UCH. Firstly, it was rather limited in its scope of application as it only dealt with shipwrecks rather than with heritage in general. Secondly, the 1961 decree departed from the idea that in order to safeguard shipwrecks they should be removed from the seabed as soon as possible.[1179] Finders were encouraged to excavate wreck sites and the decree as a whole mainly

[1174] Ministère de la Culture, *Archéologie - Historique du service*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Historique, (consulted 8 August 2018).
[1175] Remains were found originating from different time periods that were separated from each other by over a century. G. LE GURUN, "France" in S. DROMGOOLE (ed.), *The Protection of the Underwater Cultural Heritage – National Perspectives in Light of the UNESCO Convention 2001*, Leiden, Martinus Nijhoff Publishers, 2006, (59) 60. (LE GURUN 2006)
[1176] LE GURUN 2006, 59-60.
[1177] Loi No. 61-1262 du 24 novembre 1961 relative à la police des épaves maritimes, *JORF* 25 novembre 1961, 10810; Décret No. 61-1547 du 26 décembre 1961 fixant le régime des épaves maritimes, *JORF* 12 janvier 1962, 375. (decree 1961)
[1178] Chapter V decree 1961. J.L. MASSY, French Legislation on Maritime Cultural Assets, available at www.vliz.be/imisdocs/publications/103196.pdf, (53) 53-54. (MASSY, French legislation)
[1179] Article 2 decree 1961.

focussed on safeguarding the interests of those finders and salvors via compensation.[1180] Needless to say that this 1961 decree did not live up to the current standards regarding the protection of UCH.

In 1966, the Department of Underwater Archaeological Research (Direction des Recherches Archéologiques Sous-Marines) (DRASM) was established. This department was assigned the task of implementing the legislative framework described above and coordinating underwater archaeological research in the national territory.[1181] The establishment of DRASM has been described as an act marking the birth of the scientific discipline of underwater archaeology which was up till that point still in its infancy. In 1991, DRASM was reformed and became the Department of Underwater Archaeological Research (Department des Recherches Archéologiques Sous-Marines) (DRASSM).[1182] This is an administrative directorate that is in charge of marine archaeology. It is based in Marseille and resides within the Ministry for Culture.[1183] DRASSM is competent up till 24 nm from the baseline.[1184] It is responsible for some 10.000 km along the French coast, which includes 5.533 km of the French metropolitan coasts.[1185]
Prior to establishing DRASSM, the French legislator had already revised the legal regime dealing with UCH in 1989. The legislator adopted a new Act relating to maritime cultural goods on 1 December 1989 (1989 Act) as well as a decree for its application two years later, in 1991 (1991 decree).[1186] A number of important reforms were introduced by the 1989 Act. Firstly, the concept of 'bien culturel maritime' or 'maritime cultural asset' (MCA) was established. This Act, unlike its 1961 predecessor, was no longer merely limited to shipwrecks but aimed to protect a wide variety of UCH. Secondly, it was established that title to MCA in most cases belongs to the State, rather than to the finder or salvor. Thirdly, the 1989 Act applies to MCAs located both in the Public Maritime Domain (Domaine Public Maritime) (PMD), which includes the French territorial sea and

[1180] Chapter V decree 1961.
[1181] MASSY, French legislation.
[1182] Ministère de la Culture, *Archéologie - Historique du service*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Historique, (consulted 8 August 2018). Arrêté du 4 janvier 1996 portant création et organisation du département des recherches archéologiques subaquatiques et sous-marines, *JORF* 11 janvier 1996, 429. (Order 1996)
[1183] Ministère de la Culture, *Archéologie - Historique du service*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Historique, (consulted 8 August 2018).
[1184] Article 2 Order 1996.
[1185] Ministère de la Culture, *Archéologie - Historique du service*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Historique, (consulted 8 August 2018).
[1186] Loi n° 89-874 du 1 décembre 1989 relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation des fouilles archéologiques, *JORF* 5 décembre 1989, 15033 (Act 1989); Décret n°91-1226 du 5 décembre 1991 pris pour l'application de la loi n° 89-874 du 1er décembre 1989 relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation des fouilles archéologiques, *JORF* 7 décembre 1991, 16017. (decree 1991)

the shores,[1187] and in the contiguous zone, reaffirming the coastal States' jurisdiction over heritage in both these zones. Fourthly, this Act determined that for any archaeological activity to take place prior administrative authorisation must be obtained. Finally, a number of penal and administrative sanctions were introduced in order to enforce the newly established approach for the management of UCH. In 2004, the 1989 Act became part of chapter V of the Heritage Code (Code du Patrimoine) which still contains the legal provisions dealing with UCH in France.[1188] These provisions and the legal framework that was established for UCH in France will be discussed below.[1189]

In 2013, France ratified the UNESCO Convention and became its 42th member. Before 2016, France had not yet made any alterations to its national legislation in order to fully comply with the provisions of the UNESCO Convention. In 2016, France adopted the Act on the liberty of creation, architecture and the patrimony (2016 Act).[1190] One of the objectives of this Act was to introduce a number of alterations to book V of the Heritage Code to assure full compliance with the UNESCO Convention. The changes that were introduced by the 2016 Act will be discussed under this section.

### 2.2. Book V Heritage Code

The French Heritage Code consists of two parts, namely a legislative part and a regulatory part. The legislative part encompasses rules of a general scope that are laid down by acts and that usually require an implementing decree. The regulatory part includes the provisions adopted by decree and allows for the practical application of the general rules of the legislative part. The regulatory part can for example include provisions on the precise delimitation of the scope of a general rule contained in the legislative part or on the assignment of a competent authority necessary for implementing such a rule.[1191]

The provisions of the 1989 Act have been incorporated under book V of the Heritage Code which deals with archaeology. This book consists of four titles addressing respectively the definition of archaeological heritage in general, preventive archaeology, planned archaeological excavations as

[1187] The extent of the Public Maritime Domain will be discussed below under section 2.3.2.
[1188] Ordonnance n° 2004-178 du 20 février 2004 relative à la partie législative du code du patrimoine**,** *JORF* 24 février 2004, 37048.
[1189] See *infra* section 2.2. and following.
[1190] Loi n° 2016-925 du 7 juillet 2016 relative à la liberté de la creation, à l'architecture et au patrimoine, *JORF* 8 juillet 2016, texte n°1. (Act 2016)
**[1191]** Université virtuele Environement & Développement Durable, *Recherche d'information juridique sur le site Légifrance – Tutoriel N °1*, http://c2i-niveau2.univ-lille1.fr/r2doc/R2DOC_S21_T01/co/R2DOC_S21_T01_sec3_chapt1.html (consulted 15 July 2018).

well as incidental finds and finally contains a number of diverse provisions. The rules specifically dealing with UCH that were originally adopted in the 1989 Act can be found under title III, chapter two of book V. The provisions formerly contained in the 1991 decree, which was adopted for the application of the 1989 Act, can be found under title III, chapter two of the regulatory part of the Heritage Code.

### 2.3. Scope of application

The Heritage Code applies to MCAs. This term was copied from the 1985 Draft European Convention.[1192] MCAs are defined as deposits,[1193] wrecks, remains or, in general, every object that is of prehistorical, archaeological or historical interest and that is located within the PMD or on the bottom of the sea in the contiguous zone.[1194] This definition specifies both the material as well as the territorial scope of chapter two, title III, book V of the Heritage Code.

#### 2.3.1. Material scope

The definition of article L532-1 Heritage Code explicitly mentions three categories of heritage, namely deposits, wrecks and remains, followed by a more general description to ensure that all types of assets can be considered as MCAs. Le Gurun doubts whether this last addition was necessary as the three categories explicitly cited in the definition already include all possible components of MCAs.[1195]

While the 1961 Act only dealt with shipwrecks, heritage protection was considerably broadened in the 1989 Act and thus in the Heritage Code. Furthermore, in the 1961 Act a distinction was made between isolated objects on the one hand and archaeological sites containing the remains of entire shipwrecks and their cargo on the other. In case of the discovery of an isolated object, the competent administration had the possibility to award title over the object to the finder or alternatively to compensate the finder when the importance of the object justified it being placed

[1192] In fact many of the innovations that were introduced in the 1989 Act and later included in the Heritage Code were inspired by the activities of the Council of Europe. A. FIRTH, "France", *Int'l J. Estuarine & Coastal L*. 1992, (57) 61-62. For more on this Convention see chapter one section 6.2.2..

[1193] The word that is used in the Heritage Code is 'gisement' which can be defined as a set of remains that can likely be exploited archaeologically. The term 'gisement' should, however, not be confused with that of 'site archéologique' which is the area of land containing one or more concentrations of archaeological remains (deposits, structures, objects, traces). TUVAALUK, *Glossaire Archéologique*, https://unites.uqam.ca/tuvaaluk/accueil/glossaire.html (consulted 8 August 2018).

[1194] Section L532-1 Heritage Code.

[1195] G. LE GURUN, "France" in S. DROMGOOLE (ed.) *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague, Kluwer, 1999, (43) 46. (LE GURUN 1999)

in a public collection.[1196] When an archaeological site was discovered, title to it belonged to the State and the salvage of the site had to be conducted by the State or a concessionary.[1197] If the discoverer of the site was found to have the necessary capacities, he had priority to claim the concession for this excavation to be given to him.[1198] This division between isolated objects and archaeological sites had the adverse effect of encouraging false reports. Finders of sites were tempted to declare that their discovery was an isolated object rather than part of a homogenous site in order to obtain title to it. By making such a distinction the 1961 Act promoted the dispersal of the archaeological patrimony to the benefit of treasure hunters.[1199] In the current legislation no such distinction is made as this could potentially endanger the integrity of the maritime cultural heritage.[1200]

The definition of MCA does not contain a time-criterion, even though this was proposed by Recommendation 848 of the Council of Europe.[1201] This entails that objects or remains that have been submerged for less than 100 years are potentially included under this definition. A significance or selective criterion has been included in the definition, namely that the objects or remains must be of prehistorical, archaeological or historical interest. This is a rather wide criterion allowing for numerous objects to fall within the scope of this provision. However, a case that came before the Correctional Court in Brest in 1994 provided some more insights as to how this criterion should be interpreted.[1202] The case dealt with two shipwrecks that were both lost during WWI: a warship named the François Kléber and a cargoship named the Saracen. Divers were removing objects from both these sites without having obtained prior administrative authorisation.[1203] The question that the Correctional Court had to address was whether these wrecks should be considered as MCAs and whether thus the divers were violating the 1989 Act as they had not obtained the necessary prior authorisations for the activities that they were conducting on the sites. The Court provided that while the Kléber is of historical value and should therefore be considered as a MCA, this is not the case for the Saracen, even though this wreck sank under the same circumstances and around the same time in 1917. The underlying reasoning applied by the Court to make such a distinction is that for a warship it suffices that the ship was a witness of or

[1196] Article 25 decree 1961
[1197] Article 23-24 and 26 decree 1961.
[1198] Article 27 decree 1961.
[1199] J. BERARD, *Rapport No. 467 fait au nom de la commission des Affaires culturelles (1) sur le projet de loi, adopté par l'assemblée nationale, relative aux biens culturels maritimes et modifiant la loi du 27 septembre 1941 portant réglementation des fouilles archéologiques*, Sénat, Deuxieme Session Extraordinaire de 1988-1989, 8-10 and 21-22. (BERARD Report No. 467)
[1200] LE GURUN 1999, 47.
[1201] See chapter one section 6.2.1. for more on Recommendation 848.
[1202] LE GURUN 1999, 48 referring to Tribunal Correctionnel, Brest, 25 octobre 1994, ministère public *cl*. C.S., M.P., T.W., K.C., C.G., M.C., R.D., M.G. et C.H., p. 10, unreported.
[1203] See *infra* section 2.6.

took part in a major historical event in order to be considered as a MCA. For civil vessels on the other hand, this case resulted in the creation of an additional requirement that needs to be fulfilled in order for such a wreck to be considered as a MCA. The Court stated that a civil wreck must help increase the knowledge of the human past, for example by providing new insights into naval technology or shipbuilding, in order to be considered as a MCA. Rather than to create an additional criterion for civil wrecks, Le Gurun believes that the Court would have done better to state that for military wrecks the historical interest is assumed and does not need to be investigated further.[1204] In any case, this Court case made it clear that military vessels, regardless of when they sank, are to be considered as MCAs. This thus includes 'younger' wrecks which sank for example during WWII.[1205] In fact, in 1994, when the above mentioned case came before the Court, the Kléber had not yet been submerged for 100 years. Likewise, the wreck of the CSS Leopoldville was recognised in 2001 as a MCA by DRASSM because of its historical value upon request from the US.[1206] As this wreck sank in 1944, it had only been submerged for 57 years at that time. Le Gurun points out that for shipwrecks that perished during WWII the trend to recognise them as MCAs is likely to continue.[1207]

This approach of the French legislation relies for the most part on a case-by-case assessment of whether a find should be considered as a MCA. It can be considered that as the selective criterion used to determine whether an object is a MCA is very broad, the Heritage Code offers a form of blanket protection. Upon discovering a find, the discoverer is likely not to have the necessary technical skills to assess whether an object is of prehistorical, archaeological or historical interest. This is especially true for civil wreck sites considering the additional criterion set in the Kléber case. Therefore, everyone discovering a remain or object of which it cannot at first sight be said with certainty that it is not a MCA, is best to abide with the provisions of the Heritage Code in order to avoid prosecution due to a miscalculation in the nature or importance of an object or remain. Since no time-criterion is contained in the Heritage Code, this is true for all discoveries regardless of their age.

### 2.3.2. Territorial scope

The Heritage Code regulates the management and protection of MCAs located both in the PMD and in the contiguous zone. The PMD has been defined in article L2111-4 of the General Code

[1204] LE GURUN 1999, 48.
[1205] LE GURUN 1999, 48 referring to Tribunal Correctionnel, Brest, 25 octobre 1994, ministère public *cl*. C.S., M.P., T.W., K.C., C.G., M.C., R.D., M.G. et C.H., p. 10, unreported.
[1206] Arrêté préfectoral No. 34/2001 portant règlementation de la pratique de la plongée sur l'épave du CSS Leopoldville, 31 juillet 2001. This order was replaced by arrêté préfectoral No. 04/2007 portant reglementation de la pratique de la plongee sous-marine sur l'épave du paquebot Leopoldville, Cherbourg 11 janvier 2007.
[1207] LE GURUN 2006, 65.

relating to Properties from Public Organisations. This zone includes, *inter alia*, the bottom and underground of the sea up till the outer limit of the territorial sea as well as the shore. The shore is defined as the zone that is alternatively covered and uncovered by water between low and high tide.[1208]

For MCAs located in the contiguous zone, the same rules apply as for MCAs located in the PMD, with a few exceptions as will be discussed. The intention of the legislator was to implement article 303(2) UNCLOS dealing with objects of an archaeological or historical nature in the contiguous zone.[1209] Even though France only became a Member State to UNCLOS in 1996, article 303(2) UNCLOS had already been implemented in the 1989 Act.[1210] As will be evidenced when assessing the regime created for MCAs in the contiguous zone, the French legislator interpreted article 303(2) UNCLOS as assigning legislative powers rather than mere enforcement powers.[1211] In other words, in the 1989 Act France did not simply determine under which conditions archaeological and historical objects can be removed from the contiguous zone, but asserted regulatory competences with the objective to protect MCAs in that zone.[1212] Provisions were adopted actively regulating the obligations and rights of finders of MCAs in the contiguous zone.

The Heritage Code does not refer to MCAs located in the EEZ, on the continental shelf or in the Area. Nevertheless, by ratifying the UNESCO Convention in 2013, France has accepted the obligation to issue provisions regulating the finding and protection of MCAs in these zones.[1213] In 2016, France adopted the 2016 Act with the objective to affirm and guarantee the freedom of

[1208] Section L2111-4 Code Général de la propriété des personnes publiques. In fact the PMD consists of two parts, namely the natural PMD and the artificial PMD. Asides from the territorial sea and the shore, other zones are encompassed in the definition of the PMD as well, such as salt water ponds that are connected to the sea or zones in the oversees departments connected to France, including Guadeloupe, Guyana, La Réunion and Martinique. In the framework of this assessment, however, the main element of the PMD is the territorial sea. For the full definition of the PMD and a clear analysis of this zone see sections L2111-4 - L2111-6 Code Général de la propriété des personnes publiques and C. SAUJOT-BESNIER, "Chronique juridique: L'archéologie sous-marine et subaquatique", *Rev. archéol. Ouest* 2000, (239) 241-242. (SAUJOT-BESNIER 2000)

[1209] T.M. SOSIC, "The 24-mile Archaeological zone: abandoned or confirmed?" in R. WOLFRUM, M. SERSIC and T.M. SOSIC (eds.), *Contemporary Developments in International Law: Essays in Honour of Budislav Vukas,* Leiden, BRILL Nijhoff, 2016, (305) 314-315. (SOSIC 2016)

[1210] Oceans and Law of the Sea United Nations, *Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements*, www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated 3 April 2018).

[1211] See chapter one section 2.3.3.2. for the discussion on the implementation of article 303(2) UNCLOS.

[1212] SOSIC 2016, 314-315. The competence that was asserted by France in this zone is, however, limited as will be evidenced *infra* in section 2.4.3.

[1213] DRASSM recognises that it is the duty of States Parties to the UNESCO Convention to protect UCH located in the EEZ and on the continental shelf. DRASSM, *Archéologie subaquatique et sous-marine – de la découverte à la valorisation*, 2016, available at www.culturecommunication.gouv.fr/var/culture/storage/pub/drassm_decouverte_valorisation/index.htm#/8, 5.

creation on the one hand[1214] and to modernise heritage protection on the other.[1215] The 2016 Act provides that in order to implement the obligations of the UNESCO Convention in French national legislation, the control of the competent administrative authority should be extended to MCAs located in the French EEZ and on the continental shelf as well. [1216] This extension of control needs to be accompanied by the appropriate administrative and penal sanctions.[1217] At the moment it is not yet clear which provisions will be adopted in order to protect MCAs located in the EEZ or on the continental shelf. In article 95 of the 2016 Act the French parliament has authorised the French government to modify the Heritage Code via ordinance in order to extent the control of the administrative authority.[1218] An ordinance on archaeology and the application of the UNESCO Convention on underwater cultural heritage will be adopted is currently being prepared.[1219] In the impact assessment made prior to drafting the 2016 Act, the possibility to extent the mechanisms currently applicable in the PMD and the contiguous zone to the high seas was mentioned as well. One of the objectives of the 2016 Act was to come to a global protection of MCAs regardless of where they are located.[1220] In the end, however, the 2016 Act does not mention anything on extending the provisions dealing with MCAs or the power of the competent authority to MCAs located in the high seas.

### 2.4. Ownership rights over Maritime Cultural Assets

#### 2.4.1. Ownership rights over Maritime Cultural Assets in the Public Maritime Domaine

When MCAs are discovered in the PMD, the State holds title to them in three scenarios. The first is that the State was already the owner of the MCA, most likely a State vessel, at the time of its sinking and has not abandoned or transferred its rights. In this case, the State remains the owner

[1214] The 2016 Act adresses the liberty to make and diffuse artistic creations. This relates, *inter alia*, to the creation of artistic work, cinematographic work, audiovisual work, visual art structures and live performances.
[1215] Act 2016; Gouvernment, *Compte rendu du Conseil des ministers du 8 juillet 2015: Liberté de la création, architecture et patrimoine*, www.gouvernement.fr/conseil-des-ministres/2015-07-08/liberte-de-la-creation-architecture-et-patrimoine (consulted 1 August 2018).
[1216] The competent administrative authorities are discussed more in detail in the sections below.
[1217] Article 95 (I) 3°(a) Act 2016.
[1218] The legislative procedure used here is a special procedure prescribed in article 38 of the French constitution. For more on this procedure see La vie publique, *Qu'est-ce qu'une ordonnance?* www.vie-publique.fr/decouverte-institutions/institutions/administration/action/voies-moyens-action/qu-est-ce-qu-ordonnance.html (consulted 8 August 2018).
[1219] Bulletin Officiel de Ministère de la Justice du 28 avril 2017, 4 see http://docplayer.fr/52357878-Bulletin-officiel-du-ministere-de-la-justice.html; C. MORIN-DESAILLY, Bilan de l'application de la loi par la commission de la culture, 27 juin 2017, available at www.senat.fr/espace_presse/actualites/201511/projet_de_loi_relatif_a_la_liberte_de_la_creation_a_larchitecture_et_au_patrimoine.html.
[1220] *Etude d'impact projet de loi relatif à la liberté de la création, à l'architecture et au patrimoine*, 7 julliet 2015, NOR: MCCB1511777L/Bleue-1, 125. (impact assessment Act 2016)

of the heritage and can exercise its rights over the wreck. Secondly, when it is unlikely that an owner of the MCA can be identified, the State will obtain ownership rights over it.[1221] This situation is most likely to occur in relation to ancient heritage of which it is (almost) impossible to determine who the original owner was, for example for prehistorical remains.[1222] Thirdly, the State will become the owner of the MCA in case the original owner(s) cannot be found within a period of three years after the date on which the discovery was made public.[1223] The publication of the discovery of a find is the responsibility of the Minister of Culture. It must contain a description of the MCA and, as far as possible, the identification of the owner at the time the MCA was lost. This publication must be done within six months following the identification of the MCA both in the Official Journal of the French Republic and in a daily newspaper that is circulated nationwide. The period of three years commences at the moment that the last of these two publications has been issued.[1224]

At the time of drafting the 1989 Act, the US and France had just signed the CSS Alabama agreement on 3 October 1989.[1225] This resulted in the French legislator not being able to ignore the possibility of discovering a MCA of which a third State is the identifiable owner and the legal implications of this. Prior to the 1989 Act, France already acknowledged that third States retained title over the wrecks of their vessels located within French waters. In the CSS Alabama agreement, the ownership claim of the US over the CSS Alabama located in the French territorial sea was therefore accepted in the end.[1226] France expects the same treatment of its shipwrecks located in foreign waters.[1227] In the la Belle agreement, which dealt with the French wreck of the La Belle located in Texan waters, it was decided that France retains the ownership rights over this vessel as it has not abandoned it nor transferred title to it.[1228] France feels that cooperation and consultation are crucial elements for managing French sunken State vessels located in foreign waters. A commission was established that is responsible for preliminary investigations concerning French military vessels located in foreign waters. This commission assesses *inter alia* the status of the wreck, its cultural interest, the implications of excavating it and the possibility for scientific cooperation.[1229] In any case, it is felt by France that consultations should always take place as otherwise it is

[1221] Section L532-2 Heritage Code.
[1222] LE GURUN 1999, 53.
[1223] Section L532-2 Heritage Code.
[1224] Section R532-5 Heritage Code.
[1225] Agreement CSS Alabama 1989.
[1226] See chapter two section 2.2.2. for more on the CSS Alabama Agreement.
[1227] LE GURUN 2006, 90-91.
[1228] Agreement La Belle 2003, article 1. See chapter two section 2.2.2. for more on the La Belle Agreement.
[1229] LE GURUN 2006, 91 reffering to instruction no.318 DEF/EMM/PL/ORA/NP du 10 juin 1999 relative à l'instruction préliminaire des dossiers de découverte d'epaves de navires militaires fraçais dans des eaux étrangères, unreported.

impossible to obtain consent from the owner and respect its ownership rights as is required in article 303(3) UNCLOS.[1230]

### 2.4.2. Compulsory purchase

The French State has the possibility to proceed to the compulsory purchase of a MCA over which the original owner claimed his rights. The Minister for Culture must notify the owner of the MCA of the State's intention to purchase it and must propose a compensation that will be given in exchange.[1231] The owner is then given a period of three months to present his views on this matter.[1232] When the owner agrees with the purchase, this will result in an ordinary transfer of property against the agreed sum of money. When the owner does not agree with the purchase, the public utility of the acquisition will be declared by the Minister of Culture, after receiving advice from the National Council for Archaeological Research (NCAR),[1233] through a so called decree of the Council of State.[1234] The actual transfer of the property is pronounced by the Court of First Instance in whose jurisdiction the MCA is located provided that an indemnification is given prior to the taking in possession of the asset.[1235] This indemnification must cover all direct, material and certain damages. When no mutual agreement can be reached on the amount of the indemnification, the Court will fix the amount.[1236]

As the State is the owner of about 80% of all MCA based on either original ownership or the acquisition of ownership as foreseen in article L532-2, only 20% of the MCAs can potentially be the subject of such a compulsory purchase. This measure is justified on the basis that it is essential in order to protect MCAs in a satisfactory manner. As Le Gurun points out, the main value of this

[1230] LE GURUN 2006, 92. See chapter one section 2.3.3.1. for more on article 303(3) UNCLOS.
[1231] Section R532-19 Heritage Code.
[1232] Section R532-19 Heritage Code.
[1233] The NCAR resides under the Minister of Culture. It was created in 1994 (Le Conseil National de la Recherche Archéologique, *JORF* 29 May 1994, 7766).
It is competent for questions on archaeological research within the national territory and is consulted for advice in several cases. It also has a more general function in providing guidance in research by establishing objectives, principles, methods, norms and ensuring the dissemination of knowledge. Ministère de la culture, *Le conseil national de la recherché archéologique*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Conseil-national-de-la-recherche-archeologique (consulted 8 August 2018).
[1234] These are a special type of decrees that prior to their enactment must be submitted to the Council of State for advice. Vie Publique, Qu'est-ce qu'un décret? www.vie-publique.fr/decouverte-institutions/institutions/administration/action/voies-moyens-action/qu-est-ce-qu-decret.html (consulted 8 August 2018).
[1235] The Minister of Culture has three months after the publication of the decree to request the Court to pronounce the transfer of ownership. If he does not do so within this period, the decree will be considered nullified. Section R532-19 Heritage Code.
[1236] Section L532-11 and R532-19 Heritage Code.

system lies not in its use but in its existence.[1237] It provides the State with the possibility to act in case the behaviour of the owner threatens the MCA.[1238] A potential example that was given during the parliamentary debates on the 1989 Act was the fictional case of discovering an 18th century Napolitan ship with the descendants of the owner refusing any scientific study of the wreck and its cargo and them not being interested in the conservation of the property.[1239] In such a case, a system of compulsory purchase might be the best way for the State to ensure that this MCA is protected.

In order to gain further insights into when this procedure of acquisition would be used, the parliamentary debates should be considered. Firstly, in these debates it is provided that a good can be expropriated when this is justified in the interest of its conservation or scientific exploitation.[1240] These are two alternative conditions that should be fulfilled in order for the compulsory acquisition to be justified. The first condition is that the purchase is justified in light of the conservation of the good. This seems to insinuate that the good is under a threat which necessitates the compulsory purchase. Le Gurun points out that while theoretically this situation could present itself for assets that are of low scientific value, in practice it may be assumed that if the State takes such an interest in an asset that it feels the need to acquire it, this asset will possess a certain scientific value. Therefore, under this scenario, these conditions are in fact linked and can be considered as one condition. When departing from the second criterion, however, the compulsory purchase would be justified because of the scientific value of the good. Whether the good is threatened and its conservation jeopardised is of no importance in this situation. Here a clear distinction can thus be made between the two alterative conditions.[1241]

Alternatively, in another parliamentary piece drafted during the same debates, it is provided that compulsory purchase can only be justified in cases of 'exceptional interest'.[1242] According to Le Gurun, the possibility of compulsory purchase should be interpreted in the most restrictive sense possible in order to minimise interference with private ownership rights and to legitimise the State's need to take action in certain well-defined situations. Le Gurun provides that two criteria should be fulfilled: the first is that the owner endangers the MCA and the second is that the MCA is of exceptional interest and needs to be protected from the owner in the public interest. This interpretation adds an element in which the attitude of the owner vis-à-vis the MCA is taken in

[1237] To the knowledge of the author, this procedure has not yet been used to date. See also M. CORNU and J. FROMAGEAU, *Le patrimoine culturel et la mer:* aspects juridiques et institutionnels, Paris, L'Harmattan, 2002,113.
[1238] LE GURUN 1999, 54 and 56.
[1239] BERARD Report No. 467, 28.
[1240] BERARD Report No. 467, 12.
[1241] LE GURUN 1999, 56.
[1242] R. BEIX, Assemblée Nationale, Débats parlementaires - Compte Rendu Intégral, Séance du 23 novembre 1989, *JORF* 24 novembre 1989, 5566.

consideration as well. This interpretation is based upon parliamentary debates where it was stated that compulsory purchase can take place when the owner is known, but is in default, and the expropriation is justified by the interest of conserving the asset or its exploitation.[1243] In this case both conditions must be fulfilled cumulatively before the State can proceed to expropriation of a MCA.[1244]

One of the main innovations when drafting the provision on compulsory purchase under 1989 Act was that it can apply to both movable goods as well as immovable goods. Traditionally, mechanisms relating to the compulsory transfer of ownership only applied to immovable goods. In the 1989 Act, it was, however, felt that in order to offer full protection for MCAs it should be possible for the State to oblige owners to sell movable goods as well.[1245]

It should be noted that article L532-11 Heritage Code provides that acquisition can only take place when the MCA is located in the PMD. This thus entails that once the MCA has been removed, or when it is located in the contiguous zone, this provision cannot be used.[1246] It is not entirely clear why the possibility to acquire a MCA once it has been recovered does not exist, as the State might wish to acquire such MCAs as well in order to protect them.

### 2.4.3. Ownership over Maritime Cultural Assets located in the contiguous zone

The rules set forth in the Heritage Code on ownership and expropriation do not apply to MCAs discovered in the contiguous zone. Article L532-12 Heritage Code provides that all provisions set out under that chapter are applicable to the contiguous zone with the exception of the provisions relating to ownership. France felt that it would be contradictory to international law, mainly article 303(2) UNCLOS, for a State to assert ownership rights over the cultural heritage located in its contiguous zone as this provision does not afford full legislative jurisdiction to the coastal States. It merely allows States to control marine activities in so far as this is used to combat traffic in cultural artefacts.[1247] In article 303(2) UNCLOS a coastal State only has limited, fragmentised and specialised competences in its contiguous zone.[1248] With the adoption of the UNESCO Convention the regime for UCH located in the contiguous zone was further elaborated, although some ambiguity to its exact extent still remains. No provisions were, however, introduced regulating

[1243] J. BERARD, Sénat, Débats parlementaires – Compte Rendu Intégral, Séance du 19 octobre 1989, *JORF* 20 octobre 1989, 2651.
[1244] LE GURUN 1999, 57.
[1245] BERARD Report No. 467, 27.
[1246] LE GURUN 1999, 56.
[1247] LE GURUN 2006, 76 and LE GURUN 1999, 52.
[1248] BERARD Report No. 467, 11.

ownership rights over UCH in the UNESCO Convention. It was left up to the individual States to decide on this topic.

If the find were to consist of a French State vessel, it does appear that France would claim ownership rights over this wreck as it has accepted the principle of explicit abandonment for State vessels and the continuation of sovereign immunity.[1249] Likewise, if the wreck belonged to another State at the time of sinking, based on previous actions and the established policy in France, it seems likely that France would acknowledge the rights of that third State in the wreck. France would in this case cooperate with the third State based on the principles set forth in the UNESCO Convention or the duty to cooperate provided under UNCLOS. Nevertheless, the issue of ownership rights over UCH located beyond the territorial sea remains disputable, as international conventions do not provide a clear framework. The most that can be said is that based on UNCLOS and the UNESCO Convention, account must be taken of the interests of States with a verifiable link and/or the preferential rights of States of cultural, historical or archaeological origin.[1250] These interests will be taken into account through cooperation and consultation. The UNESCO model for a national act on the protection of UCH provides that UCH is owned by the State, under the condition that there is no existing ownership immediately prior the discovery.[1251] This model act, however, applies within the limits of national jurisdiction without defining the extent of this zone, leaving the question open whether this includes the contiguous zone.[1252]

### 2.5. Duty to report

Upon discovering a MCA the finder must report this to the administrative authority within 48 hours after the discovery was made or alternatively upon arrival in the first port.[1253] The competent administrative authority to which the reporting must be addressed is the marine affairs officer, chief of the district or department of maritime affairs closest to the place of discovery or the first port of arrival.[1254] The MCA must be left *in situ* and cannot be damaged by its discoverer.[1255] This policy of preserving MCA *in situ* was one of the innovations when drafting the 1989 Act. In the

[1249] LE GURUN 2006, 94.
[1250] For more on this topic see M. VERMA and P. SETH, *Rightful Ownership with Respect to Underwater Cultural Heritage*, 2004, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2647914 and L. LINA, "Ownership of Underwater Cultural Heritage in the Area", *Creighton International and Comparative Law Journal* 2011, 60-80.
[1251] UNESCO Model Act, 10.
[1252] UNESCO Model Act, 3.
[1253] Section L532-3 and L532-12 Heritage Code. In case of successive reportings, the first one is considered as the finder. Section L532-5 and L532-12 Heritage Code. This report must contain the location of the discovery and the nature of the good. Section R532-2 Heritage Code.
[1254] Section R532-1 Heritage Code.
[1255] Section L532-3 and L532-12 Heritage Code.

1961 decree, the finders of a wreck were under the duty to bring the wreck into safety, which meant that it should be recovered from the seabed. It can thus be said that long before the UNESCO Convention crystallised this principle of *in situ* preservation, the French legislator had already consolidated it in its 1989 Act. Reasons cited for this include the fact that due to its specific chemical balance the marine environment is a good surrounding for the preservation of MCAs.[1256] In order to prevent fast deterioration of the heritage, these must be exposed with care.[1257] Other reasons include that the scientific interest of a site is reduced once parts of it have been removed, especially considering the fact that the finder cannot always assess whether the find is an isolated object or whether it belongs to a larger site. This new approach also helps in the battle against the illicit traffic in MCAs.[1258]

In case a MCA has been incidentally removed from the seabed as the consequence of activities that are not directed at heritage, the finder cannot dispose of the object. He must report this to the competent marine affairs officer within the same timeframe as set out above. The asset must be deposited with the officer or kept at its disposal.[1259] In the initial proposal for this provision the MCA had to be deposited with the maritime affairs administration simultaneously with the reporting. The National Assembly, however, felt that the obligation to deposit the asset with the administration would place an excessive burden on the finder. The National Assembly thus altered this provision so that incidentally retrieved MCAs were to remain with the finder and should be kept at the disposal of the administration. The commission for cultural affairs later suggested that this new provision could have a perverted effect as it places even more constraints on the finder. The person who has to keep the asset at its disposal is in fact its guardian and is responsible for its conservation. Especially for MCAs, this can be quite burdensome as they need to be conserved under very specific conditions to guarantee their preservation. The commission for cultural affairs felt that in order for the National Assembly's approach to achieve its objective, the administration has to be diligent in retrieving the good within the shortest period of time from the finder. However, the commission points out that in practice the maritime affairs administration might show little eagerness to retrieve the asset as it is not equipped for receiving archaeological objects. In this case problems of responsibility might arise. Therefore, it was finally decided to retain both options in the 1989 Act, being either that the finder deposits the MCA with the administration or that the finder keeps it at the disposal of the administration, so that the finder can choose which is the most suitable under the circumstances.[1260] In order for this system to work, it is crucial that clear guidelines are provided on how the finder must preserve the heritage and that the competent

[1256] BERARD Report No. 467, 17
[1257] SAUJOT-BESNIER 2000, 240.
[1258] BERARD Report No. 467, 17-18.
[1259] Section L532-4 and L532-12 Heritage Code. The report must contain the location as well as any other circumstances relating to the recovery of the good. Section R532-2 Heritage Code.
[1260] BERARD Report No. 467, 19-20.

authority quickly intervenes in order to assess the value of the heritage allowing it to take further preservation measures when necessary.[1261]

The maritime affairs administration will forward all reports addressed to it to the Ministry of Culture which will proceed to identify the MCA.[1262]

### 2.6. Legal protection of Maritime Cultural Assets

Without having obtained prior authorisation from the competent administrative authority, no person may carry out prospections using specialised materials in order to determine the location of a MCA, nor may anyone carry out excavations or surveys.[1263] Likewise, without prior authorisation no one may move or take samples of any MCA. Authorisations will be granted taking into account the qualifications of the requester as well as the nature and modalities of the research.[1264] Any request for authorisation must specify the identity, the competences and the experience of the requester as well the composition of the research team, the location, the scientific objective, the material means, the financial means and the estimated duration of the activity.[1265] Requests for authorisation must be addressed to DRASSM which resides within the Ministry of Culture.[1266] Authorisation can be granted by DRASSM following consultations with the

[1261] DRASSM has made a guide on how to conserve MCAs. While this guide is not specifically intended for finders to preserve incidental finds, the principles set forth in it can be applied in this situation as well. DRASSM, *Guide de Conservation*, March 2011, available at www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Documentation-scientifique.

[1262] Section R532-3 Heritage Code.

[1263] The specialised materials meant in this provision are mainly optical prospecting equipment such as appliances equipped with a camera that are towed at the sea surface, robots that are equipped with (remote controlled) camera's, submersibles equipped with autonomous video and navigation systems, as well as non-optical prospecting devices such as ultrasound echo sounder, electromagnetic devices or magnetometers. BERARD Report No. 467, 24.

[1264] Section L532-7 Heritage Code. The National Assembly wanted to introduce a reference to the intention of the diver under this provision. For several reasons, including the risk that amator divers would be considered as potential delinquents and the difficulty for the prosecution to demonstrate the intent of any offenders, no such reference was included. BERARD Report No. 467, 24.

[1265] Section R532-7 Heritage Code.

[1266] The tasks of DRASSM include the making of an inventory, studying, protecting, conserving and promoting underwater archaeological heritage. It is responsible for enforcing the provisions on the Heritage Code relating to UCH. Furthermore, it has responsibilities in giving advice and exercising technical and scientific control in respect of archaeological sites, it makes proposals with respect to scientific relationships with third States and is concerned with the training of archaeologist-divers. One of the main missions of DRASSM includes the elaboration of an archaeological map. Arrêté du 16 décembre 1998 érigeant le département des recherches archéologiques subaquatiques et sous-marines en service à compétence nationale, *JORF* 30 décembre 1998, 19956, article 1. The data of the archaeological map are partly available via the patrimony atlas which can be found via the following link: http://atlas.patrimoines.culture.fr/atlas/trunk/ For more on this atlas see Ministry of Culture, *Atlas des patrimoines*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Valoriser/Atlas-des-patrimoines (consulted 8 August 2018)

NCAR.[1267] This authorisation will specify the conditions under which the operations must be conducted.[1268] Any authorised activity must be take place under the control of the person that requested and received the authorisation.[1269] These activities are conducted under the general control of the Minister of Culture and are subjected to a reporting duty, which must especially include an inventory of all the objects that were discovered.[1270] When the owner of the MCA at which the activities are directed is known, his written consent must be obtained prior to any intervention.[1271] When the owner of the MCA withdraws his consent and notifies the Minister of Culture of this, the authorisation will be void from the day of the notification on.[1272] Furthermore, the Minister for Culture can withdraw the authorisation in two scenarios. The first is in case the requester gravely or repeatedly violates the conditions that were attached to the authorisation, or violates in the same manner the duty to declare or conserve the discoveries made.[1273] The second scenario is when the importance of the discoveries justifies the State to continue with the activities itself or when the State wishes to purchase the MCA.[1274] When the withdrawal is motivated by grave or repeated violations, the person that obtained the authorisation is not entitled to receive any indemnification. He is, however, entitled to a compensation for the works and installations that might be used by the State for continuation of the excavation.[1275] On the other hand, when the authorisation is withdrawn due to the fact that the State wishes to continue the excavations itself, the authorised person is entitled to a reimbursement of all costs flowing directly from the works that he has conducted. He can also request a special indemnification of which the terms of payment are set by joint order by the ministers competent for culture and budget after receiving advice from the NCAR.[1276] Any such request for reimbursement or indemnification must be addressed to the Minister for Culture within three months following the notification of the withdrawal of authorisation.[1277]

[1267] Section L545-1 Heritage Code.
[1268] Section R532-8 Heritage Code. Droit et Archéologie, *Réglementation de l'archéologie de terrain en France*, http://www.archeodroit.net/html/jdc_regl.html (consulted 8 August 2018).
[1269] Section L532-8 Heritage Code.
[1270] Section R532-11 Heritage Code.
[1271] Section L532-9 Heritage Code.
[1272] Section R532-17 Heritage Code.
[1273] In this case the default of the owner will be declared and a term will be set. Section R532-12 Heritage Code.
[1274] Section R532-12 Heritage Code.
[1275] Section R532-14 Heritage Code.
[1276] Section R532-15 Heritage Code. C. SAUJOT-BESNIER, "Chronique juridique : L'archéologie sous-marine et subaquatique (Suite)", *Rev. archéo. Ouest* 2001, (219) 220. (SAUJOT-BESNIER 2001)
[1277] Section R532-16 Heritage Code.

As a general rule, it is provided that when the conservation of a MCA is compromised, the administrative authority, after declaring the default of the owner, may take *ex officio* any conservation measures necessary in the specific situation.[1278]

### 2.7. Reward for the finder

The Heritage Code allows for a reward to be given to the finder of a MCA located in the PMD. In order to obtain this reward, the finder must have reported the discovery of the MCA in accordance with the provisions of the Heritage Code and the State must be the owner of the MCA following one of the two scenarios set out in article L532-2 Heritage Code.[1279] As article L532-2 does not address the situation in which the State was the original owner of the MCA, for example if it is a State vessel, it seems doubtful that a reward could be granted for such a discovery. The nature and the amount of the reward are fixed by DRASSM after receiving advice from the NCAR.[1280] A reward for MCAs discovered in the PMD can take two forms. The first is a monetary reward. The amount of the reward is determined in function of the interest of the MCA within the following limits: for assets of a regional interest there is a maximum of 2.000 euros, for assets of a national interest the maximum is 10.000 euros and for assets of international or exceptional interest the maximum amount for the reward is set at 30.000 euros.[1281] The second possibility is to give the finder custody over the asset while the ownership rights remain with the State. The advantage of this approach is that DRASSM will not need to store numerous and similar MCAs that are low in value. The finder would in most cases be happy to take care of the asset.[1282] The conditions for such custody are fixed in an agreement. In any case the deposited MCA receives an indelible mark indicating that it is the property of the State.[1283] The finder has the right to specify the manner in which he would like to be compensated. To the extent possible, the Minister for Culture will take this wish into account without, however, having to justify himself in case an alternative manner is found to be more suitable.[1284] In case a reward is given in the form of custody over the MCA, the amount of the reward is based on the scientific interest of the find as is the case for a monetary reward.[1285]

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[1278] Section L532-10 Heritage Code. These measures are excercised by the Minister of Culture who, unless in cases of urgency, consults with the NCAR. Section R532-18 Heritage Code.
[1279] Section L532-6 Heritage Code.
[1280] Section L532-6 Heritage Code. A Commission for underwater operations was established within the NCAR which has the task of given advice on the nature and amount of the compensation, as well as on the importance of the remains. Section R545-10 and R545-11 Heritage Code.
[1281] Arrêté du 8 février 1996 relatif aux biens culturels maritimes, *JORF* 20 février 1996, 2740, article 2. (Order 1996 MCA)
[1282] LE GURUN 1999, 59.
[1283] Article 3 Order 1996 MCA.
[1284] Article 1 Order 1996 MCA.
[1285] Section R532-4 Heritage Code.

When, after investigating the discovery, its scientific interest proves to be higher than initially estimated, the State can re-evaluate the reward.[1286]

As the State is not entitled to a MCA in the contiguous zone following article L532-2 Heritage Code, a separate provision was included dealing with rewards for the discovery and reporting of MCAs located in this zone. The Heritage Code provides that every person that discovers and declares a MCA owned by the State and located in the contiguous zone may receive a reward the amount of which is fixed in the same manner as was set out above for the assets discovered in the PMD.[1287] This is a rather strange formulation, as France does not claim ownership rights over MCA in its contiguous zone, with perhaps the exception of its own sunken State wreck.[1288] Saujot-Besnier noted that the Heritage Code is ambiguous as articles L532-2 and L532-11 do not apply in the contiguous zone and no specifications have been included regarding the allocation of ownership rights over MCA located in this zone. Saujot-Besnier rightfully stated that it would have been better to formulate article L532-13 Heritage Code in the following manner: 'Anyone who has discovered a maritime cultural asset located in the contiguous zone, which would have belonged to the State if it had been located in the PMD, may benefit from a reward the amount of which is fixed by the administrative authority'.[1289] In any case for MCAs discovered in the contiguous zone, the reward can only be a monetary one as the State is not the owner of the MCA.[1290]

In the 1961 Act and its decree, a reward was automatically given to the salvor of a wreck as this was a corollary to the obligation to salve the heritage. This automatism was abrogated in the 1989 Act. This Act has shifted from granting a compulsory compensation for preforming a successful salvage to granting a reward for reporting the discovery of a MCA and leaving it *in situ*.[1291] In other words, in the Heritage Code, receiving a reward is not a right. The Minister for Culture has a discretionary power to offer a reward to the finder.[1292] Whether such reward is given depends on the available financial means. [1293]

[1286] Article 2 Order 1996 MCA.
[1287] Section L532-13 Heritage Code.
[1288] As no reward is given for the reporting of the discovery of State craft that already belonged to the State in the PMD, it is highly unlikely that such a reward would be given for the reporting of such wreck in the contiguous zone.
[1289] SAUJOT-BESNIER 2001, 222.
[1290] SAUJOT-BESNIER 2001, 222.
[1291] BERARD Report No. 467, 10.
[1292] LE GURUN 1999, 59.
[1293] LE GURUN 1999, 60.

## 2.8. Sanctions

In order to enforce the protective rules set out for MCA, the French Heritage Code provides a number of sanctions in case of non-compliance. These include fines up to 7.500 euros and for certain infringements imprisonment of up to two years.[1294]

In order to enforce the provisions of the Heritage Code a rather extensive list of persons and authorities is assigned with an enforcement task. Offenses of the provisions dealing with MCAs in the Heritage Code are investigated by *inter alia* (assistant) judicial police officers, maritime affairs administrators, the officials assigned to the services exercising control missions in the field of maritime affairs under the authority or at the disposal of the Minister in charge of the sea, the officers of the technical and administrative body of maritime affairs, the customs officers, the agents of the Minister in charge of culture specially sworn and commissioned for this purpose under conditions fixed by decree, the commanders, second commanders or second officers of the ships of the national navy, semaphoric watchers and, in the ports, the harbor officers and the assistant port officers.[1295]
Having a large number of persons and authorities responsible for the enforcement of the protection of MCAs can be a considerable help for effectively protecting UCH as it is often difficult to monitor all activities taking place at sea. Nevertheless, it is important to specify the tasks of each enforcement authority to avoid that due to an overload of competent authorities certain offenses remain unpunished as all authorities look at one another to act.

The 2016 Act provides that when the control of the administrative authority will be extended to MCAs located in the EEZ or on the continental shelf, the appropriate administrative and penal sanctions will be adopted to enforce this.[1296] As was said, in light of this an ordinance on archaeology and the application of the UNESCO Convention on underwater cultural heritage will be adopted.

## 2.9. France and the UNESCO Convention

When in 2001 the text of the UNESCO Convention was put to a vote France abstained from voting. This was the first time that France abstained from voting on a convention relating to cultural heritage.[1297] The main reason for not wanting to vote was that France had some concerns relating

[1294] Section L544-5, L 544-6 and L544-7 Heritage Code.
[1295] Section L544-8 Heritage Code.
[1296] Article 95 (I) 3°(a) Act 2016.
[1297] LE GURUN 2006, 61.

to the relationship between the UNESCO Convention and UNCLOS.[1298] More specifically, as was the case for many States, France mainly had issues with two aspects, namely the regime for State vessels and the fear of creeping coastal State jurisdiction.

### 2.9.1. Protection of State vessels

As was true for a number of other States including the UK, Germany, Spain and the US, France initially opposed to the inclusion of State craft in the UNESCO Convention. France felt that article 32 UNCLOS should be interpreted and applied in a rigorous manner and that therefore the inclusion of State vessels used for non-commercial purposes would be contrary to the principle of sovereign immunity.[1299] In the end, however, the majority of States agreed that leaving State craft out of the scope of the Convention would considerably weaken it as a large amount of UCH consists of State vessels. Therefore, in the final text of the UNESCO Convention, State craft was included under its scope.[1300]

After assessing the provisions of the Convention dealing with State craft, France concluded that these could not guarantee that the principles of State immunity and State ownership are adequately respected.[1301] Like other States, France wanted article 7(3) UNESCO Convention to impose a duty on the coastal State to consult the flag State when State craft belonging to the latter are discovered in the territorial sea of that coastal State. As was assessed in chapter one, article 7(3) merely provides that the coastal State 'should inform' the flag State which is a far end away from a duty to obtain the consent of the flag State when dealing with State craft.[1302] Furthermore, France felt that article 7(3) violates section L532-9 of the French Heritage Code providing that the written consent of the identified owner, including the State owner, must be obtained prior to authorising any activities directed at the MCA.[1303] No such requirement can be seen in the UNESCO Convention.
Articles 10(2), (4) and (7) of the UNESCO Convention were found to be unsatisfactory for similar reasons and gave rise to some concerns as well.[1304]

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[1298] LE GURUN 2006, 77.
[1299] LE GURUN 2006, 78. "*With such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes.*" Article 32 UNCLOS.
[1300] See section 4 chapter one.
[1301] LE GURUN 2006, 68-69.
[1302] See section 4.4.1.2. chapter one.
[1303] Section L532-9 Heritage Code.
[1304] LE GURUN 2006, 81. When the coastal State prohibits certain activities as foreseen in article 10(2) UNESCO Convention, this could result in the flag State being denied access to his property. The interpretation of the word 'interference' and 'immediate danger' in article 10(4) UNESCO Convention is left to the Coordinating State. This provision does not specify which measures the coastal State can take in case of immediate danger. LE GURUN 2006, 82. See also section 4.5.3.2. chapter one for more on these provisions.

### 2.9.2. Coastal State jurisdiction

The second issue that France had with the UNESCO Convention related to the rights of coastal States under this Convention. France was opposed to the idea that the best way to protect UCH located beyond the contiguous zone was to extend coastal State jurisdiction over these areas. Such an approach would considerably alter the balance of rights established under UNCLOS. Rather than extending the rights of coastal States, France was in favour of using bilateral or multilateral *ad hoc* agreements involving all interested States in order to make arrangements on UCH after asserting who holds title over it.[1305] In other words, France would have preferred a scientific and co-operative approach that is subjected to respecting ownership rights over granting additional rights to the coastal States over UCH located outside their contiguous zone.[1306]

### 2.9.3. Ratification and implementation of the UNESCO Convention

In 2013, despite the issues that it had with a number of its provisions, France ratified the UNESCO Convention.[1307] France believed that by ratifying this Convention, it could extend its actions directed at UCH to the limits of its EEZ in order to prevent wreck hunters from plundering wreck sites in a better-structured manner.[1308] The concerns that France had expressed in relation to the UNESCO Convention were addressed prior to the ratification in the report drafted by the commission of foreign affairs of the National Assembly.[1309] Emphasis was placed on the fact that the UNESCO Convention aims to fill the legal vacuum that was still there after the adoption of articles 149 and 303 UNCLOS. The Convention does not intend to call into question the legal framework set out under UNCLOS. In this regard, the report refers to article 3 UNESCO Convention providing that it must be interpreted in conformity with UNCLOS. It cannot be used to affirm or contest a claim for sovereignty or national jurisdiction nor can it be used to regulate the issue of ownership rights over UCH.[1310] As is provided in article 2,8° the UNESCO Convention shall respect the rules of international law and State practice relating to sovereign immunities and will not

[1305] LE GURUN 2006, 85.
[1306] LE GURUN 2006, 90.
[1307] LOI n° 2012-1476 du 28 décembre 2012 autorisant la ratification de la convention sur la protection du patrimoine culturel subaquatique, *JORF* 29 décembre 2012, 20787.
[1308] Ministère de la culture, *Archéologie - Conserver et protéger*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Conserver-proteger (consulted 8 August 2018).
[1309] J. GLAVANY, *Rapport No. 408 fait au nom de la Commission des Affaires Etrangères sur le projet de loi n°90, autorisant la ratification de la convention sur la protection du patrimoine culturel subaquatique*, Assembléé nationale, quatorzième législature, Enregistré à la Présidence de l'Assemblée nationale le 14 novembre 2012, 35p. (GLAVANY Report No. 408)
[1310] GLAVANY Report No. 408, 15-16.

modify the rights that States have over their State craft. According to France, this includes the rule that sunken State vessels belong to the flag State regardless of where they are located, including in the territorial sea of a third State, and regardless of the time that has elapsed since their sinking.[1311]

A second report written in name of the commission for foreign affairs, defence and armed forces of the Senate suggested that France should become a party to the UNESCO Convention as it already complied with a lot of the requirements set under this Convention.[1312] The definition set out for MCAs covers all aspects mentioned in the UNESCO Convention and even goes one step further as no time cut-off applies. There is a preference for the *in situ* preservation of UCH and anyone that discovers heritage is prohibited from damaging it. Furthermore, there is a reporting duty for all discoveries made in the territorial sea and contiguous zone and authorisation must be obtained prior to any interfere with MCAs. Rules are even set out for UCH that was obtained incidentally. The Heritage Code is in compliance with the provisions on the law of salvage and finds contained in article 4 of the UNESCO Convention. While the 1961 decree still referred to the salvor of the wreck, the Heritage Code refers to the finder who is under the obligation to leave the heritage *in situ*. While this finder may be entitled to a reward for reporting a find, this is not the same as the reward given to a salvor for the successful salvage of UCH. Furthermore, as the State claims title over MCAs located in the PMD when no original owner can be found, the application of the law of finds is not possible in this zone. For MCAs located in the contiguous zone, the law of finds might apply in theory as here the French State does not claim ownership rights over MCAs. By offering a reward in article L532-13 for reporting MCAs in the contiguous zone, it was nevertheless hoped that finders would be encouraged to act in conformity with the French legislation.[1313] In any case, even for MCAs located in the contiguous zone, the finder cannot recover or damage them without prior authorisation. It should also be noted that France made a reservation in the sense of article 30(1)(d) of the Salvage Convention excluding cultural heritage from the application of the law of salvage and finds.[1314] Finally, the Heritage Code also provides for adequate penal sanctions in conformity with article 17 of the UNESCO Convention. [1315]

[1311] GLAVANY Report No. 408, 23-24.
[1312] R. TUHEIAVA, Rapport No. 209 au nom de la commission des affaires étrangères, de la défense et des forces armées (1) sur le projet de loi, adopté par l'assemblée nationale, autorisant la ratification de la convention sur la protection du patrimoine culturel subaquatique, Sénat, session ordinaire de 2012-2013, Enregistré à la Présidence du Sénat le 12 décembre 2012, 13. (TUHEIAVA Report No. 209); The report, however, recommended that the ratification should be accompanied by a declaration expressing France's interests in, and views on, its sunken warships even when these are submerged in foreign or international waters. In the end, France made no such declaration upon ratifying the Convention. TUHEIAVA Report No. 209, 17.
[1313] BERARD Report No. 467, 32.
[1314] LE GURUN 2006, 74.
[1315] LE GURUN 2006, 72.

A point in which particular pride is taken is the presence of a strong national authority in conformity with article 22 UNESCO Convention, namely DRASSM. France remains one of the few countries to have a service in place with a specialised staff that is able to administratively and scientifically manage UCH.[1316] For example, since 2007, DRASSM has been working on developing and testing appropriate methodologies to ensure the future expertise, documentation and study of deep sea wreck sites. In 2012, a campaign took place on the wreck la Lune. This vessel belonged to Louis XIV and sank in 1664. It was found in 1993 at a distance of 20 nm from the French coast in a remarkably good state at a depth of 90 meters. The campaign allowed DRASSM to develop and finalise research techniques appropriate for using at great depth.[1317] Another example in this regard is the wreck of Le Danton. This was a French battleship that sank in 1917 with the loss of many lives after being attacked by a German submarine. The wreck is located about 35 km southwest of the island of Sardinia. It was discovered in 2008 in a remarkably good state at a depth of over 1.000 metres. This wreck is the subject of a vast study project led by underwater archaeologists from DRASSM. During this project tens of thousands pictures were taken of the wreck using remote controlled robots that are capable of working at great depths. This allowed a very precise 3D model to be made of the wreck site. The objective of creating such a model was to allow the general public to take a complete virtual tour of the wreck. The 'Le Danton' project gave DRASSM the chance to develop new techniques and equipment suitable for working at great depths. The wreck site served as a so-called 'laboratory site'.[1318] As DRASSM has decennia of experience, its assistance is often sought abroad as well. When requested, DRASSM will aid in archaeological operations in fresh water and assure the scientific and technical control over these operations.[1319]

Another interesting aspect to note about the French legislation is its approach for dealing with human remains discovered in the marine area. Le Gurun pointed out that this practice is in line with the requirement set by the UNESCO Convention to award proper respect to human remains. The concept 'war grave' or 'memorial' does not exist in the French Heritage Code nor does any specific legislation addressing the issue of maritime graves. The French maritime prefect (préfet

[1316] Ministère de la Culture, *Archéologie - Historique du service*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Historique, (consulted 8 August 2018).

[1317] These techniques are based on 3D modelling of the wreck by studying it through augmented reality and the development of new robotics which meet the methodological requirements of archaeology. Ministère de la culture, *Archéologie - Etudes et recherche*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux/Etudes-recherche (consulted 8 August 2018).

[1318] M. DEGEZ, "Ils ont exploré l'épave du Danton, par 1020 m de fond", *La Provence*, 23 April 2017, www.laprovence.com/article/mer/4417820/ils-ont-explore-lepave-du-danton-par-1-020-m-de-fond.html; Cols Blues Marine Nationale, *Plongée sur le Danton*, 5 May 2017, www.colsbleus.fr/articles/9573.

[1319] Ministère de la Culture, Archéologie - *Archéologie sous les eaux*, www.culturecommunication.gouv.fr/Thematiques/Archeologie/Archeologie-sous-les-eaux (consulted 8 August 2018).

maritime) can issue orders restricting or prohibiting access to certain shipwrecks that have been recognised as MCAs by DRASSM, which can include maritime gravesites.[1320] Such an order was issued for example for the German submarine U-171, which sank with the loss of 22 lives and is located in the French territorial sea. This order established an area around the wreck in which diving activities are prohibited.[1321] Recently, however, the French legislator felt that the policy surrounding the management of human remains should be codified. In preparing the 2016 Act, one of the objectives was to define a procedure for conserving and studying human remains that were discovered during archaeological operations or through an incidental discovery, as well as the modalities for the return or re-burial of such remains. It is felt that human remains must be treated with respect and dignity, which entails that when possible the descendants of the deceased should be tracked down and their agreement should be obtained when carrying out scientific studies on the remains. When appropriate, these remains should be returned to their families. This approach will mostly be applicable to the remains of persons that died relatively recently, such as the victims from the World Wars. When no descendants can be identified, human remains should be reburied when there is no intention to conserve them in a sustainable manner with a view to conduct scientific research on them. While these principles are already applied in France when dealing with human remains, they are more of an implicit deontological set of rules than a clear normative framework. The objective of including these principles in the 2016 Act was to create a legal framework for the treatment of human remains. The legislator wanted to reaffirm that these remains cannot be appropriated, wanted to specify which authority is competent for these remains while they are being studied and the modalities for their conservation during this period. Finally, the legislator wished to recall the rights of descendants in terms of restitution of the remains and their reburial.[1322] The draft 2016 Act, which was approved by the National Assembly, provided that book V of the Heritage Code must "*définir la procédure de remise à l'autorité administrative, de conservation et d'étude sous sa garde des restes humains mis au jour au cours d'une opération archéologique ou d'une découverte fortuite et les modalités selon lesquelles ceux-ci peuvent faire l'objet de restitution ou de réinhumation*"[1323] This provision was, however, deleted from the draft 2016 Act following an amendment made by the commission for

[1320] The préfet maritime is the representative of the French State at sea in charge of maritime safety functions. This function is entrusted to a naval officer. For the North Sea, at the moment this is Pascal Ausseur. Préfet Maritime de la Manche et de la Mer du Nord, *Organigramme*, https://www.premar-manche.gouv.fr/organigramme.html (consulted 12 April 2018).

[1321] This was Arrêté préfectoral No. 59/99 of 4 August 1999. LE GURUN 2006, 68.

[1322] Impact assessment 2016, 131.

[1323] Projet de loi No. 591 relative à la liberté de la creation, à l'architecture et au patrimoine adopté par l'assembléé nationale en premiere lecture, Assemblée Nationale, session ordinaire de 2015-2016, 6 octobre 2015, article 30, 4°, b.

culture, education and communication in the Senate.[1324] This is a shame as including provisions on this could have assisted in clarifying which rules and principles should be respected when dealing with human remains and elaborate the notion 'proper respect' as can be found in the UNESCO Convention.[1325]

While the French Heritage Code is already to a large extent in conformity with the UNESCO Convention, a number of points still need to be addressed. One of the main innovations that needs to be introduced is the application of the Heritage Code to heritage located outside the French territorial sea and contiguous zone. The extension of the Heritage Code to the French EEZ or continental shelf was foreseen in the 2016 Act and might thus be implemented in practice in the near future. Further alterations will, however, need to be introduced to ensure that French nationals and flagged vessels report the discovery of UCH or activities directed at UCH in the Area or in the EEZ and on the continental shelf of a third State. In short, France needs to implement the UNESCO cooperation system with all its modalities for heritage located outside the territorial jurisdiction of States. Other provisions that might still need to be implemented in the Heritage Code include provisions supporting the battle against the illicit import, possession of and dealing in UCH (article 14 UNESCO Convention), the prohibition to use the French territory in support of activities directed at UCH that are conducted not in conformity with the UNESCO Convention (article 15) and provisions to ensure that French nationals and flagged vessels do not engage in activities directed at UCH in a manner that is not in conformity with the UNESCO Convention (article 16).

## 3. The Netherlands

### 3.1. Introduction

The Netherlands has a strong history of maritime trade. Evidence of this are the many ships that sailed under the former East India Company (VOC). The fact that the Netherlands was and still remains an important maritime power has resulted in a large number of Dutch shipwrecks being scattered across oceans worldwide. These are the wrecks of both commercial as well as State vessels. Additionally, other types of heritage have been discovered in the Dutch sea including the skull of a woolly mammoth in 2005.[1326] It is thus clear that the Netherlands has a strong interest in preserving UCH both in its own marine areas as well as beyond that.

[1324] For more on the reason for this amendment see Projet de loi – liberté de creation, architecture et patrimoine (1ère lecture), Amendement présenté par Mme Férat (rapporteur), N°COM-297, 21 janvier 2016, article 30, www.senat.fr/amendements/commissions/2015-2016/15/Amdt_COM-297.html.
[1325] Consult chapter two for more on the topic of the protection of human remains.
[1326] T. MISSIAEN and M. PIETERS, *Prehistorische bewoning in de Noordzee*, www.sea-arch.be/sites/sea-arch.be/files/public/docs/Publicaties/poster_Missiaen_Pieters.pdf.

Traditionally, finds that were incidentally recovered in the Dutch sea through dredging activities were placed on the antiquities market. These discoveries often led to commercial salvage operations to take place in the area were the find was discovered. This practice only increased in the 60's and 70's when equipment for scuba-diving became more affordable.[1327] All through the nineteenth and a large part of the twentieth century, heritage management and archaeology were not considered as a priority by the Dutch legislator. Over the years, however, the protection of monuments began to become a concern of the legislator. At this point the realisation also grew that a large part of the archaeological heritage is buried in the ground and can only become visible through excavations.[1328] In 1918 the National Bureau for Monument Care (Rijksbureau voor de Monumentenzorg) was established, which in 1947 became the National Institute for Monument Care (Rijksdienst voor Monumentenzorg). Part of this National Institute, namely the department for archaeology later split off and became a separate institute: the National Institute for Archaeological Soil Research (Rijksdienst voor het Oudheidkundig Bodemonderzoek).[1329] This formed the central point for carrying out excavations and documenting Dutch archaeological heritage.[1330] In 2006, the National Institute for Monument Care and the National Institute for Archaeological Soil Research once again merged into one institute, namely the National Institute for Archaeology, Cultural Landscapes and Monuments (Rijksdienst voor Archeologie, Cultuurlandschap en Monumenten). The name of this Institute was later altered into the National Institute for Cultural Heritage (Rijksdienst voor het Cultureel Erfgoed) (NICH).[1331] In 2011, the Netherlands Institute for Collection (Instituut Collectie Nederland) fused with the NICH, resulting in the latter to become a comprehensive institute responsible for implementing the national policy for archaeology, monuments, historical landscapes and movable heritage.[1332]

[1327] T.J. MAARLEVELD, "The Netherlands" in S. DROMGOOLE (ed.), *The Protection of the Underwater Cultural Heritage – National Perspectives in Light of the UNESCO Convention 2001*, Leiden, Martinus Nijhoff Publishers, 2006, (161) 163. (MAARLEVELD 2006)

[1328] MAARLEVELD 2006, 166.

[1329] In 1995 the Dutch Institute for ship- and underwater archaeology was incorporated in the National Institute for Archaeological Soil Research. Overheidscijfers.nl, *De Rijksdienst voor het Cultureel Erfgoed in een notendop*, www.overheidscijfers.nl/rce-detail (consulted 9 August 2018).

[1330] W.J.H. WILLEMS, "Archaeological Heritage Management in the Netherlands: Past, Present and Future" in W.J.H. WILLEMS, H. KARS and D.P. HALLEWAS (eds.), *Archaeological Heritage Management in the Netherlands, Fifty Years State Service for Archaeological Investigations*, Assen, Van Gorcum, 1997, 6.

[1331] Overheidscijfers.nl, *De Rijksdienst voor het Cultureel Erfgoed in een notendop*, www.overheidscijfers.nl/rce-detail (consulted 9 August 2018).

[1332] The Netherlands Institute for Collection was responsible for managing a collection of movable cultural heritage. Europa nu, *Instituut Collectie Nederland (ICN)*, www.europa-nu.nl/id/vi3ag6n5hnil/instituut_collectie_nederland_icn (consulted 7 August 2018).

As for the legal protection of cultural heritage, it was only in 1961 that the first comprehensive national act dealing with the management of monuments was adopted.[1333] This 1961 Monument Act mainly focussed on the protection of land-based monuments. However, as UCH was not explicitly excluded from its scope of application, a number of its provisions did offer some basic protection for UCH as well. In 1988 the 1961 Monument Act was replaced by a new Act, the 1988 Monument Act.[1334] Under this Act, for the first time, provisions were included regulating the management and protection of cultural heritage located outside municipal territory, which includes heritage located on the seabed. In 2007, the Netherlands ratified the Valletta Convention, which it had signed in 1992.[1335] In order to implement the provisions of this Convention, the Netherlands had in fact already one year before their official ratification adopted the 2006 Archaeological Monument Care Act (AMCA) amending the 1988 Monument Act.[1336] One of the most important amendments that was introduced by the AMCA was that the 1988 Monuments Act henceforth applied to excavations and finds in the contiguous zone as well.[1337] This was a considerable step forward in the protection of UCH. In 2011, an evaluation was conducted on the AMCA. This evaluation concluded that the position of maritime archaeology within the 1988 Monument Act was in need of further clarification.[1338] This led the NICH to conduct additional research in the fall of 2011 in order to identify some of the issues that existed concerning maritime archaeology. The main findings from this research were firstly that the persons and authorities responsible for heritage protection do not always feel responsible for maritime archaeology and secondly that there was a lack of knowledge and information in order to take the interests of this type of heritage into account.[1339]

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[1333] Wet van 22 juni 1961 (Monumentenwet), *Stb*. 1961, 200. (Monuments Act 1961)

[1334] MAARLEVELD 2006, 168. Wet van 23 december 1988 tot vervanging van de Monumentenwet (Monumentenwet 1988), *Stb*. 1988, 639. (Monuments Act 1988)

[1335] The Netherlands ratified the Valletta Convention on 11 June 2007. The Convention entered into force on 12 December 2007 for the Netherlands. Council of Europe, *Chart of signatures and ratifications of Treaty 143, European Convention on the protection of the Archaeological Heritage (Revised)*, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/143/signatures?p_auth=dg2WfyCT (last update 10 August 2018).

[1336] Wet van 21 december 2006 tot wijziging van de Monumentenwet 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Valletta (Wet op de archeologische monumentenzorg), *Stb*. 6 februari 2007, 42. (AMCA 2006)

[1337] Article 2(E) 47a and 2(E) 54a AMCA 2006.

[1338] G. KEERS, H. VAN DER REIJDEN and H. VAN ROSSUM, *Ruimte voor archeologie themaveldrapportages evaluatie WAMZ*, July 2011, report number P18090 available at *https://zoek.officielebekendmakingen.nl/blg-153018.pdf,* 2*;* H. VAN DER REIJDEN, G. KEERS and H. VAN ROSSUM, *Ruimte voor archeologie – Synthese van de themaveldrapportages*, July 2011, report number P18090, available at https://cultureelerfgoed.nl/sites/default/files/downloads/dossiers/rapport-ruimte-voor-archeologie-synthese-van-de-themaveldrapportages.pdf , 15-16.

[1339] H.ZIJLSTRA (State Secretary for Education, Culture and Science), *Beleidsreactie evaluatie archeologiewetgeving*, 7 February 2012, available at https://cultureelerfgoed.nl/sites/default/files/downloads/dossiers/kamerbrief-met-beleidsreactie-op-evaluatie-archeologiewetgeving.pdf, 8. The NICH addressed these issues through, *inter alia*, the maritime programme which ran from 2012-2015. One of the objectives of this programme was to clarify the

Recently, the Dutch legislation dealing with cultural heritage protection was fundamentally reformed. Two new acts were created namely the 2015 Heritage Act and the 2016 Environment Act.[1340] Together these Acts provide an integral framework for the protection of cultural heritage. The 2015 Heritage Act deals with a wide diversity of heritage related topics including museum objects, museums, monuments and archaeology both on land and underwater. It replaces six acts and regulations, including the 1988 Monument Act.[1341] The Heritage Act lays down the rules on how heritage should be treated, which are the responsible authorities and how compliance with its provisions should be controlled. It entered into force on 1 July 2016.[1342] The Heritage Act is largely based on the Valletta Convention and encompasses a number of its principles such as the preference for *in situ* preservation and the disturber-pays principle.[1343] The provisions of the Heritage Act are discussed below in this section.[1344]

The 2016 Environment Act combines 26 existing pieces of legislation in the field of building regulations, environment, water, spatial planning and nature protection into one act.[1345] This act will enter into force in 2021.[1346] Up till that moment, the relevant provisions from the Monuments Act 1988 continue to apply.[1347] For the protection of cultural heritage, as a general rule, it can be stated that the Heritage Act deals with the definition of heritage and the care for cultural goods in the possession of the government while the Environment Act addresses cultural heritage in

legislation and policy relating to the protection of UCH. For more on this programme see https://cultureelerfgoed.nl/dossiers/maritieme-archeologie/maritiem-programma.

[1340] Wet van 9 december 2015 houdende bundeling en aanpassing van regels op het terrein van cultureel erfgoed (Erfgoedwet), *Stb*. 18 december 2015, 511 (Heritage Act 2015); Wet van 23 maart 2016 houdende regels over het beschermen en benutten van de fysieke leefomgeving (Omgevingswet), *Stb*. 2016, 156 (Environment Act 2016).

[1341] Other acts that are replaced by the Heritage Act are the Wet verzelfstandiging rijksmuseale diensten, Wet tot behoud van cultuurbezit, Wet tot teruggave cultuurgoederen uit bezet gebied, Uitvoeringswet UNESCO-verdrag 1970 inzake onrechtmatige invoer, uitvoer of eigendomsoverdracht van cultuurgoederen en regeling materieel beheer museale voorwerpen. NICH, *Bundeling van 6 wetten en regelingen*, https://cultureelerfgoed.nl/dossiers/erfgoedwet/bundeling-van-6-wetten-en-regelingen (consulted 15 January 2018).

[1342] NICH, *Nieuwe wet voor het cultureel erfgoed*, https://cultureelerfgoed.nl/dossiers/erfgoedwet (consulted 15 January 2018).

[1343] G. KOZIJN and A. KLOMP, "Maritiem Erfgoed in de nieuwe Erfgoedwet", *eMagazine Maritiem Programma* – Special Edition: Vrijwilligers in de onderwater archeologie 2015 available at http://nl.magazine.maritiemprogramma.nl/emagazine-mp05-nl/#!/maritiem-erfgoed-in-de-nieuwe-erfgoedwet, 7-8.

[1344] See *infra* section 3.2. and following.

[1345] The Environment Act 2016 reduces the number of ministerial regulations (ministeriële regelingen) from 120 to 10 and reduces the multiple destination plans to one environment plan. National Government, *Nieuwe omgevingswet maakt omgevingsrecht eenvoudiger*, www.rijksoverheid.nl/onderwerpen/omgevingswet/vernieuwing-omgevingsrecht (consulted 10 January 2018).

[1346] National government, *Nieuwe omgevingswet maakt omgevingsrecht eenvoudiger*, www.rijksoverheid.nl/onderwerpen/omgevingswet/vernieuwing-omgevingsrecht (consulted 10 January 2018).

[1347] NICH, *Cultureel erfgoed in de Omgevingswet*, https://cultureelerfgoed.nl/dossiers/omgevingswet/cultureel-erfgoed-in-de-omgevingswet (consulted 15 January 2018).

relation to the physical living environment.[1348] The Environment Act applies on land as well as in the marine area up to the 200 nm limit of the EEZ. While this Act does address certain aspects of UCH protection, it mainly focusses on the protection of land-based heritage. For this reason, this Act will not be discussed separately under this section. However, occasional reference will be made to it when this is deemed useful.

## 3.2. Scope of application of the 2015 Heritage Act

### 3.2.1. Material scope

The 2015 Heritage Act distinguishes between cultural heritage in general and monuments and cultural objects more specifically. Cultural heritage is defined as

> "*tangible and intangible resources inherited from the past, created in the course of time by people or arising from the interaction between man and the environment that people, irrespective of the ownership thereof, identify as a reflection and expression of continuously evolving values, beliefs, knowledge and traditions, and that offer a frame of reference to them and to future generations*".[1349]

This is a very broad definition as it contains both tangible and intangible resources. This entails that aside from movable and immovable heritage, the notion 'cultural heritage' also includes immaterial heritage, digital heritage or even geological and biological specimens.[1350] In order for any type of resource to be considered as cultural heritage it must have been either created by men, which can include a wide variety of assets including wrecks, buildings and other man-made artefacts; or it must have arisen from the interaction between men and the environment, which can include for example bone fragments, landscapes or any other trace of human existence that was not man-made. Finally, in order to qualify as cultural heritage, these resources must reflect

[1348] NICH, *Cultureel erfgoed in de Omgevingswet*, https://cultureelerfgoed.nl/dossiers/omgevingswet/cultureel-erfgoed-in-de-omgevingswet (consulted 15 January 2018). As a general rule, the Environment Act provides that everybody must take care of the physical living environment, of which cultural heritage is a part. When a person knows or can reasonably suspect that his activity will have negative effects on the physical living environment, he must take all measures that can reasonably be expected to prevent these effects. When they cannot be avoided, the effects should be limited or later undone. When they cannot be limited the activity cannot be conducted insofar as this can reasonably be requested. Article 1.2.2.i., 1.6 and 1.7 Environment Act 2016.

[1349] Article 1.1. Heritage Act 2015 (translation made by NICH, available at https://cultureelerfgoed.nl/publicaties/heritage-act-2016).

[1350] Bundeling en aanpassing van regels op het terrein van cultureel erfgoed (Erfgoedwet), Tweede Kamer der Staten-Generaal, Vergaderjaar 2014–2015, 34 109, nr. 3 Memorie van Toelichting, https://zoek.officielebekendmakingen.nl/kst-34109-3.html, 60. (Heritage Act 2015 Explanatory Note)

and express an aspect of human evolution and offer a frame of reference. This criterion is very broad as it can potentially encompass practically everything that has any link with past human life.

The legislator opted to introduce the term cultural heritage in the Heritage Act as an overarching concept that serves a function both in terms of defining the scope of the Act as well as forming a basis for other concepts relating to specific parts of cultural heritage. By including this general concept the legislator aimed to introduce unity and cohesion in the Heritage Act.[1351]

The Heritage Act mentions two specific categories of cultural heritage. The first are monuments. These are all immovable properties that are considered to be part of cultural heritage following the definition set out above.[1352] When a monument has been listed in the register of listed national monuments, the Heritage Act will refer to it as a national monument.[1353] The second category of cultural heritage specified in the Act are cultural objects which constitute the movable part of cultural heritage. These cultural objects can be designated as protected cultural objects and treated accordingly in accordance with the Heritage Act.[1354]

A separate specific category of cultural heritage included in the Heritage Act is that of the archaeological monuments. An archaeological monument is defined as "*a site that forms part of cultural heritage due to the remains, objects, or other traces present there of human presence in the past, including said remains, objects, and traces*."[1355] While the term 'monument' in the Heritage Act is only used to address immovable heritage, the movable objects, traces and remains present on site are considered to be part of the archaeological monument as well. For shipwrecks, for example, the archaeological monument will not merely consist of the site where the wreck is located, but will contain the remains of the wreck and its cargo as well.

Another specific type of heritage that was introduced in the Heritage Act is the so-called archaeological find. This term encompasses all remains, objects and other traces of human presence in the past that originate from an archaeological monument.[1356] In the 1988 Monument Act there was no need for this notion as excavated or discovered parts originating from an archaeological monument were described as movable monuments. This, however, does not

[1351] Heritage Act 2015, Explanatory Note 60.
[1352] In the 1988 monument Act no mention was made of the concept of cultural heritage in general. Rather this Act merely dealt with monuments. Unlike in the Heritage Act, however, the term monuments in the Monument Act 1988 encompassed both movable and immovable objects. Article 1 b. Monuments Act 1988.
[1353] See *infra* section 3.4.2. for more on national monuments.
[1354] See *infra* section 3.4.3. for more on protected cultural objects.
[1355] Article 1.1. Heritage Act 2015 (translation made by NICH, available at https://cultureelerfgoed.nl/publicaties/heritage-act-2016).
[1356] Article 1.1. Heritage Act 2015.

comply with the new approach of the Heritage Act where the notion 'monument' can only refer to immovable heritage.[1357]

In both the 1961 Monument Act and the 1988 Monument Act, a time-criterion was included. Only objects that had been created over 50 years ago could be considered as monuments. This time-criterion was abolished by an amendment made to the 1988 Monument Act in 2012.[1358] While, prior to the abolishment of this time-criterion, divers were allowed to conduct operations directed at younger wrecks or sites, this is no longer the case. The broad definition of 'cultural heritage' combined with the lack of a time-criterion ensures a very broad application of the Heritage Act.[1359]

### 3.2.2. Territorial scope

The 1961 Monument Act did not specify its territorial scope of application. Based on its provisions, however, in which the responsibility for dealing with monuments was given to the municipality in whose territory the object was discovered, it could be assumed that this Act was mainly created to deal with heritage located within municipal grounds. This does not entail that the Act did not apply to monuments located in the territorial sea. It, however, did leave some uncertainty as to the practical application of these provisions without the municipalities as competent authorities.[1360] In the 1988 Monument Act, the protection of heritage located outside municipal territory was taken into account explicitly as several provisions addressed this type of monuments.[1361] At the time of its adoption, the Act only applied to monuments located in the Dutch territorial sea. Monuments located in the contiguous zone, let alone beyond this zone, were

[1357] Heritage Act 2015, Explanatory Note 59.

[1358] Wet van 6 juni 2011 tot wijziging van de Monumentenwet 1988 en de Wet algemene bepalingen omgevingsrecht in verband met de modernisering van de monumentenzorg, *Stb.* 30 June 2011, 330, article 1(A). (Amendment Act 2011)

[1359] The abolition of the time-criterion was cause for some protest to arise from divers as they felt that their freedom to visit wreck sites was limited because of this. The diving community clearly expressed its concerns on this matter during the discussions in the Symposium 'Volunteers in underwater archaeology' of 18 November 2016 at Amersfoort. See *infra* section 3.7.1.

[1360] The 1961 Monument Act did not explicitly exclude its application outside municipal territory. As diving activities were not yet so common back in the beginning of the sixties, the legislator did not sufficiently take into account objects located on the seabed outside of municipal territory. It appears, however, that it was not the intention of the legislator to exclude these objects from the protective regime. According to Maarleveld three aspects of the 1961 Monument Act were of importance for the preservation of underwater monuments: the reporting duty, the prohibition to excavate without prior authorisation and the protection offered by placing the monument on a list. T.J. MAARLEVELD, *Monumentenwet en Archaeologie onder water*, Rijswijk, January 1983, www.academia.edu/928364/Monumentenwet_en_Archeologie_onder_Water, 14-18. In 1985 the Minister of Culture declared that he would henceforth interpret the 1961 Monuments Act in such a way that its obligations apply independently of any municipal structure and that a Department for Underwater Archaeology would be established to address reports of UCH sites. MAARLEVELD 2006, 169.

[1361] For example article 7 and 13 of the 1988 Monument Act refer to monuments located outside municipal territory for which the Minister of Culture is then competent.

not yet considered. This changed, with the amendment of the 1988 Monument Act in 2006 with the AMCA. The AMCA introduced two articles in the Monument Act 1988 in which it was provided that a number of provisions of the Monument Act were henceforth applicable in the contiguous zone as well, namely those dealing with excavation permits and the ones on incidental finds.[1362] In the 2015 Heritage Act, a general provision has been included providing that the whole of chapter five applies in the contiguous zone as well.[1363] This chapter deals with the preservation of archaeological monuments and will be further assessed.

It should be noted that the Dutch municipalities have certain competences up to 1 km in the North Sea.[1364] Heritage discovered in this area falls within the rules for heritage located within municipal territories.[1365] The protection offered for heritage located within municipal areas and in the North Sea beyond the 1 km zone does not differ in essence. The question of whether heritage is located within the municipal boundaries is mainly relevant for two reasons. The first relates to ownership rights over archaeological finds and the duty to preserve archaeological remains in a depot. For heritage discovered within municipal boundaries, it is the province, or under certain circumstances the municipality, that becomes the owner of the find and must maintain a depot for its preservation. For heritage discovered beyond the 1 km zone at sea this responsibility lies with the national government. The second reason why the location of the find is relevant relates to the procedure for designating archaeological national monuments and granting authorisation for activities directed at them. As these are all merely procedural aspects rather than an actual difference in the level of protection offered to heritage no further distinction will be made in this regard.

[1362] Article 47a and 54a AMCA.
[1363] Article 1.2. Heritage Act 2015.
[1364] In theory all municipalities have certain competences in a zone of 1 kilometre in the sea area. When the boundaries of the municipalities were determined, however, this distance of 1 km was not always respected in a strict sense, resulting in certain municipalities to have competences up till for example 2 km in the sea region. Conversation with Janneke Bos and Andrea Klomp.
[1365] Wet van 2 november 1990, houdende regeling provincie-en gemeentegrenzen langs de Noordzeekust van de gemeente Den Helder tot en met de gemeente Sluis en wijziging van de Financiële-Verhoudingswet 1984, *Stb*. 1990, 553; Wet van 8 december 1980 tot provinciale indeling van de Waddenzee, *Stb*. 1980, 670 and Wet van 12 december 1985 tot gemeentelijke indeling van de Waddenzee, *Stb*. 1985, 648. A.G. OUDE ELFERINK, *Beleid en Regelgeving Informatiesysteem Noordzee (BREIN)*, Report for Rijkswaterstaat, Zee en Delta, 11 november 2014, http://docplayer.nl/15586431-Netherlands-institute-for-the-law-of-the-sea-nilos-dr-a-g-oude-elferink.html, 8. The coastal municipalities can establish zoning plans and management regulations dealing with archaeology applicable up till 1 kilometer in the North Sea and Waddensea. Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Beoordelingsrichtlijn Archeologie BRL SIKB 4000 version 4.0*, 7 June 2016 available at www.sikb.nl/archeologie/richtlijnen/brl-4000, 11. (Assesment Guideline SIKB 4000)

The 2015 Heritage Act does not apply to the Dutch EEZ or continental shelf, nor does it contain any provisions having extraterritorial application beyond these zones.[1366] In several sectoral pieces of legislation dealing with economic activities at sea reference is made to the protection of archaeological heritage during these activities. These legislative pieces include for example the act for wind energy at sea and the soil extraction act.[1367] Likewise, in the new water decree which implements the EU Framework Directive Marine Spatial Planning account must be taken of cultural heritage in maritime spatial plans for the Dutch EEZ.[1368] Nevertheless, no comprehensive set of rules dealing with UCH located beyond the Dutch contiguous zone can be found anywhere.

### 3.3. Duty to report

The Dutch Heritage Act provides that anyone who discovers a find other than during excavations, of which he knows or should reasonably suspect that it is an archaeological find, should report this to the competent Minister as soon as possible.[1369] The definition of 'an excavation' has been altered over the years in order to address the specific issues relating to UCH. In the 1988 Monument Act an 'excavation' was defined as conducting activities with the objective to detect or investigate monuments resulting in disturbance of the seabed.[1370] When the activity did not disturb the seabed, it did not qualify as an excavation. Under the 1988 Monument Act a permit only needed to be obtained for excavations. Activities that did not disturb the seabed could be carried out freely. This restrictive definition of the notion 'excavation' proved to be problematic for UCH. One of the main issues was the burden of prove, which prevented the enforcement of the prohibition to excavate without a permit. Once an object has been excavated, it is very difficult to prove that this was done while disturbing the seabed. Furthermore, contrary to those on land, maritime archaeological monuments are often located on the seabed rather than in the subsoil. Removal of such heritage can thus occur without any (noticeable) disturbance of the seafloor. These activities were thus not subjected to the duty to obtain a permit 1988 Monument Act. Additionally, for UCH, it is not always easy to determine when detection or investigation of

[1366] See *infra* section 3.8. on the Netherlands and the UNESCO Convention for more on the Dutch views relating to heritage in the EEZ and on the continental shelf.
[1367] Wet van 24 juni 2015 houdende regels omtrent windenergie op zee, *Stb.* 30 juni 2015, 261, article 4. Wet van 27 oktober 1965 houdende regelen omtrent de ontgrondingen, amended several times, available at http://wetten.overheid.nl/BWBR0002505/2016-07-01, article 3.
[1368] Besluit van 30 november 2009 houdende regels met betrekking tot het beheer en gebruik van watersystemen (Waterbesluit), *Stb.* 2009, 548 gewijzigd door Besluit van 19 februari 2016 tot wijziging van het Waterbesluit in verband met de implementatie van de kaderrichtlijn maritieme ruimtelijke planning, *Stb*. 2016, 99, article 4.5.a.
[1369] Article 5.10(1) Heritage Act 2015. The competent minister is the Minister of Education, Culture and Science. Article 1.1. Heritage Act 2015.
[1370] Article 1(h) Monuments Act 1988.

archaeological monuments take place. This type of heritage is often visible and can simply be taken without the need to actively search for it. [1371]

In response to these problems, the 2015 Heritage Act introduced a number of adjustments to the definition of the notion 'excavation'.[1372] Excavations now include carrying out "*actions involving the detection, investigation, or acquisition of cultural heritage, or parts thereof, which results in disturbance of the soil or disruption or total or partial displacement or removal of an archaeological monument or of underwater cultural heritage.*"[1373] The Heritage Act thus no longer requires that the seabed is disturbed. The mere fact that heritage was moved or removed is sufficient to qualify an act as an excavation and for the activity to be subjected to the duty to obtain authorisation as prescribed by the Act.

As was said, the Heritage Act provides for a reporting duty for finds discovered outside the context of an excavation as defined above. The Act does not prescribe a clear time-limit for fulfilling this reporting duty, but requires that this is done as soon as possible. In other words, the person that discovers the UCH, must make it his priority to report the find.[1374]

A second type of reporting duty is included in the Heritage Act. Anyone who, without conducting an excavation, makes observations on archaeological monuments of which he knows or should reasonably suspect that these are of importance for the archaeological monument care, shall report these observations as soon as possible to the Minister of Education, Culture and Science.[1375] Such observations can include that heritage sites are being looted or that they are under a threat of being damaged or lost. This reporting obligation can considerably help with the protection of UCH as divers and other sea users need to assist in keeping an eye on heritage sites. Originally, this reporting duty was introduced in the 2006 AMCA.[1376]

### 3.4. Legal protection of heritage sites

#### 3.4.1. Blanket protection

In the Dutch policy for heritage protection, as a general rule, heritage sites should be preserved *in situ*. When *in situ* preservation is not possible, or when for another reason, for example for

[1371] Heritage Act 2015, Explanatory Note 34.
[1372] Heritage Act 2015, Explanatory Note 34.
[1373] Article 5.1.(1) Heritage Act 2015 (translation made by NICH, available at https://cultureelerfgoed.nl/publicaties/heritage-act-2016).
[1374] Article 5.10(.1) Heritage Act 2015.
[1375] Article 5.11. Heritage Act 2015.
[1376] Article 2(E) 54 AMCA 2006.

scientific research, the decision is made that a site must be excavated, this must be done under strict conditions after obtaining authorisation.[1377] The Heritage Act provides for a so-called blanket protection of archaeological monuments and finds. This blanket protection is based on two cornerstones. The first is that any incidental recovery needs to be reported to the competent Minister. The second cornerstone is the general prohibition to excavate UCH without a certificate as will be further elaborated below.[1378] These two cornerstones ensure that heritage is left *in situ* upon discovery and is not damaged or disturbed. Additionally, as cultural heritage is defined broadly in the Heritage Act and no age criterion can be found, this protection will apply very widely ensuring that all objects that can (potentially) qualify as UCH are protected. Furthermore, the prohibition to excavate without a certificate ensures that the law of salvage and finds in their original form do not apply, which is in conformity with the UNESCO Convention.

### 3.4.2. National monuments

Asides from the general blanket protection that is provided for UCH in the Heritage Act, it can also be protected as a so-called 'national monument' or 'protected cultural object'. An (archaeological) monument can be designated by the Minister as a national monument when it is of public importance due to its beauty or for its scientific, cultural or historical value.[1379] All national monuments are recorded in a publicly accessible register of listed national monuments.[1380] At the beginning of 2018, this register contained about 63.000 national monuments, the majority of which are residential houses. The register is managed by the NICH.[1381] Authorisation is required for, *inter alia*, demolishing, disturbing, relocating and altering a national monument.[1382] Currently, only one monument located in the North Sea has been designated as a national monument, namely Aanloop Molengat.[1383] This wreck site is located 4 kilometres west of Texel in the ground

[1377] Maritiem Erfgoed, *Beleid, Wetgeving, Handhaving*, https://maritiem-erfgoed.nl/beleid-wetgeving-handhaving (consulted 9 January 2018).
[1378] Article 5.1. Heritage Act 2015. See *infra* section 3.5.
[1379] Article 3.1.1. Heritage Act 2015.
[1380] Article 3.3. Heritage Act 2015.
[1381] The register of listed national monuments can be found on the following sites: http://rijksmonumenten.nl; https://monumentenregister.cultureelerfgoed.nl and www.monumenten.nl. The NSCH also manages a database named ARCHIS 2.0/ ARCHIS 3.0 which has the objective to register and manage objects with a cultural-historical value. Other Dutch databases containing information on UCH include the National Contact Number (Nationaal contactnummer) database, the hydrographic database, the SonarReg92 contact database and the Machu database. It would be beneficial to bring all of these databases together into one central database. S. VAN DEN BRENK and J. OPDEBEECK, Powerpoint 'Gegevensdatabases en maritieme archeologie', Rijksdag 14 December 2016.
[1382] Article 2.1.(1)(f) Wet algemene bepalingen omgevingsrecht, *Stb.* 2008, 496 requires a permit for, *inter alia*, the demolition, disturbance, relocation or alteration of a national monument. The provisions of this Act will be incorporated in the Environment Act 2016.
[1383] In the Maritime Program that ran from 2012-2016, this lack of nationally listed buildings under water was recognised and the idea was put forward to protect 50-100 places that serve as stepping stones to tell the story of the Dutch maritime past. The NICH is looking into this possibility.

running up to the fairway 'Molengat', which explains the somewhat peculiar name that was given to the wreck.[1384] The wreck was designated as a national monument on 14 December 2016 because of its particular cargo, which includes lead, tin, wrought iron, cow hides, pepper and a number of elephant tusks, and because of the good state that it was in.[1385] As this monument is located in the North Sea, Rijkswaterstaat is the managing authority.[1386] In 2021, after the Environment Act will enter into force, Rijkswaterstaat shall be the authority granting all authorisations for activities directed at national monuments in the North Sea. The wreck of 'Aanloop Molengat' is monitored by both the NICH and Rijkswaterstaat. Additionally, the Heritage Inspection (Erfgoedinspectie)[1387] and Dutch coastguard keep an eye on the wreck to protect it and, when necessary, to act against illegal activities directed at it. Finally, The Hydrography Services (Dienst der Hydrografie) marked the location of the wreck as a historic wreck site on sea charts.[1388]

The procedure for designating national monuments is a long one.[1389] Several steps need to be taken before a shipwreck can become a national monument. These steps include a study of all known information on the wreck (archives), conducting research at the water surface (multibeam, sonar, camera) and conducting research at the submerged site by divers or maritime archaeologists. Only a limited number of wrecks have been investigated this extensively, which makes that the number of shipwrecks that can be designated as a national monument is rather low. Potential candidates include the wreck of the Sophia Albertina, the Roompot wreck and the wreck Ritthem.[1390]

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[1384] NICH, *Eerste rijksmonument in de Noordzee een feit*, 14 December 2016, https://cultureelerfgoed.nl/nieuws/eerste-rijksmonument-in-de-noordzee-een-feit.

[1385] The wreck was discovered in 1984 by a fisherman who reported it to the NICH. The wreck has provided a great deal of knowledge on 17th century shipbuilding. The research conducted on this site was the first example of archaeological research conducted under water. Shortly after this discovery, the 1961 Monuments Act was amended to explicitly include monuments that are located outside municipal territory. NSCH, *Eerste rijksmonument in de Noordzee een feit*, 14 December 2016, https://cultureelerfgoed.nl/nieuws/eerste-rijksmonument-in-de-noordzee-een-feit.

[1386] This is an executive organisation of the Ministry of Infrastructure and Environment. Its mission is to manage and develop national roads, waterways and waters. This organisation has responsibilities in the field of heritage protection. Rijkswaterstaat, for example, concluded an agreement with NICH on archaeological research and discoveries while conducting works on roads or under water. For more information on Rijkswaterstaat see www.rijkswaterstaat.nl/

[1387] The Heritage Inspection (Erfgoedinspectie) resides under the Ministry of Education, Culture and Science. For more information on this Inspection see www.erfgoedinspectie.nl/.

[1388] NSCH, *Eerste rijksmonument in de Noordzee een feit*, 14 December 2016, https://cultureelerfgoed.nl/nieuws/eerste-rijksmonument-in-de-noordzee-een-feit.

[1389] In the Heritage Act, the procedure for designating a national monument has been simplified, which shortens the period preceding designation. In the future, however, only a limited number of new national monuments will be designated. The focus will be on structurally improving the management of the existing monuments. NICH, *Vraag en antwoord – Aanwijzen van monumenten*, https://cultureelerfgoed.nl/vraag-en-antwoord (consulted 8 January 2018).

[1390] J. BOS, *Een Rijksmonument in je beheersgebied, Wat betekent dat?*, oral presentation in Amersfoort at meeting 14 December 2016.

A number of practical measures have been taken to protect the 'Aanloop Molengat' site. These include conducting regular surveys and monitoring the wreck, including the monument in databases, providing the general public with information on this wreck and indicating it on sea charts. This wreck site has in the past been partially excavated and the objects that were recovered are being conserved. Finally, specific rules have been established for activities taking place in the vicinity of the wreck and for granting authorisation for activities directed at this monument.[1391]

### 3.4.3. Protected cultural objects

While monuments can be designated as national monuments, movable goods can be designated as 'protected cultural objects'. As long as UCH is preserved *in situ*, it will be considered as a site and thus as an immovable monument. When objects are recovered from a site, however, these become movable and can be designated by the Minister as a protected cultural object. The conditions that must be fulfilled hereto is that the object is of special cultural-historical or scientific value or of exceptional beauty and should be considered as irreplaceable[1392] and indispensable[1393].[1394] Under certain conditions the consent of the owner of the cultural object is required for its designation.[1395] A publicly accessible register containing all protected cultural objects and collections is kept by the Minister.[1396] For protected cultural objects the protection does not commence at the moment of registration in the list, but at the moment that the decision to designate has been taken. This is different for national monuments, which are only protected from the moment of registration in the list. For this reason, the possibility of pre-protection exists for national monuments, which becomes final at the moment of registration.[1397] For protected

[1391] Other measures that can potentially be taken for the protection of national monuments include covering up the site, marking the site or prohibiting certain activities in the vicinity of monument. These measures were not deemed necessary for the protection of 'Aanloop Molengat'. J. BOS, *Een Rijksmonument in je beheersgebied, Wat betekent dat?*, oral presentation in Amersfoort at meeting 14 December 2016.
[1392] A cultural object is irreplaceable when there are no or practically no other or similar cultural objects in good condition present in the Netherlands. Article 3.7.4.a Heritage Act 2015.
[1393] A cultural object is indispensable when it has a symbolic function, a function of being a link or a benchmark function. Article 3.7.4.b Heritage Act 2015.
[1394] Article 3.7(1) Heritage Act 2015.
[1395] Article 3.9.1. Heritage Act 2015. This is the case when the owner is the creator of the good or his/her heir; or in case that he is the one that brought the good to the Netherlands or has acquired it within 5 years after the good was brought in the Netherlands or is the heir of the person that did. Article 3.9.3-4 Heritage Act 2015.
[1396] Article 3.11. Heritage Act 2015. This register can be consulted via http://data.collectienederland.nl/vc/wbc-2/. The register is a fairly static list. Only in cases of urgency, such as when there is a threat that an object would be exported abroad indefinitely, objects will qualify for inclusion in the register. The owner of the cultural object or the collection can object to the designation decision. The owner can go to Court to fight this decision. NICH, *Beschermde cultuurgoederen en verzamelingen*, http://data.collectienederland.nl/vc/wbc-2/ (consulted 8 August 2018).
[1397] This pre-protection will be regulated in the 2016 Environment Act.

cultural objects no system of pre-protection exists as the procedure for designation is much simpler and less time-consuming than for national monuments.[1398]

Persons that have a protected cultural object in their possession, must present it upon request to the competent inspector and must notify that inspector promptly if the object is lost or destroyed.[1399] Without giving prior written notice to the inspector, it is prohibited to, *inter alia*, relocate, offer for auction, dispose of or rent out a protected cultural object.[1400]

### 3.5. Certificates for excavations

#### 3.5.1. Reform of the permit system

In the 1988 Monument Act, the right to conduct excavations was legally reserved for a number of organisations that had obtained a permit.[1401] For the most part, it was the responsibility of the permit holders to promote and guard the quality of excavations. This system, which is largely based on self-regulation, never functioned properly. It was reformed in the 2015 Heritage Act and the idea of self-regulation within the archaeological sector was legally codified.[1402] In the Heritage Act the excavation permits formerly issued by the national government are replaced by a legally regulated system of certificates.[1403] The underlying idea was to make an appeal to the archaeological sector to help establish the professional standards for this certification system. It was felt that this system would allow better use to be made of the expertise of the archaeological sector and to adjust the quality standards to new developments and insights. This enlarges the sectorial support for these standards and ensures more control on compliance.[1404]

#### 3.5.2. Certification for excavations

As is determined in the 2015 Heritage Act, without a certificate no person may carry out excavations.[1405] These certificates are issued by the so-called certification institutions.[1406] These

[1398] Heritage Act 2015, Explanatory Note 75.
[1399] Article 4.3. Heritage Act 2015.
[1400] Article 4.4 Heritage Act 2015.
[1401] Article 11 Monuments Act 1988.
[1402] The advice from the Central College of Experts in Archaeology was sought on this new certificate system. The advice gives the impression that there is sufficient willingness in the sector to come to an effective system of certification. Heritage Act 2015, Explanatory Note 29-30.
[1403] Article 5.1.1. Heritage Act 2015.
[1404] Heritage Act 2015, Explanatory Note 30.
[1405] Article 1.1. and 5.1.1. Heritage Act 2015. A list of all certificate holders can be found via the following link: www.sikb.nl/archeologie/certificeren-en-registratie/certificaathouders.
[1406] Article 5.2. Heritage Act 2015. A list of all certification institutes can be found on the following website: www.sikb.nl/archeologie/certificeren-en-registratie/cerificatie-instellingen?term=toetsende%20instellingen&p=1.

certification institutions are appointed by the Minister for Culture, Education and Science.[1407] The Minister can only appoint institutions when they have been accredited by the Council for Accreditation (Stichting Raad voor Accreditatie).[1408] This accreditation indicates that for a certain period of time a legitimate expectation exists that the certification institute is competent to issue certificates and complies with the requirements regarding independence, impartiality and continuity.[1409]

### 3.5.3. Quality standards from the archaeological sector

A certificate will only be issued if the applicant can sufficiently demonstrate that the excavation, documentation, conservation and reporting will be done in a professional manner.[1410] As was explained, this legal quality standard of professionalism has been further elaborated by the archaeological sector. The Central College of Experts in Archaeology (Centraal College van Deskundigen Archeologie) (CCoEA)[1411] has further developed this quality standard in a certification scheme that comprises an assessment guideline[1412] and a set of quality standards.[1413] The assessment guideline contains the requirements based on which excavation certificates are issued.[1414] The quality standards for Dutch archaeology contain the minimal requirements with

[1407] Article 5.2.1. Heritage Act 2015. The requirements with which an institute must comply in order to be designated as a certification institute are set out in the following decision: Besluit van 8 april 2016, houdende regels voor archeologische opgravingen, *Stb*. 2016, 155, article 3.2. (Decision Heritage Act Archaeology). The certification institutes must report on their activities to the competent Minister. Article 3.7. Decision Heritage Act Archaeology 2016.

[1408] Article 5.2.2. Heritage Act 2015. For more on the Council for Accreditation see www.rva.nl/.

[1409] Article 5.2.2. Heritage Act 2015.

[1410] Article 5.3. and 5.4.1.1. Heritage Act 2015. The certificate holder has the obligation to document all the acts that were conducted during the excavations as well as all archaeological discoveries that were made. Furthermore, he must conserve all discoveries made during excavations and draft a report describing all the results of the operation. When the excavation or any of the activities linked to it are not done in a professional manner, the certification institute can suspend or withdraw the certificate. Article 5.4.1.1-3 Heritage Act 2015.

[1411] The CCoEA is responsible for the development and keeping up to date of the quality norms for the company life and the government relating to archaeology. It is part of the Foundation Infrastructure Quality Assurance Soil Management (Stichting Infrastructuur Kwaliteitsborging Bodembeheer). Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Centraal van Deskundigen Archeologie*, www.sikb.nl/archeologie/ccvd-archeologie (consulted 8 August 2018).

[1412] The applicable assessment guideline anno 2018 is Assesment Guideline SIKB 4000.

[1413] The Quality Standard for Dutch Archaeology (Kwaliteitsnorm Nederlandse Archeologie) (KNA) consists of a number of protocols that each describe part of the archaeological work. Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Wat is de KNA*, www.sikb.nl/archeologie/werkproces-archeologie/kna (consulted 8 August 2018). The most recent version is KNA 4.0. The protocols under KNA 4.0. can be found on www.sikb.nl/archeologie/richtlijnen/brl-4000.

[1414] Heritage Inspection, *Certificatieschema archeologie*, www.erfgoedinspectie.nl/toezichtvelden/archeologie/inhoud/wet--en-regelgeving/certificatieschema-archeologie (consulted 8 August 2018).

which an organisation must comply when conducting archaeological activities.[1415] These quality standards are made up of a number of protocols each describing part of the archaeological work. Different protocols have been created for different types of certificates. For example, the quality standards for conducting an excavation are likely to be more extensive than the ones for conducting research with a view to making an inventory.[1416] The Minister of Education, Culture and Science can legally consolidate the assessment guideline and quality standards to offer clarity on the applicable professional framework. This was done in 2016.[1417]

Two different types of certificates have been created, namely those that must be obtained obligatory and those that can be obtained voluntarily in order to demonstrate expertise. There are five types of obligatory certificates. These deal with research and excavations both on land and in the marine area. The four certificates that can be obtained voluntarily address, *inter alia*, depot management, specialist research and desk research.[1418] For all of these certificates a protocol was adopted under the quality standards containing the professional requirements that must be respected when conducting the activity.[1419]

### 3.5.4. Costs for certificates

As the certification institutes are market parties, their costs will not be reimbursed with government means. Applicants thus have to pay the institutes to compensate the costs.[1420] This is an application of the disturber-pays-principle. The amount of these costs depends on which activities the certification institute must conduct in order to issue the certificate and, later in time, to perform audits to control the certificate holder. Depending on how extensive a particular quality standard is filled in by the archaeological sector, more activities will have to be conducted by the certification institute to assess whether the applicant is in compliance. This results in more expensive certificates. The idea is that there will be price competition between the certification institutions. When necessary, however, the government can lay down a maximum rate for obtaining a certificate.[1421]

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[1415] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Wat is de KNA*, www.sikb.nl/archeologie/werkproces-archeologie/kna (consulted 8 August 2018).
[1416] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *BRL 4000 Archeologie*, www.sikb.nl/archeologie/richtlijnen/brl-4000, (consulted 8 August 2018).
[1417] Besluit van de Minister van Onderwijs, Cultuur en Wetenschap van 2 juli 2016, nr.1014106 houdende aanwijzing van de richtlijn, bedoeld in artikel 5.5., onderdeel b, van de erfgoedwet, voor het op professionele wijze verrichten van opgravingen, *Stb*. 2016, 3644; Heritage Act 2015, Explanatory Note 30-31.
[1418] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Certificaathouders archeologie*, www.sikb.nl/archeologie/certificeren-en-registratie/certificaathouders (consulted 8 January 2018).
[1419] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *BRL 4000 Archaeology*, www.sikb.nl/archeologie/richtlijnen/brl-4000 (consulted 8 January 2018).
[1420] Article 3.3.3. Decision Heritage Act Archaeology 2016.
[1421] Heritage Act 2015, Explanatory Note 31-32. Article 3.3.4. Decision Heritage Act Archaeology 2016.

### 3.5.5. Actor-Register

A new instrument that was created since the entry into force of the 2015 Heritage Act is the so-called actor-register.[1422] The objective of this register is to list certain actors in the field of archaeology that comply with the standards set for demonstrating that a person is competent to conduct certain archaeological tasks, both in terms of knowledge and experience. Registration in the list demonstrates to employers and supervisors that the actor is well trained for the function which he exercises.[1423] Inscription in the register is valid for a period of four years after which the actor or his employer must demonstrate that the actor has kept his knowledge up to date during this period. When this can be demonstrated, the inscription is prolonged for another four years.[1424] The requirements concerning education and professional experience are set out under annex 4 of the assessment guideline (BRL 4000). The register is a useful instrument for the certification institutes that do not need to assess the archaeological actor in each audit but can merely have a look at the register. The question of whether an archaeological actor deserves to be included in the register is left to the so-called assessment institutes (toetsende instellingen). [1425] These are independent parties that were assigned for this task. In most cases these will be the same as the certification institutes.[1426]

### 3.5.6. Reporting duty for the certificate holder

The certificate holder must notify the competent Minister that the excavation has begun. Within two weeks after it has ended, he must report his initial findings to the Minister. Within two years after the end of the excavation the certificate holder must submit a report describing the results of the excavations to the Minister and the owner of the heritage at which the excavation was directed. The certificate holder conserves any recovered archaeological finds and transfers them, along with the excavation documentation, within two year after completing the excavation to the owner.[1427] Special depots have been assigned for finds discovered during excavations in order to

[1422] This register can be consulted through the following link: www.actorregistratie.nl/raadplegen
[1423] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Factsheet Actorregister Archeologie*, June 2016, www.actorregistratie.nl/doc/SIKB%20FACTSHEET%20ACTORREGISTER.pdf 1, 2.
[1424] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Hoe werkt de Actorregistratie Archeologie?*, 25 July 2016, www.actorregistratie.nl/doc/Toelichting%20Hoe%20werkt%20het%20Actorregister%20Archeologie_%20geactualiseerde%20versie%2025072016.pdf, 2.
[1425] A list of all assessment institutions can be found at this website: www.sikb.nl/archeologie/certificeren-en-registratie/cerificatie-instellingen?term=toetsende%20instellingen&p=1.
[1426] Stichting Infrastructuur Kwaliteitsborging Bodembeheer, *Factsheet Actorregister Archeologie*, June 2016, www.actorregistratie.nl/doc/SIKB%20FACTSHEET%20ACTORREGISTER.pdf 1, 2-4.
[1427] Article 5.6.(1-4) Heritage Act 2015.

store and conserve them. When the archaeological finds belong to a municipality, a province or the State, they will be conserved in one of the specially assigned depots.[1428]

### 3.5.7. Supervision and transitionary period

In the 1988 Monument Act the Heritage Inspection supervised compliance with the rules relating to conducting excavations. With the new certification system other institutions have been given supervisory responsibilities as well. The certification institutes are now responsible for supervising compliance with the quality standards created by the archaeological sector through the system of granting certificates and regular audits. When necessary the certification institutes can suspend or withdraw the certificate. As the Council for Accreditation has accredited the certification institution, there is a sufficiently large guarantee that the compliance test will be conducted in an adequate manner. This entails that when the system functions properly, the Minister will not supervise the professional execution of excavations. He will focus his attention on other aspects such as the prohibition to conduct excavations without a certificate and the duty to report finds.[1429]

### 3.5.8. Exceptions to the certification rule

The 2015 Heritage Act allows for exceptions to be made to the general rule that a certificate is required for conducting activities directed at archaeological heritage, or excavations.[1430] Four exceptions to this general rule are inscribed in the Decision on archaeological excavations of 8 April 2016.[1431] One of them relates to the use of metal detectors and only applies to land-based heritage. This exception will therefore not be addressed here. The other three are discussed below.

The first exception applies to colleges and universities. These educational institutions do not need to obtain a certificate in order to conduct excavations when this is done for educational purposes.[1432] The underlying reason for this exception is that colleges and universities have already been accredited by the Dutch-Flemish accreditation organisation based on their quality of education. Additionally, the quality of their research is continuously assessed through peer reviewed publications and periodical visitations. While the above mentioned accreditation does

[1428] These depots can be found at the level of the province, municipality or State. In any case the State will designate one or more specific depot(s) that are suitable for the storage of archaeological finds connected to shipping activities. Articles 5.8. and 5.9 Heritage Act 2015.
[1429] Heritage Act 2015, Explanatory Note 32-33.
[1430] Article 5.1.2. Heritage Act 2015.
[1431] Decision Heritage Act Archaeology 2016.
[1432] Article 2.1. Decision Heritage Act Archaeology 2016. Articles 5.4.1-2 and 5.6. of the Heritage Act 2015 do apply to such activities.

not primarily deal with the quality of archaeological research, a certification duty for conducting such activities would entail a double burden for universities and colleges. In order for this exemption to apply the archaeological excavation must be conducted in the framework of the educational program with the objective to develop the students' competences as part of an obligatory practical subject. The excavation cannot have a commercial character.[1433]

The second exception applies to associations of amateur archaeologists, being volunteers, which have the preservation of archaeological sites and the conduct of archaeological activities as their statutory objective.[1434] Amateur archaeologists have always played an important role in the preservation of and the acquisition of knowledge on archaeological sites. The legislator considered it important to allow these amateurs to continue to play this role in the new Heritage Act. It cannot be expected that amateur archaeologists comply with the quality standards of professionalism that are set to obtain a certificate. Similarly, it cannot be expected that they pay to obtain a certificate since they do not have the option of earning back their expenses as they are not involved in commercial activities.[1435] This exception to obtaining a certificate only applies to associations of volunteers and not to individual archaeologists. Archaeological associations have research manuals and codes of conduct in place that encourage their members to respect the soil archive. This guarantees a basic level of quality. Associations must, however, still comply with a number of conditions. The initiation of an excavation must be reported via the website 'Archis' to the NICH, any finds must be transferred to the archaeological depot and all finds must be reported to the NICH.[1436]

Finally, the last exception applies to persons that hold a permit, certificate or any other document that has been issued in another EU member State. When this authorisation guarantees that the permit holder will display the same level of professionalism as is requested in the Dutch Heritage Act, that person does not need to obtain an additional certificate under Dutch legislation.[1437]

These exceptions to the obligation to obtain a certificate ensure that certain minor operations which have traditionally been beneficial for the knowledge on the soil archive can still take place without the heavy burden of complying with all requirements relating to quality and

[1433] Decision Heritage Act Archaeology 2016, Explanatory Note, 12.
[1434] Article 2.3. Decision Heritage Act Archaeology 2016.
[1435] Decision Heritage Act Archaeology 2016, Explanatory Note, 11-12.
[1436] NICH, *Vrijwilligers in de archeologie en de erfgoedwet*, 2016, https://cultureelerfgoed.nl/sites/default/files/publications/erfgoedwet_-_vrijwilligers_archeologie_weba_1.pdf, 4.
[1437] This is only the case if the person conducts these excavations on an incidental basis in the Netherlands. Articles 5.4.1-2. and 5.6. of the Heritage Act 2015 apply to these excavations. Article 2.4. Decision Heritage Act Archaeology 2016.

professionalism. At the same time, however, these exceptions all ensure that at least a basic level of quality is guaranteed and that all finds are reported to the competent authority.

### 3.6. Ownership rights over cultural heritage

In order to determine who owns UCH, a distinction must be made between finds that were discovered during excavations and incidental finds. For finds that were discovered during excavations and for which no one original owner can be found, title will be awarded to the State when the find was discovered outside the municipal territory.[1438] The certificate holder will transfer all recovered archaeological finds within two years after completion of the excavation to the owner.[1439]

For incidental finds, the treasure rule contained under book 5 title 2 of the Dutch Civil Code applies. A treasure belongs in equal parts to the person who discovered it and the owner of the movable or immovable object in which the treasure is discovered.[1440] UCH located in the marine area will thus belong to the finder in part as well as to the State. A treasure has been defined as an object of value that has been hidden for so long that the owner can no longer be traced.[1441] Firstly, it must be noted that when the original owner can be identified, this person or entity will retain the ownership rights over the find. Secondly, under the new definition given to the notion excavation in the Heritage Act, not many incidental finds will remain. Everything that is discovered and taken by a diver without a certificate will be considered as illegal excavation and therefore belongs to the government or original owner.[1442] The finder will thus only in rare cases be entitled to partial ownership over the UCH.

The Heritage Act does not prescribe in what way the owner should threat a find. The only obligation that can be found is that the owner of an incidentally discovered archaeological find must keep it at the disposal of the competent authority for scientific research during a period of six months from the day that the find was reported.[1443] No legal rule has been created which allows the Dutch government to proceed to the compulsory purchase of the part of the ownership rights awarded to the finder of the incidental find. The government can of course attempt to purchase such a find from the finder or to try and get the finder to renounce his rights over the

[1438] Article 5.7. Heritage Act 2015.
[1439] Article 5.6.3. Heritage Act 2015.
[1440] Article 13(1) Title 2 Book 5 Dutch Civil Code.
[1441] Article 13(2) Title 2 Book 5 Dutch Civil Code. Question arises how the notion 'value' would be defined in the framework of archaeological finds. These might be of low monetary value, but have significant value from an archaeological point of view.
[1442] Communication with Andrea Klomp from NICH, e-mail 6 June 2016.
[1443] Article 5.10(1) Heritage Act 2015.

find, both of which have been done in the past.[1444] The Heritage Act does not specifically provide for a reward to be given to the discoverer of an archaeological find.[1445]

## 3.7. Enforcement and sanctions

### 3.7.1. Concerns of the diving community

One of the objectives when redefining the notion 'excavation' in the 2015 Heritage Act was to ensure that its provisions could be better enforced. As was explained above, the requirement that the seabed must have been disturbed in order to qualify an act as an excavation in the 1988 Monument Act was rather problematic in terms of the burden of prove.[1446] When the new definition for 'excavation' in the Heritage Act was adopted, not everyone was pleased with this. The Dutch diving community had some concerns regarding to this definition. Divers believed that the Heritage Act penalised a number of activities, which were previously allowed in the 1988 Monuments Act. They feared that this would lead to the criminalisation of divers. This fear was, however, refuted in 2016 by David Bouman.[1447] In the run up to the symposium 'volunteers in underwater archaeology' David Bouman conducted research on the relationship between volunteers and professionals in underwater archaeology. One of the conclusions following this research was that the new Heritage Act does not criminalise additional actions compared to the 1988 Monument Act, but mainly strengthens the enforcement of this Act. In order to fully address some of the questions that the Dutch diving community has concerning the Heritage Act, and mainly to assess the future role that can be played by amateur divers, two pilot projects were conducted. The first pilot project was situated in Texel and ran from 20 November 2015 until 31 December 2016. The objective of this project was to test whether sport divers can contribute to the preservation of heritage.[1448] A second pilot project on the cooperation between sport divers, amateur archaeologists and the NICH commenced in September 2016. In this project special

[1444] Communication with Andrea Klomp from NICH, e-mail 6 June 2016.

[1445] Potentially, however, the discoverer of the heritage will be entitled to a finder's reward under book 5 of the Civil Code when he has fulfilled all the obligations that rest upon him. The amount of this reward will depend on the specific circumstances of each case. See for example, Aalsmeer, *Beleid voor gevonden voorwerpen* http://decentrale.regelgeving.overheid.nl/cvdr/xhtmloutput/historie/Aalsmeer/24210/24210_1.html (consulted 9 August 2018)

[1446] See *supra* section 3.3.

[1447] David Bouman is a researcher in the field of Maritime Archaeology at the University of Leiden.

[1448] D. BOUMAN, *Eindrapportage van het onderzoek 'Duiken op wrakken. Vrijwilligers in de onderwater archeologie*, 7 November 2015, available at https://archeologieinnederland.nl/sites/default/files/attachments/Rapportage_Onderzoek%20onder%20vrijwilligers%20in%20de%20onderwater%20archeologie%20.pdf; M. MANDERS, "Inzet van vrijwilligers in de onderwaterarcheologie", *eMagazine Maritiem Programma* – Special Edition: Vrijwilligers in de onderwater archeologie 2015 available at http://nl.magazine.maritiemprogramma.nl/emagazine-mp05-nl/#!/maritiem-erfgoed-in-de-nieuwe-erfgoedwet, 3-6.

attention is being paid to sunken warships. For this reason the 'foundation survivors submarines 1940-1945' is involved in this project.[1449] The results of both projects will be considered when furthering the cooperation between archaeologists and recreational divers and when implementing the Heritage Act.

### 3.7.2. Supervising authorities and sanctions

In the Heritage Act, the Minister for Education, Culture and Science is responsible for supervising the compliance with the provisions of the Act as well as the provisions following from this Act. The Minister must thereto, *inter alia*, collect and register data and impose administrative sanctions for conduct contrary to those provisions.[1450] Inspectors and other public officials are appointed by the Minister in order to supervise compliance with the Heritage Act.[1451]

The Heritage Inspection has a number of responsibilities in light of ensuring compliance with the Heritage Act.[1452] The Inspection will investigate whether illegal excavations take place, whether incidental finds are reported and whether finds that are being sold were obtained legally. For serious violations the Heritage Inspection can initiate a criminal investigation. Hereto, it possesses the necessary competences, even outside the 12 nm zone. During this investigation, the inspectors of the Heritage Inspection will fall under the responsibility of the public prosecutor.[1453]
As was explained above, an important role is given to the certification institutions which are responsible for ensuring that excavations are conducted in conformity with the Rules set out under the quality standards and the conditions inscribed in the certificate.[1454]

In 2016, an enforcement plan for maritime heritage management was adopted. This plan specifies how the different enforcement actors will cooperate in the North Sea and the Waddensea. Hereto, a task division was laid down. The Heritage Inspection is in charge of supervision and detection. It

[1449]Maritiem Erfgoed, *Beleid, Wetgeving & Handhaving*, www.maritiem-erfgoed.nl/beleid-wetgeving-handhaving (consulted 8 August 2018).
[1450] Article 8.1. Heritage Act 2015. The Minister is competent to impose an administrative coercion (last onder bestuursdwang) in order to enforce compliance with the Heritage Act and any provisions pursuant to this Act. Article 8.2. Heritage Act 2015. Last onder bestuursdwang is a sanction that can be imposed with the objective to end a violation and to restore the rightfull situation. This is not the same as a fine. Van Dinter advocates, *Bestuursdwang*, www.wetrecht.nl/bestuursdwang/ (9 January 2018).
[1451] Article 8.3. Heritage Act 2015.
[1452] Heritage Inspection, *wet- en regelgeving*, www.erfgoedinspectie.nl/toezichtvelden/archeologie/wet--en-regelgeving (consulted 9 January 2018). The provisions from chapter five on the enforcement of the general administrative act apply to the Heritage Act as well.
[1453] N. ATEN, "Handhaving", *eMagazine Maritiem Programma* – Special Edition: Vrijwilligers in de onderwater archeologie 2015 available at http://nl.magazine.maritiemprogramma.nl/emagazine-mp05-nl/#!/maritiem-erfgoed-in-de-nieuwe-erfgoedwet, 8.
[1454] See *supra* section 3.5.

informs the coast guard and keeps in contact with the public prosecutor. The NICH offers advice and information on the heritage sites.[1455] Its expertise and knowledge are necessary to determine whether an object is in fact cultural heritage. This is not always easy to do for recovered objects as firstly the context is crucial to assess an object's cultural or archaeological value and secondly it must be proven that the object originates from within the Dutch 24 nm zone where the Heritage Act applies. Therefore, it is very important to catch perpetrators red handed as much as possible.[1456] For this purpose cooperation is essential. The plan determines that the Heritage Inspection and NICH organise consultations four times a year, which are also attended by the coast guard, Rijkswaterstaat and the Hydrographic services.[1457] Together these services and institutions are responsible for compliance with the Heritage Act.

The Heritage Act does not determine which penalties are imposed for violations of its provisions, but rather refers to Article 1.a.2. of the act on economical offences.[1458] This Act provides that the violation of article 5.1.1. Heritage Act on the prohibition to conduct excavations without a permit and article 5.10.1. Heritage Act on the reporting of incidental finds are economical offences.[1459] In case the violation of these provisions occurred intentionally, the law on economical offences qualifies it as a crime,[1460] which can be punished with imprisonment of maximum 2 years, community service or a penalty up to 20.500 euros.[1461] In all other cases, these violations are considered to be offences[1462] and are punished with imprisonment for maximum six months, community service or a penalty up to 20.500 euros.[1463] Additional punishments are possible, including the confiscation of the objects used to commit the crime/offence.[1464]

[1455] N. ATEN and J. OPDEBEECK, "Het gaat om gemeenschappelijk erfgoed", *Nieuwsbrief Integraal beheer Noordzee*, July 2017, 11.
[1456] N. ATEN, *Handhavingsplan cultureel erfgoed Noordzee en Waddenzee*, Symposium Amersfoort, 14 December 2016.
[1457] N. ATEN and J. OPDEBEECK, "Het gaat om gemeenschappelijk erfgoed", *Nieuwsbrief Integraal beheer Noordzee*, July 2017, 11.
[1458] Wet van 22 juni 1950, houdende vaststelling van regelen voor de opsporing, de vervolging en de berechting van economische delicten, *Stb.* 1950, K258, article 1a.2. (Act Economical Offences)
[1459] The same is true for articles 4.2, 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.22 and 4.23. Article 1(2) Act Economical Offences.
[1460] Article 2(1) Act Economical Offences.
[1461] Article 23 Dutch Penal Code; Article 6(1)2° Act Economical Offences. In case of recidivism the imprisonment can be up to 4 year and the fine can be up to 82.000 euros. Article 6(1)3° Act Economical Offences and article 23 Dutch Penal Code.
[1462] Article 2(1) Act Economical Offences.
[1463] Article 6(1)5° Act Economical Offences.
[1464] Article 7d Act Economical Offences and article 33a Dutch Penal Code.

## 3.8. The Netherlands and the UNESCO Convention

The Netherlands has not yet ratified the UNESCO Convention. It has, however, expressed its intention to do so.[1465] The ratification procedure normally runs from 2017-2020. During this period the text of the UNESCO Convention will be assessed to see which of its principles are already implemented in the Dutch legislation and which need to be altered in order to comply with the Convention. During this period alignment between the different ministries and Caribbean Netherlands will take place and awareness campaigns are organised.[1466]

### 3.8.1. Issues of the Netherlands with the UNESCO Convention

The Netherlands was not always willing to ratify the UNESCO Convention. As was stated under chapter one, the Netherlands was one of the States that abstained from voting on the UNESCO Convention in 2001.[1467] The Dutch concerns relating to the Convention are similar to the ones that were expressed by France. Prior to deciding on the Dutch ratification of the UNESCO Convention, in 2011 the Minister of Foreign Affairs in a letter requested advice on a number of the Dutch issues relating to the Convention.[1468] This resulted in the advisory report on the protection of the underwater cultural heritage to be presented by the Advisory Committee on Issues of Public International Law in 2011 (Commissie van advies inzake Volkenrechtelijke Vraagstukken) (ACIPIL).[1469]

In his letter the Minister of Foreign Affairs drew the attention to a number of specific issues requesting some clarification from ACIPIL. Firstly he inquired about the relationship between articles 9 and 10 of the UNESCO Convention on the one hand and UNCLOS on the other. More specifically the question was asked whether these articles should be interpreted differently depending on whether the coastal State acts on its own behalf or on the behalf of the international community. A second question asked in the letter was to what extent the UNESCO Convention will set a precedent for the division of maritime jurisdiction at sea. Thirdly, the Minister wanted to know in what way ratification of the UNESCO Convention would affect the ability of the Netherlands to act as the owner of the Dutch former East India Company ships. Finally, the Minister

[1465] NICH, *Nederland gaat scheepswrakken beter beschermen*, 20 May 2016, https://archeologieinnederland.nl/nieuws/nederland-gaat-scheepswrakken-beter-beschermen.
[1466] J. KUGGELEIJN and S.FRANSSEN, *Nieuwe ontwikkelingen in de onderwater archeologiewetgeving: De erfgoedwet en Unesco 2001*, oral presentation in Amersfoort at meeting 14 December 2016.
[1467] If the Netherlands would ratify the UNESCO Convention, it would be the fourth State that initially abstained from voting on the Convention to do so following France, Guinea-Bissau and Paraguay.
[1468] Letter U. ROSENTHAL (Minister of Foreign Affairs) to Prof. KAMMINGA, *Request for Advice on the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 16 September 2011 reference DJZ/IR-177/2011.
[1469] Advisory Committee on issues of public international law, *Advisory Report No. 21 on the UNESCO Convention on the protection of the underwater cultural heritage*, The Hague, December 2011. (Advisory Report No. 21 UNESCO Convention)

wished to receive advice on the question whether there are alternative manners for the Netherlands to adequately protect UCH at the international level, instead of ratifying the UNESCO Convention.[1470]

### 3.8.2. Report of the Advisory Committee on Issues of Public International Law 2011

The ACIPIL addressed all these issues in its advice. As for the first question, ACIPIL referred to the constructive ambiguity inscribed in article 9 of the UNESCO Convention.[1471] The ACIPIL recognises that two interpretations are possible concerning article 9§1(b)(i) and (ii), one of them indeed entailing that additional competences are given to the coastal State. However, in the 2011 advice it was concluded that these provisions must be interpreted in such a way that only flag States and States of nationality can impose a duty to report on their ships or nationals. It was felt that this interpretation is the one most in conformity with UNCLOS and the wording of the provision. The ACIPIL recommended that in case the Netherlands would decide to ratify the UNESCO Convention, it should make a declaration on article 9 UNESCO Convention to clarify the interpretation that it gives to this provision. On article 10 UNESCO Convention, the ACIPIL provided that §3-7 and 10 of this provision represent only a minor shift in the competence division between the coastal and flag State. When a coastal State acts in its role as Coordinating State, it exercises its competence on behalf of all State Parties as a whole. Article 10§6 excludes the possibility that a coastal State could exercise this competence merely in its own interest.[1472]

On the second question, the ACIPIL answered that it considers it unlikely that the UNESCO Convention will set a precedent for the division of jurisdiction at sea. According to the interpretation of the ACIPIL only a minor shift in the distribution of competences in other fields asides from the protection of cultural heritage can be expected.[1473]

As for the third question, the ACIPIL stated that the UNESCO Convention would give the Netherlands an instrument to block unilateral claims on the wrecks of their sunken vessels, including those of the former East India Company. Additionally, by ratifying the UNESCO Convention the Netherlands would have the right to declare that they have a verifiable link based on article 9§5 of the Convention in order to be consulted during consultations on how to protect the wreck.[1474] Ratifying the UNESCO Convention would in other words strengthen the Dutch position vis-à-vis its former East India Company wrecks rather than weaken it.

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[1470] Letter U. ROSENTHAL (Minister of Foreign Affairs) to Prof. KAMMINGA, *Request for Advice on the UNESCO Convention on the Protection of the Underwater Cultural Heritage*, 16 September 2011 reference DJZ/IR-177/2011.
[1471] See section 4.5.3. chapter one for more on this constructive ambiguity.
[1472] Advisory Report No. 21 UNESCO Convention, 2-11.
[1473] Advisory Report No. 21 UNESCO Convention, 2-12.
[1474] Advisory Report No. 21 UNESCO Convention, 2-13.

Finally, relating to the last question posed by the Minister, the ACIPIL provided a number of options for protecting UCH, including legal proceedings and bilateral agreements. However, it concluded that none of these instruments offer the same level of protection as the UNESCO Convention.[1475]

### 3.8.3. Ratification of the UNESCO Convention

This advice was taken into consideration by the Dutch government and based on this positive assessment of the UNESCO Convention, even though the ACIPIL did not offer a clear advice on whether the Netherlands should ratify the Convention, the decision was made to further investigate the possibility of ratification.[1476] Further advice was sought from the Dutch National UNESCO Committee on this matter. The Committee recommended the Dutch government to ratify the UNESCO Convention as it is the only treaty that can provide an effective worldwide protection of UCH.[1477] Additionally, the Commission advised the Dutch government to undertake actions in order to increase awareness among the general public of the exceptional value and vulnerability of UCH and the need to protect it.[1478]

In 2016 the Minister of Education, Culture and Science stated in a letter that he and the Minister of Foreign Affairs would commence the ratification process of the UNESCO Convention. The Ministers recognised that the urgency to protect UCH at an international level is high and that it is difficult to act against violations taking place outside national waters. They support the general objective of the UNESCO Convention, which is to facilitate a worldwide protection of UCH. At the same time the Ministers emphasized the importance of respecting the division in jurisdiction between flag States and coastal States as it exists today under UNCLOS. For this reason it was decided that ratification is possible under the condition that the Netherlands makes a declaration upon ratification stating that it assumes that all State Parties will interpret the UNESCO Convention in conformity with UNCLOS. The Netherlands expects to be able to contribute to such an interpretation over the years to come.[1479]

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[1475] Advisory Report No. 21 UNESCO Convention, 2-14.

[1476] F.C.G.M. TIMMERMANS (Minister of Foreign Affairs), *Brief vaststelling van de begrotingsstaten van het ministerie van Buitenlandse zaken (V) voor het jaar 2014*, The Hague, 2 October 2013, 33 750V.

[1477] This is of considerable importance for the Netherlands as it has numerous wrecks located worldwide originating mainly from the East India Company, West India Company and the World Wars.

[1478] National UNESCO Committee, *Advies van de nationale UNESCO Commissie over de bescherming van cultureel erfgoed onder water*, *s.d.*, available at www.unesco.nl, 1-2.

[1479] M. BUSSEMAKER (Minister of Education, Culture and Science), *Brief Vaststelling van de begrotingsstaten van het Ministerie van Onderwijs, Cultuur en Wetenschap (VII) voor het jaar 2016 aan de voorzitter van de Tweede kamer der Staten-Generaal*, The Hague, 19 May 2016, nr. 146, 34 300 VIII.

## 4. The United Kingdom

### 4.1. Introduction

The UK is one of the great maritime powers. This is as true today as it was in the past. The UK coastline is rich in different types of heritage including numerous shipwrecks dating from all time periods. As a common law State, principles such as the law of salvage and finds are well embedded in the legislative framework dealing with shipwrecks. As will be assessed, over the last years the application of these principles has been somewhat restricted in favour of the protection of UCH. While the UK legislative framework for the protection of UCH is rather fragmentised, efforts have been made to reform this framework or at least to interpret it in light of the principles laid down by the UNESCO Convention.

In 2011, the UK issued a Marine Policy Statement, which serves as the framework for adopting marine plans and decisions relevant to the marine environment.[1480] Part of the marine environment is the historic environment which encompasses "*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.*"[1481] When an element of the historic environment has a certain degree of significance, it is called a 'heritage asset'. The view of the administrations is that heritage should be conserved "*through marine planning in a manner appropriate and proportionate to their significance.*"[1482] This policy has resulted in hardly any changes to have been made to the UK framework for UCH over the last couple of years. Nevertheless, the mere inclusion of heritage assets in marine plans is not sufficient to offer a comprehensive framework for UCH protection.

Under this section the most important UK legislative acts having an effect on UCH in the marine territory will be assessed in detail as well as the UK view on the UNESCO Convention. It should be noted that while the UK consists of England, Scotland, Wales and Northern Ireland, the focus of this section lies with England. For the most part the legislation applied in the other three regions is the same as the one applicable in England. The main difference can be seen in the competent authorities which does not constitute a fundamental difference in the protective framework for UCH. For this reason no separate mention will be made of Scotland, Wales or Northern Ireland in this section. However, when there is a substantial difference between the English approach and

[1480] This Marine Policy Statement was adopted for the purposes of article 44 Marine and Coastal Access Act 2009, 2009 c. 23 (MCAA). See *infra* section 4.6.5.1. for more on this MCAA. HM government, *UK Marine Policy Statement*, The Stationary Office, 2001. (UK Marine Policy Statement 2011)
[1481] UK Marine Policy Statement 2011, 21.
[1482] UK Marine Policy Statement 2011, 21.

the approach in one of the other UK regions, this will be mentioned.

## 4.2. Merchant Shipping Act 1995

### 4.2.1. Introduction

The first act that applies to UCH is the Merchant Shipping Act (MSA).[1483] This Act is quite an extensive one dealing with a variety of aspects related to merchant shipping including the registration of British ships, shipping safety and pollution by ships. Part IX of the MSA is of importance for the protection of UCH as it deals with the salvage, reporting, managing and disposal of wrecks. The MSA also implements the 1989 Salvage Convention in the form of a schedule annexed to it.[1484] The objective of part IX MSA is threefold: 1. reuniting owners with their property, 2. providing a salvage reward for the finder, and 3. providing for an extra source of revenues for the Exchequer.[1485] Originally, these provisions were adopted to ensure the safekeeping and disposal of distressed or recently wrecked vessels. They were not designed to apply to wrecks that have been submerged for a longer period of time, which is usually the case for UCH. Due to technological progress, however, shipping casualties became more rare resulting in part IX MSA to be increasingly used for dealing with material originating from wrecks that have been submerged for a longer period of time and that might qualify as UCH. The analysis of part IX MSA will demonstrate that these provisions are in fact not suitable for dealing with UCH.[1486]

### 4.2.2. Scope of application

The term 'wreck' under part IX of the Act includes *"jetsam, flotsam, lagan and derelict"*.[1487] 'Jetsam' is generally defined as objects that have been thrown overboard when a ship was in danger and sank afterwards.[1488] 'Flotsam' includes objects that were lost from a ship that sank or

[1483] Merchant Shipping Act 1995, 1995 c. 21. (MSA)

[1484] The UK exercised a reservation in respect of maritime cultural property upon ratification of the Salvage Convention, but has not yet used it. DROMGOOLE 2006, 315. See section 3.5.1. chapter one for more on the Salvage Convention.

[1485] The Chancellor of the Exchequer is the Chief Financial Minister of the government and is responsible for raising revenues and for controlling public spending. Gov.uk, Ministerial role, Chancellor of the Exchequer, https://www.gov.uk/government/ministers/chancellor-of-the-exchequer, consulted 13 March 2017.

[1486] DROMGOOLE "United Kingdom" in S. DROMGOOLE (ed.) *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives*, The Hague, Kluwer, 1999, 183. (DROMGOOLE 1999)

[1487] Section 255(1) MSA. The term 'wreck' also encompasses hovercraft and aircraft. (DROMGOOLE 2006, 315). Part IX MSA does not provide for an age criterion, which is logical as these provisions were meant to apply to recently wrecked vessels or vessels in distress.

[1488] Maritime and Coastguard Agency, *Wreck and Salvage Laws, the role of the Receiver of the Wreck, wreck owners and salvors and how to report wreck material*, 14 September 2012, www.gov.uk/guidance/wreck-and-salvage-law (last update 30 January 2018) (Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012); DROMGOOLE 1999, 183.

perished and that float on the water.[1489] 'Lagan' are objects that have been thrown overboard from a ship prior to it perishing and that have sunk to the bottom of the sea.[1490] Finally, according to Dromgoole, the term derelict in part IX MSA probably has the same meaning as it does in the law of salvage. A derelict is a vessel that has been physically abandoned by its master and crew without any intention of returning to it or hope of recovering it. It should be noted that in order for a vessel to be considered as a derelict, it is not necessary that its owners have abandoned their ownership rights.[1491]

The definition that is given to 'wreck' in the MSA is considered to be rather archaic and technical. In certain cases it might be challenging to determine whether an object should be considered as 'wreck'. For example, when an isolated object is discovered, it is difficult to establish the origin of such a remain. Questions such as 'Was the object thrown overboard?', 'Was it accidentally dropped?', 'Does the remain originate from a ship?'… arise, which might be impossible to answer with certainty. This can cause unnecessary complications in deciding on the fate of perhaps important cultural artefacts. In practice it appears, however, that a more pragmatic approach is used and that the origin of the object will not be scrutinised in too much detail.[1492] Nevertheless, when it is clear that a remain or object does not constitute 'wreck', such as submerged structures or prehistoric remains, the MSA will not apply to it. In other words, the MSA does not offer a comprehensive framework for the protection and management of UCH.

As for the territorial scope of part IX MSA, the definition of 'wreck' provides that it applies to jetsam, flotsam, lagan and derelict that "*were found in or on the shores of the sea or any tidal water."*[1493] Tidal waters include "*any part of the sea and any part of a river within the ebb and flow of the tide at ordinary spring tides, and not being a harbour*"[1494] As will become clear, however, the Act is not limited to wrecks discovered in tidal waters, but can in fact apply to wrecks discovered in UK territorial waters and wrecks brought into the UK from outside UK territorial waters as well.

### 4.2.3. Reporting of wrecks

The MSA provides for one or more Receiver(s) of wrecks to be appointed by the Secretary of State.[1495] The Receiver is charged with administering the provisions dealing with wrecks and the

[1489] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012; DROMGOOLE 1999, 183.
[1490] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012; DROMGOOLE 1999, 183.
[1491] DROMGOOLE 2006, 316.
[1492] DROMGOOLE 2006, 316.
[1493] Section 255(1) MSA.
[1494] Section 255(1) MSA.
[1495] Section 248(2) MSA.

law of salvage taking into account the interests of both the salvor and the owner.[1496] Every person that discovers or takes possession of a wreck located within UK waters or takes possession of a wreck located outside UK waters and brings it within those waters, shall report this to the Receiver.[1497] 'UK waters' under this Act must be understood as "*the sea or other waters within the seaward limits of the territorial sea of the United Kingdom*".[1498] These thus include the UK territorial sea, extending up to 12nm.[1499] These discoveries must be reported regardless of their age, size, apparent value or importance.[1500] If the finder is not the owner of the wreck he is obliged to either hold it to the Receiver's order or to deliver it to the Receiver.[1501] When a vessel is wrecked on or near the UK coast or tidal waters, all cargo and articles belonging to it which either washed ashore or are lost or taken from the vessel, must be delivered to the Receiver. When a person refuses to deliver an object, the Receiver may take it, if necessary by force, from this person.[1502]

An important question that arises in relation to the reporting duty in the MSA is whether the mere discovery of a wreck must be reported to the Receiver or whether this reporting duty only applies when the wreck has been recovered. From an archaeological point of view the first interpretation is preferable as this allows for *in situ* preservation. For wrecks discovered within UK waters, it seems that recovery is not necessary in order for the duty to report to the Receiver to apply. The MSA namely provides that this reporting duty applies to anyone that 'finds *or* takes possession' of a wreck. In other words the mere discovery of the wreck must be reported. For wrecks located

[1496] The Receiver's office is part of the Maritime and Coastguard Agency, which is an executive agency of the Department for Transport. The current Receiver of Wreck is Alison Kentuck. She has the task of dealing with voluntary salvage cases throughout the entire UK. Thereto the team of the Receiver must process incoming reports of discovered wrecks, which includes conducting research in order to establish who owns the wreck and contacting the finder and the owner, as well as other interested parties such as archaeologists and museums with a view to cooperating. Gov.UK, *Receiver of Wreck*, www.gov.uk/government/groups/receiver-of-wreck (consulted 28 January 2018); Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

[1497] Section 236(1) MSA. This reporting must be done within 28 days of the recovery by completing the 'Report of wreck and Salvage form'. A full description of the wreck must be given in this report. This report can be found here: www.gov.uk/government/publications/report-a-wreck-or-salvage-form-msf-6200. Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

[1498] Section 313(2) MSA.

[1499] The competence of the Receiver extends to tidal waters but does not cover lakes or rivers that are beyond tidal reach. If wreck material originates from non-tidal waters, it is treated as if it was found on land and legislations such as the Treasure Act 1996 or the Ancient Monuments and Archaeological Areas Act 1979 (AMAAA) to apply to it. Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

[1500] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

[1501] Section 236(1)(b) MSA. In the 1984 MSA, the predecessor of the 1995 MSA , the finder (other than the owner) had to deliver the find to the Receiver. This caused problems as the Receiver's office did not have any specialised facilities for storing this archaeological material. The change in wording that was inserted in the 1995 MSA reflects the gradually developed practice of allowing a find to remain in the finder's possession while deciding on its ultimate disposal. The finder must agree that he will take reasonable care of the property, must indemnify the Maritime and Coastguard Agency for any loss or damage of the property while it was in his or her possession and upon request must surrender it to the Receiver. (DROMGOOLE 1999,184)

[1502] Section 237(1) and (3) MSA.

outside UK waters, on the other hand, the MSA provides that the wreck is brought in UK waters before the duty to report applies. This encourages finders to recover wrecks and bring them into UK waters. As the Receiver considers it her task to ensure that owners are reunited with their recovered property and that a salvage reward is paid to the legal salvor, this interpretation is used by the service of the Receiver.[1503] From an UCH-protection point of view, this is regrettable as such an approach does not respect the principle of *in situ* preservation and allows UCH sites to be destroyed and their elements to be scattered.[1504]

#### 4.2.4. Handling of wreck and ownership rights

Within 48 hours after the Receiver takes possession of a wreck, she will make a publicly accessible record in which the wreck as well as any distinguishing marks are described.[1505] It may be presumed that 'takes possession of' must be interpreted as to include constructive possession over a wreck, which is established through a finder's declaration that he is holding the wreck on behalf of the Receiver. [1506] The creation of a public register allows for the original owners to come forward and at the same times provides interesting information for archaeologists on potential UCH.[1507]

Under certain circumstances, the Receiver is entitled to sell a wreck that is in her possession. This sale can take place if the value of the wreck is less than 5.000 pounds, if the wreck is so damaged or of such perishable nature that it cannot with advantage be kept or if the wreck is not of sufficient value to pay for storage.[1508] While such a sale might be justified for recently sunken wrecks, this is not always the case for UCH. Objects that constitute UCH can be of low economical value, but can have considerable value from an archaeological or historical point of view. It would be inappropriate to sell such a wreck to anyone other than a museum or other institution that guarantees its preservation and research. [1509] It is thus crucial that the Receiver does not merely

[1503] DROMGOOLE 2006, 317.
[1504] This also entails that if a find located outside UK waters was merely discovered, without being recovered, that the finder must not come forward to report this. This is unfortunate as much crucial information on UCH might be lost this way.
[1505] Section 238 (1) and (2) MSA. When the value of the wreck according to the Receiver exceeds 5.000 pounds in value, a similar description must be send to the chief executive officer of Lloyd's in London. The latter will post this is a conspicuous position for inspection. Section 238(1)(b) and (3) MSA. This can be of interest to insurers of recent casualties, as well as to successors in title to insurers that were lost years ago. DROMGOOLE 2006, 317.
[1506] DROMGOOLE 2006, 317. Over the years the general practice has been that the finder keeps possession of the find in accordance with the instructions given by the Receiver. DDCMS, *Protecting our marine Historic Environment: Making the system work better*, March 2004, http://webarchive.nationalarchives.gov.uk/20110405090235/http://www.cadw.wales.gov.uk/upload/resourcepool/Marine%20Environment-complete5451.pdf, 12. (DDCMS, Making the system work better 2004)
[1507] DROMGOOLE 2006, 317.
[1508] Section 240(1) MSA.
[1509] DROMGOOLE 2006, 318.

takes into account the monetary value of a wreck, but its value from a heritage point of view as well.
The proceeds of the sale, minus the costs, are held by the Receiver and are subjected to the same claims and rights as the wreck would be had it not been sold.[1510] The competence to sell the wreck in the above-mentioned cases is a discretionary one and has not always been automatically used by the Receiver. Nevertheless, it offers the Receiver the possibility to sell a wreck when it is felt that this is necessary or desirable.[1511]

The owner of a wreck that is in the possession of the Receiver has one year the time from the moment the wreck came into the Receiver's possession to claim his rights. The owner will, after paying the salvage reward as well as any other fees and expenses that are due,[1512] be entitled to the wreck or the proceeds of the sale.[1513] When no ownership claim is made over a wreck that was discovered in the UK or in UK waters, up to the 12 nm boundary, title to it will be vested in the Crown.[1514] One exception to this general rule exists. Title to a wreck will not be awarded to the Crown, when Her Majesty or any of Her Royal predecessors have granted such rights to another person.[1515] These grantees must provide a statement to the Receiver in which they specify the particulars of this entitlement to unclaimed wreck. The Receiver will, when she takes possession of a wreck discovered at a location to which the above-mentioned statement refers, send a description of the wreck and any distinguishing marks to the grantee.[1516] In case the original owner does not claim the wreck within a year, the Receiver will deliver it to that grantee.[1517] When no one claims title over the wreck following section 242 of the Act, the Receiver can sell it. The proceeds, after deducing all expenses, the Receiver's fees and the salvage reward, will be paid by the Receiver for the benefit of the Crown.[1518]

[1510] Section 240(2) MSA.
[1511] DROMGOOLE 2006, 318.
[1512] Section 249(1) provides that the Receiver must be reimbursed for the expenses made in the discharge of his function and must be paid all fees that are prescribed. Section 249(1) MSA. Currently, the Receiver does not charge a fee, but does recover all expenses incurred to store property or to obtain a valuation of a salved wreck. Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.
[1513] Section 239(1) MSA.
[1514] Section 241 MSA; Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012. In the 1986 Pierce v. Bemis case, the Queen's Bench Division affirmed that ownership rights over unclaimed wrecks located outside UK territorial waters cannot be claimed by the British Crown: "*That, by section 523 of the Merchant Shipping Act 1894, the Crown's right to claim a droit of Admiralty was limited to an unclaimed wreck found in United Kingdom territorial waters.*" *Pierce and Another v. Bemis and Others (The Lusitania)*, 29 November 1985, [1986] Q.B. 384.
[1515] Section 241 MSA. These persons include lords of the manor or other persons that are entitled to unclaimed wrecks by royal grant. DROMGOOLE 2006, 319.
[1516] Section 242(2) MSA.
[1517] The wreck must be given to the grantee when the statement delivered following section 242 MSA "*has proved to the satisfaction of the receiver his entitlement to receive unclaimed wreck found at the place where the wreck was found*" Section 243(2) MSA. All expenses, costs, fees and salvage must be paid prior to delivery of the wreck. Section 243(1-2) MSA.
[1518] Section 243(3-6) MSA.

Dromgoole points out that the right of the Crown to unclaimed wrecks should be extended to wrecks discovered outside UK territorial sea that were brought within those waters. At the moment, when no owner comes forward to claim title over such a wreck, it is returned to the finder. In this case, no control can be exercised over the final disposal of the material, which can result in UCH being destroyed and lost to the general public and archaeologists. Additionally, consideration should be given to the fact that this practice might lead to the general conception that the UK territory can be used as a jurisdiction of convenience. This could result in salvors purposefully bringing material found outside UK waters into those waters in order to obtain title over it.[1519]

### 4.2.5. Enforcement and sanctions

#### 4.2.5.1. Supervising authority and sanctions

The Receiver is responsible for the enforcement of part IX of the MSA. The Receiver actively monitors salvage and diving activities in cooperation with the Ministry of Defence, the Police, the coast guard and diving organisations. She informs sea users of their responsibilities and educates them in this field.[1520] All reports of possible offences relating to the treatment of wrecks are investigated by the Receiver's office and when sufficient evidence of such an offence can be obtained, the Receiver is entitled to prosecute the offenders.[1521]

The MSA provides for penalties in case of violation of the provisions relating to wrecks. Anyone not reporting the discovery of a wreck or not delivering it or holding it to the Receiver's order may be fined and, in case the finder is not the owner of the wreck, shall forfeit his claim to a salvage

[1519] DROMGOOLE 1999, 198.

[1520] In the 'Respect our wreck initiative', which was supported by the Receiver, consideration was given to correct behaviour by divers when visiting wreck sites. This initiative was initiated by the Professional Association of Diving Instructors, the Sub Aqua Organisation and the British Sub Aqua Club. These organisations signed a memorandum of understanding in order to implement best practices in relation to wreck matters. A number of general rules on responsible diving were set forth. In the code of practice of the British Sub-Aqua Club for example, divers are asked not to disturb or remove items from military wrecks and not to lift anything of archaeological importance. They are reminded that when they do take something from the wreck site, they have the legal requirement to report this to the Receiver. British Sub-Aqua Club, *Safe Diving guide –The Diver's Code of Conduct*, available at www.bsac.com/safety/safe-diving-guide/the-divers-code-of-conduct/#article-238 (consulted 9 August 2018); British Sub-Aqua Club, *Respect our wrecks policy*, www.bsac.com/advice-and-support/respect-our-wrecks/respect-our-wrecks-policy/ (consulted 9 August 2018); Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

[1521] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

reward and is liable to pay twice the value of the wreck.[1522] Similarly, any person who conceals or refuses to deliver cargo or articles originating from a wreck as meant under section 237 MSA to the Receiver shall be liable to a fine.[1523] A person is liable to imprisonment for a maximum term of five years when he takes a wreck discovered on or near the UK coasts or in UK tidal waters to another port and sells it.[1524] Finally, the MSA provides for a fine to be imposed to anyone who (attempts to) hinder or impede the saving of a wreck, conceals a wreck or wrongfully removes a wreck.[1525]

The Receiver can apply for a search warrant when it is believed that a wreck is being concealed, is in the possession of a person that is not the rightful owner or is being improperly dealt with. By virtue of such a search warrant, the Receiver may enter any house or vessel and seize and detain any wreck that is discovered there. Any person that provides the Receiver with information which results in the seizure of wreck will be entitled to a sum not exceeding 100 pounds.[1526] Granting a reward to people that have information on infringements of the MSA can help with its enforcement and with the protection of UCH in general.

#### 4.2.5.2. Huzzey and Knight landmark case

As a general rule, the UK policy is to promote compliance with the MSA through education rather than through criminal prosecution.[1527] For this reason prosecutions have only rarely taken place.[1528] Nevertheless, on 2 July 2014, in a landmark case, the Southampton Magistrate's Court convicted two divers for a total of 19 offences contrary to sections 236 and 237 of the MSA which deal with the reporting and delivery of finds. The two divers, Edward Huzzey and David Knight, had since 2001 been plundering multiple shipwrecks located in the UK territorial sea including a German submarine from World War I and a 19th century English East India Company shipwreck. The pair of divers had used explosives and sophisticated cutting equipment to plunder the wrecks and gathered a wide variety of items including several cannons, teapots, propellers, bowls, lamps

[1522] Non-compliance with article 236(1) MSA will only constitute an offence when the discoverer has no reasonable excuse. The fine that is given will not exceed level 4 on the standard scale, being 2.500 pounds. Section 236(2) MSA; Section 37(2) Criminal Justice Act 1982, 1982 c. 48.
[1523] Section 237(2) MSA.
[1524] Section 245 MSA.
[1525] This fine will not exceed the maximum of 2.500 pounds. Section 246(3) MSA; Section 37(2) Criminal Justice Act 1982.
[1526] Section 247 MSA.
[1527] In the spring of 2001 there was a Wreck Amnesty for three months. This was very successful as in these three months more than 4.000 reports were received, dealing with approximately 30.000 individual items. The idea behind the Amnesty was to increase awareness of the role of and procedures used by the Receiver. As finders have had every opportunity to come forth and report their finds, a stricter approach is since taken, especially with regard to persistent offenders. DROMGOOLE 2006, 320.
[1528] DROMGOOLE 1999, 188.

and figurines. The estimated value of all the recovered items was set at over 250.000 pounds. Experts considered the historical importance of these objects to be very high. Neither of the two divers, however, declared any of the objects upon recovering them to the Receiver.[1529] Considering the magnitude of the operation, which was described by district judge Calloway as of "*industrial*" scale and the fact that the dive logs revealed "*considerable skill and planning*",[1530] the Court sentenced Knight to a fine of 7.000 pound and Huzzey to a fine of 6.500 pound.[1531] Additionally, they both have to pay 25.000 pounds in costs.[1532] While most divers comply with the legal rules adopted for wreck sites and salvage operations, this case was considered to be a warning for the small criminal minority that refuses to abide by the law. The message was sent that such offenders will be identified and brought to justice.[1533]

### 4.2.6. Value of the Merchant Shipping Act for cultural heritage

The MSA is not suitable for offering protection for UCH. One of the main reasons for this is that the MSA allows for the salvage of wrecks and is mainly aimed at protecting the rights of salvors and owners. Nevertheless, this does not mean that the MSA is without value for the protection of UCH. The Receiver takes the heritage value of wrecks into account when fulfilling her tasks under this Act. She works closely together with heritage organisations in all matters relating to wrecks and can seek their advice when material of historical or archaeological importance is reported. [1534] Unless in case the finder wishes his report to be treated in confidence, reports dealing with the

[1529] The two divers were caught when they finally reported their finds to the Receiver after seeing a news report in which other divers had been arrested for taking valuable items. While in the end they did try to comply with the reporting duty set in the MSA, the time limit of 28 days was long passed as the divers were recovering items since 2001. S. MORRIS, "Divers ordered to pay £60,000 for plundering artefacts from wrecks", *The Guardian*, 2 July 2014, www.theguardian.com/uk-news/2014/jul/02/divers-pay-60000-plunder-artefacts-wrecks-fail-declare-haul. (MORRIS 2014)

[1530] *R. (on the application of Knight) v. Secretary of State for Transport*, High Court of Justice Queen's Bench Division Administrative Court, 10 July 2017, [2017]EWHC 1722(Admin). (*Knight* 2017)

[1531] It is interesting to note that Knight later attempted to obtain a salvage reward for a part of the items that were salvaged. Knight was convicted under both articles 236 and 237 MSA.. While anyone who violates article 236 MSA automatically forfeits any claim to a salvage reward, no such provision is included in article 237 MSA. Knight therefore argued that for a cannon and ingots that he had recovered and for which he was convicted not under section 236 MSA but under section 237 MSA, he was entitled to a salvage reward. Numerous arguments were cited by Knight supporting this point of view and the Secretary of State presented its counterarguments. In the end, the High Court of Justice Queen's Bench Division ruled that Knight's claim for judicial review must be dismissed, *inter alia*, as following article 23 of the Salvage Convention, all salvage claims are time barred and the period for claiming a reward had elapsed. *Knight* 2017.

[1532] Maritime and Coastguard Agency, *MCA enforcement unit: prosecutions 2014*, 1 May 2014, www.gov.uk/government/publications/mca-enforcement-unit-prosecutions-2014 (last update 17 February 2016), 4-5.

[1533] MORRIS 2014; BBC News, *Kent divers guilty of not declaring shipwreck items*, 15 May 2014, www.bbc.com/news/uk-england-kent-27426100.

[1534] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.

discovery of historic material are passed on to the Historic England Archive.[1535] Furthermore, in order to be able to consider designating a site under the 1973 PWA, as discussed below,[1536] the competent agencies will be notified of the discovery of UCH.[1537] The Receiver tries to ensure that wrecks, which are of importance from a heritage point of view, are offered to an appropriate museum. The views of the finder will be taken into consideration when offering the wreck to a museum.[1538]

While allowing for the salvage of shipwrecks, in a number of ways the provisions of the MSA do make a contribution to the protection of UCH. Firstly, the duty to report finds is very useful from an archaeological point of view as it allows for a public record to be made which offers important information to archaeologists and historians. Secondly, while it is true that the MSA encourages interference with sites and the recovery of material, it can be argued that the salvage reward paid to the finder serves as an incentive for reporting finds that would otherwise perhaps remain unknown.[1539] Thirdly, the MSA upholds the rights of the original owners and their successors to shipwrecks. When the wreck is a vessel that belonged to a State, that State can come forward to affirm its title over the wreck. This State can, especially when it is a member State to the UNESCO Convention, protect this wreck in an archaeologically sound manner. Furthermore, as a general rule, the Crown is entitled to unclaimed wrecks and can place them in a public museum or any other suitable preservation area.[1540] As was explained above, the MSA provides that when no owner or grantee claims title to a wreck, the Receiver will sell it for the benefit of the Crown.[1541] In practice, however, this approach will not be followed for historically or archaeologically important wrecks. In this case, the Crown forfeits its financial interests and the Receiver makes an effort to ensure that the wreck is deposited in a publicly accessible museum. Likewise, finders are encouraged to waive their rights to a salvage reward in order to allow the find to be donated to a

[1535] The Historic England Archive was formerly known as the National Monument Record. This record was created in 1992. It contains historic shipwrecks and submerged archaeological sites that are located in English territorial waters. This database includes wreck sites that date back to before the 15th century. Historic England, *Selection Guide Ships and Boats: Prehistory to Present*, December 2017, https://historicengland.org.uk/images-books/publications/dsg-ships-boats/, 7. (Historic England, Selection Guide Ships and Boats, 2017) The Archive contains about 40.000 records of wreck sites, archaeological features and documented losses. Historic England, *Protected Wrecks*, https://historicengland.org.uk/advice/hpg/has/protectedwrecks/ (consulted 9 August 2018).
[1536] See *infra* section 4.3.
[1537] DROMGOOLE 2006, 318.
[1538] Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.
[1539] When no owner comes forth, the finder will often be allowed to keep the wreck in lieu of a reward. It should be noted that nowadays, most salvage operations of sunken or distressed vessels are done by specialist companies following a contract that was agreed prior to the operation between the salvor and the owner. DDCMS, Making the system work better 2004, 12.
[1540] DROMGOOLE 1999, 198.
[1541] See *supra* section 4.2.4.

museum.[1542] When a finder is unwilling to waive his salvage rights, the Receiver will inquire whether a museum wishes to buy the wreck.[1543] The finder will then receive the net proceeds of the sale after the Receiver has been reimbursed for her expenses. When no museum is interested in purchasing the material, the finder is usually offered the material instead of a salvage reward upon payment of all expenses.[1544]

As a general conclusion it can be stated that while the MSA essentially is not a suitable instrument for dealing with UCH, it does contribute in a number of ways to its protection. Nevertheless, even though consideration is given to the specific nature of historically valuable wrecks, the MSA gives priority to the private interests of the owner and salvor rather than to public interests in heritage protection.

## 4.3. Protection of wrecks act 1973

### 4.3.1. Introduction

In the 1960's underwater exploration was booming following the wide availability of scuba-diving material. This resulted in a large number of shipwrecks and other objects to be discovered. At this point in time, the only legislation dealing with wrecks in the UK was the 1894 MSA, which was later revised to become the 1995 MSA. As was explained under the previous title, the 1894 MSA was considered to be unsuitable for the preservation and protection of archaeologically and historically important objects. There was thus a need to adopt new legislation for the protection of cultural heritage. An event that served as a catalyst for the adoption of such new legislation was the discovery of the HMS Association, a British warship that sank in 1707 with the loss of many lives.[1545] When the wreck of the HMS Association was discovered in 1967, competing teams of divers rendered it almost unrecognisable in their attempts to obtain the large amount of silver and gold coins present therein by the use of explosives. This event, as well as similar cases of misconduct regarding wrecks of historical importance led to a Private Member's Bill being brought before

[1542] An example of a finder donating his find to a museum was that of the Bell of the Prince Leopold, which was reported to the Receiver in 2001. The Prince Leopold, a Belgian ferry that was requisitioned during the war and took part in the Allied efforts during the D-day landings, sank in 1944. The finder wanted to donate the bell to a museum, but no appropriate museum could be found in the UK. Therefore, the Receiver considered the 'De Plate museum' in Ostend, Belgium as a possible museum. In 2004 the Receiver and the finder came to Belgium to officially hand over the bell. DROMGOOLE 2006, 320.

[1543] The price of the material is based on its current commercial value. DROMGOOLE 2006, 320.

[1544] DROMGOOLE 2006, 320. If no suitable museum can be found that wishes to acquire the material and the finder does not want to waive his or her rights to a salvage reward, the material will be sold. This is the case for all material that qualifies as wreck, including wrecks that were designated under the PWA 1973 (see *infra* section 4.3.). DROMGOOLE 2006, 341-342.

[1545] A. TONY, *HMS Association*, 26 October 2007, https://wrecksite.eu.

Parliament. The objective of this Bill was to adopt interim measures to control diving activities during the period in which the 1894 MSA was being revised. In 1973 this bill was enacted as the Protection of Wrecks Act (PWA).[1546] In 1970 the Department of Trade and Industry established a committee with the task to conduct the foreseen review of the 1894 MSA. In 1974, this committee drafted a report on this. This report was, however, never published. In 1976, following a parliamentary question inquiring whether this report had been considered, the Secretary of State of Trade and Industry replied that he considered it premature to alter the 1894 MSA at that time. Fortunately, the Secretary of State found that while the PWA was meant as an interim measure, it had proven to be an efficient instrument and should remain in force for a longer period of time in order to gain experience.[1547] Up till today, the PWA remains in force.

The main objective of the PWA in relation to historic wreck is to control salvage operations and to prevent unauthorised interference with a number of sites of special importance.[1548] The Act consists of two substantial parts followed by a third part containing supplementary provisions. The first part deals with the protection of historic wrecks sites and is administered by the national heritage organisations on behalf of the Department for Digital, Culture, Media and Sport (DDCMS). In England, the protection of wreck sites under part one PWA falls under the competence of Historic England.[1549] Historic England obtained a number of responsibilities in this field in 2002 following the National Heritage Act.[1550]

The second part of the PWA imposes a prohibition to approach dangerous wrecks. While historical wrecks can potentially be dangerous wrecks, especially wrecks of warships which might still contain ammunition, this part will not be discussed in light of this dissertation as it does not directly address the protection of UCH.

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[1546] DROMGOOLE 1999, 181-182. Protection of Wrecks Act 1973, 1973 c. 33. (PWA)

[1547] DROMGOOLE, "Protection of Historic Wreck: The UK Approach, Part II: Towards Reform", *IJECL* 1989, 95-96.

[1548] DROMGOOLE 1999, 182.

[1549] Historic England is the public body that is responsible for England's historic environment. Until 1 April 2015 this body was known by the name 'English Heritage'. Historic England, https://historicengland.org.uk/ (consulted 9 August 2018). Other national heritage organisations administering part one of the PWA are the Welsh government's Historic Environment Service (Cadw) in Wales and the Department of Agriculture, Environment and Rural Affairs in Northern Ireland. Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.
In Scotland, section 1 of the PWA has been replaced by the designation of Historic Marine Protected Areas. The PWA was repealed in November 2013. Historic England, *Protected Wreck Sites FAQ's*, https://historicengland.org.uk/listing/what-is-designation/protected-wreck-sites/wreck-site-faqs/ (consulted 8 August 2018).

[1550] Historic England, *Accessing England's Protected Wreck Sites – Guidance Notes for Divers and Archaeologists*, October 2015, available at https://historicengland.org.uk/listing/what-is-designation/protected-wreck-sites/, (3). (Historic England, Guidance Notes 2015)

### 4.3.2. Designation of sites

The PWA allows the Secretary of State to designate a restricted area around a wreck site in order to protect the wreck from uncontrolled interference.[1551] The objective of this Act is to protect a representative sample of historical and archaeological resources that are of national importance.[1552] In the designation order, the Secretary of State must determine the size of the restricted area as he feels is appropriate in order to ensure the protection of the wreck.[1553]

Two criteria must be complied with in order for an area to be designated. Firstly, the site *"is, or may prove to be, the site of a vessel lying wrecked on or in the sea bed*".[1554] A designated site must thus be likely to contain the remains of a vessel even when the vessel itself has not yet been discovered.[1555] This also entails that the PWA is rather limited in its scope of application as the only type of UCH that can be protected under this Act are wreck sites. The second criterion to be fulfilled is that there has to be a need to protect the site from unauthorised interference due to the "*historical, archaeological or artistic importance of the vessel, or of any objects contained or formerly contained in it*".[1556] While the PWA does not further specify what is meant by "*historical, archaeological or artistic importance*", a non-statutory guidance document has been published containing a list of criteria that is used by the Secretary of State to determine whether a restricted area should be designated.[1557] These criteria are the following: period, rarity, documentation/finds, group value, survival/condition, fragility/vulnerability, diversity and potential.[1558] It should be noted that the PWA does not contain an age criterion for wrecks. The criterion 'period' merely indicates that wrecks originating from certain periods are of more interest than those originating from other periods. For example, wrecks originating from before 1700 are so rare that any vessel from this period is likely to be of enormous historical importance and should be protected. Vessels of a later date, especially when functioning examples still exist, will only be protected under exceptional circumstances.[1559]

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[1551] Section 1(1) PWA. In England this is the Secretary of State for the DDCMS. Prior to making a designation order, unless in case of immediate urgency, the Secretary of State must consult with all persons that he feels are appropriate to consult. This can include consultation with bodies having maritime interests such as the government departments and agencies responsible for *inter alia* fishing, dredging and marine nature reserves. Section 1(4) PWA; DROMGOOLE 1999, 190-191.
[1552] Historic England, Guidance Notes 2015, 3.
[1553] Section 1(2) PWA. In practice this varies from 50 to 300 metres in radius. DROMGOOLE 2006, 321.
[1554] Section 1(1) PWA.
[1555] Historic England, Selection Guide Ships and Boats 2017, 17.
[1556] Section 1(1) PWA.
[1557] Historic England, Selection Guide Ships and Boats 2017, 15-16.
[1558] Historic England, Selection Guide Ships and Boats 2017, 15-16.
[1559] Historic England, Selection Guide Ships and Boats 2017, 15.

In order for a site to be designated it must be located in UK waters, which includes any part of the sea located within the seaward limits of the UK territorial waters.[1560] The PWA does not specify what is meant by 'territorial waters'. Based, however, on the interpretation used in other Acts, such as the Ancient Monuments and Archaeological Areas Act 1979 (AMAAA),[1561] 'territorial waters' should be interpreted as including UK internal waters and the territorial sea up to 12nm. [1562] Additionally, as the UK has not declared a contiguous zone in the sense of article 33 UNCLOS, it is likely that the territorial scope of application of the PWA is limited to the 12 nm line.

### 4.3.3. Offences directed at designated wreck sites

Without a license granted by the Secretary of State it is prohibited to tamper with, damage or remove (part of) a wreck or any object formerly contained in a wreck located in a restricted area. Likewise, diving and salvage operations with a view to exploring a wreck or removing objects are not allowed. A license is as well required for the use of equipment that is constructed or adapted for the purpose of conducting diving or salvage operations.[1563] This provision has been interpreted in such a way that divers need to obtain a license for simply diving on a wreck site, even when the diver does not touch the wreck or enters into the wreck's remains.[1564] This is a very stringent form of protection. An exception has been made for geophysical survey, for which in most cases no license will be required. However, Historic England requests that anyone planning such a survey notifies it of his intentions and the likely dates on which the survey will be conducted.[1565] Activities such as bathing, angling and navigating above a designated site are allowed without a license under the condition that it is not likely that these will damage the wreck site and that there is no intention to damage the site, or to obstruct any activities directed at it. Anchoring is only allowed in light of licensed activities or maritime distress.[1566] No offence is committed when any of the above mentioned activities are conducted without a license in light of an emergency, in exercising functions conferred by or under an enactment or because this is necessary due to stress of weather or any navigational hazards.[1567] Any person committing an offence as specified in the PWA can be convicted to a fine.[1568]

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[1560] Section 3(1) PWA.
[1561] See *infra* section 4.4. for more on the AMAAA.
[1562] Historic England, Selection Guide Ships and Boats 2017.
[1563] Section 1(3)(a-b) PWA. The Act also criminalises depositing objects, resulting in them to fall and lie abandoned on the seabed, which, if they were to fall on the wreck would damage or obliterate it. Section 1(3)(c) PWA.
[1564] DROMGOOLE 2006, 324.
[1565] Historic England, *Applying for Licenses for Protected Wreck Sites*, https://historicengland.org.uk/advice/planning/consents/protected-wreck-sites/applying-for-licensing/, consulted 9 August 2018.
[1566] Historic England, Guidance Notes 2015, 28.
[1567] Section 3(3) PWA.
[1568] This is a fine not exceeding 400 pounds on summary conviction or a fine on conviction on indictment. Section 3(4) PWA.

### 4.3.4. Licensing system

Applications for a license are received and validated by Historic England.[1569] Historic England requests references from the applicant to confirm his identity, experience and qualifications and, when applicable, contacts other licensees working on the site. When a request for a license is out-of-the-ordinary, advice is sought from the Historic Wreck Panel.[1570] After reviewing the application, Historic England offers a draft license or a recommendation to refuse the license to the Secretary of State of the DDCMS.[1571] The latter can grant the license either to persons that appear to him to be competent and properly equipped to conduct a salvage operation in such a manner that the historical, archaeological or artistic importance of the site is preserved *or* to a person that has another legitimate reason for conducting activities in the restricted area for which a license is required. The last part of this phrase seems rather strange. Question arises whether this entails that a person could be granted a license for conducting activities in a designated area even when this person cannot guarantee the adequate treatment of the wreck there present. This would run counter to generally accepted archaeological principles as included in the Annex to the UNESCO Convention. In the guidance notes for divers and archaeologists issued by Historic England, however, it is required that both conditions are fulfilled in order for the Secretary of State to be allowed to grant a person a license. This thus entails that the license requester must both be competent to preserve the heritage value of the site as well as have a legitimate reason for conducting activities in the site's vicinity. This approach makes the most sense from a heritage-preservation point of view.

The Secretary of State can attach conditions or restrictions to the license and can revoke it.[1572] As a general rule, licenses are valid from the date of their issuing to the end of the following

[1569] Historic England has created a set of conservation principles for the sustainable management of the historic environment. The main objective of these principles is to strengthen the credibility and consistency of the advice given and decisions taken by the staff of Historic England. All projects directed at protected wreck sites should be compatible with these principles, as well as any other policies and guidelines published by Historic England and the wider statutory policy framework including the UK Marine Policy Statement. Historic England, *Conservation principles, policies and guidance for the sustainable management of the historic environment*, 23 April 2008, https://historicengland.org.uk/images-books/publications/conservation-principles-sustainable-management-historic-environment/. Historic England, Guidance Notes 2015.

[1570] England's Historic Wreck Panel replaced the Advisory Committee on Historic Wreck Sites in 2011. It offers advice on complex and high profile wreck sites. Historic England, Guidance Notes 2015, 3; J. PENROSE (Under-Secretary of State for Culture, Olympics, Media and Sport), "Advisory Committee on Historic Wreck Sites", *Written Statements* vol. 525, 24 March 2011, available at https://hansard.parliament.uk/Commons/2011-03-24/debates/11032453000013/AdvisoryCommitteeOnHistoricWreckSites.

[1571] Historic England, Guidance Notes 2015, 5.

[1572] In case a license is revoked, the Secretary of State must give notice of this to the licensee at least one week in advance. Section 1(5) PWA.

November. It is possible to apply for the continuation of the license using the License Renewal Form.[1573]

Until 1997, two types of licenses existed. The first type was a 'survey license' which allowed for the non-intrusive investigation of a site. The second type was the so-called 'excavation license'. This second type of license was subjected to more stringent demands. For example in order to obtain such a license, it must be demonstrated that the excavation was done under the direction of an experienced marine archaeologist. In 1997, two more types of licenses were introduced. The first was a 'visitor's licence'. This license was created in response to the issues surrounding the prohibition to conduct diving activities without a license under the PWA. As this prohibition to dive applies regardless of whether the divers interfere with the site or not, this restriction is in contradiction with the archaeological principle that responsible non-intrusive access to *in situ* UCH should be promoted. For this reason, a specific license was created for visiting sites without disturbing them. The second license that was introduced in 1997 was the 'surface recovery license'. This license allowed the licensee to recover material that is exposed on the seabed when this can be done without disturbance of the site. This license was created in light of the archaeological principle that non-intrusive techniques should be encouraged.[1574]
In 2015, the licensing process was amended and the four types of licenses were merged into one all-encompassing license. Which requirements must be fulfilled to obtain such a license depends on what type of activity the license is requested for. For example, for certain intrusive activities, one of the requirements is that the cooperation of an archaeologist is sought. This archaeologist is referred to as the Nominated Archaeologist.[1575] The 2015 amendment was adopted to reflect the broad range of reasons for which access can be sought to protected wreck sites and to ensure that licenses can be granted in accordance with the latest archaeological evolutions.[1576]

A license will only be granted if it is *"of benefit to the care, understanding or public appreciation of the site*".[1577] In the past licenses have been issued for the majority of the designated sites.[1578] Over the last years, this practice has altered somewhat. Historic England will not recommend that the Secretary of State gives a license for the recovery of objects from a designated site unless a strong case can be made explaining that such a recovery is appropriate.[1579] Such an application must

[1573] Historic England, Guidance Notes 2015, 13.
[1574] DROMGOOLE 2006, 324.
[1575] Historic England will act as the default archaeological advisor. Historic England, Guidance Notes 2015, 4.
[1576] Historic England, Guidance Notes 2015, 4.
[1577] When the activities include the disturbance of the seabed or the recovery of material, the project design must accompany the application for a license. Historic England, Guidance Notes 2015, 4 and 9.
[1578] DROMGOOLE 2006, 324.
[1579] Historic England recognises that sites are irreplaceable and that there are only a finite number of them. Therefore, it is important to consider whether an excavation is necessary or whether it is better to wait until new

provide a project design specifying the reasons for the recovery, as well as the methodology that will be used and conservation measures that will be taken.[1580] Furthermore, evidence must be given of an agreement with a museum willing to house the recovered material.[1581] Historic England encourages licensees to waive their rights to a salvage reward in favour of a museum. All artefacts that are recovered are subject to the obligations as set out in the MSA, entailing *inter alia* that all finds must be reported to the Receiver. While the policy of the Receiver is to attempt to keep collections together and offer them to a suitable museum, it is essential that the long-term conservation of the recovered artefacts is already considered in the project design as there is no guarantee that a museum will have the necessary resources to conserve the recovered material. As a general rule, licensees must contact the owners of the wreck or any artefacts, if these are known, as well as all appropriate authorities in order to obtain the necessary permits and consents for the activities that they wish to conduct.[1582]

Another novelty that was introduced with the 2015 amendment was the term 'Principal Licensee'. The Principal Licensee is the individual to whom the license is granted. Even though archaeological activities are often undertaken by a team,[1583] the Principal Licensee is solely responsible for all activities undertaken by that team.[1584] He must abide by the general principles set out in the Annex to the UNESCO Convention. Even though the UK has not yet ratified the UNESCO Convention, the UK government has adopted the Annex as best practice for archaeology.[1585]

The greatest aid in enforcing the protection of designated wrecks is the fact that the licensees want to protect their personal interests in a wreck site. On the other hand, the diving season is rather

techniques become available allowing the site to be investigated in a non-intrusive manner. Historic England, Guidance Notes 2015, 4.

[1580] Sources of project funding must be considered before a project can commence. The revenues from the sale of antiquities that were recovered from protected wreck sites cannot be considered as a potential source of funding. Historic England, Guidance Notes 2015, 23.

[1581] It is, however, recognised that no definitive agreement can be made on the final deposition of the recovered material until it has been determined who holds title over the artefacts. Historic England, Guidance Notes 2015, 17.

[1582] Historic England, Guidance Notes 2015, 10 and 16.

[1583] All the licensees, nominated archaeologists and other team members are eligible to become affiliated volunteers of Historic England. These volunteers are given certain privileges such as training and support from Historic England. They are covered by the Historic England insurance and reimbursed for out-of-pocket expenses that incur during volunteering. Finally, when problems arise, they can ask for assistance from Historic England in resolving problems that might arise. On the other hand, these volunteers must comply with a number of obligations. These include abiding by the Historic England code of behaviours, conducting their voluntary activities in accordance with the policies and procedures set by Historic England and fulfil the duties as set out in the Volunteer Role Description. Historic England, *Volunteer Policy*, https://historicengland.org.uk/about/volunteering/volunteer-policy/ (consulted 8 August 2018).

[1584] As it is not always possible for the Principal Licensee to be present on site, he can appoint a number of additional licensees that are responsible on site in his absence. Historic England, Guidance Notes 2015, 17.

[1585] Licensees are also under the obligation to report on their activities to Historic England. Any information obtained from the investigation of historic wreck sites is made public. Historic England, Guidance Notes 2015, 1 and 31.

short (about four months) which means that sites sometimes remain unguarded for days or even weeks in a row. It might take a while before interference with a site is discovered and by that time all prove of the identity of the culprits might be gone. The PWA for the most part prevents large-scale looting and the destruction of sites, as well as conflicts between rival salvage groups, but small-scale theft by individual divers is not uncommon. Prosecutions have, however, been rare. Preference is given to educating divers in order to persuade them to abide by the PWA.[1586]

#### 4.3.5. Protected wreck sites

Only a very small part of all wrecks have been designated under the PWA. About 37.000 documented wreck sites and known lost ships are located in English waters, which in itself is only a small part of all vessels that were lost or were left to decay over the centuries.[1587] Of all these wreck sites, only 61 have been designated under the PWA.[1588] In order for people to enjoy these historic wrecks, dive trails are being made allowing for responsible access to the designated sites. Existing dive trails include trails around the HMS Colossus, Iona II, Coronation, HMS/n A1 and Normans Bay. The HMS Colossus dive trail, for example, consists of numbered observation stations which are located around the site. A waterproof information booklet is given to divers in order to guide them between the different observation stations, as well as to explain which remains can be seen and offer some background information on the wreck.[1589] Allowing divers to visit these sites has a number of benefits. Firstly, divers are encouraged to share all photos that they take of the wreck sites, which can assist with the monitoring of the site. Another benefit is that the presence of licensed divers on the site can act as a deterrent to others that intent to access the wreck site illegally. Finally, these dive trails and the historic value of the wreck sites can provide benefits of a social and economic nature when they are used for educational or recreational purposes and when they bring in tourist revenues.[1590] For persons that cannot, or do not wish to, dive on the sites, Historic England has commissioned a series of virtual dive trails.[1591]

While only a limited number of sites are protected by the PWA, these dive trails can assist considerably in the raising of awareness and the awakening of public interest in UCH.

[1586] DROMGOOLE 2006, 325-326 and DROMGOOLE 1999, 192-193.
[1587] Historic England, Guidance Notes 2015, 3.
[1588] Historic England, *Search the list*, https://historicengland.org.uk/listing/the-list/ (consulted 9 August 2018).
[1589] CISMAS, *HMS Colossus – dive trail*, www.cismas.org.uk/colossus_dive_trail.php (consulted 8 August 2018).
[1590] Historic England, Guidance Notes 2015, 18.
[1591] Historic England, *Visit a Protected Wreck Site*, https://historicengland.org.uk/get-involved/visit/protected-wreck-dive-trails/ (consulted 8 August 2018).

## 4.4. The Ancient Monuments and Archaeological Areas Act 1979

### 4.4.1. Introduction

The UK legislation discussed so far applies exclusively in the marine environment and is limited to the management and/or protection of wreck sites. The third instrument that is discussed in this section has a wider scope of application and deals with monuments in general both on land and in the marine environment. This is the 1979 AMAAA.[1592] The AMAAA applies in England, Wales and Scotland. It is, however, not applicable in Northern Ireland.

### 4.4.2. Scheduling of monuments

#### 4.4.2.1. Application of the Ancient Monuments and Archaeological Areas Act

The AMAAA allows for monuments to be scheduled, both on land and in the UK marine area up to 12 nm. This Act thus applies in the UK territorial sea, but does not offer any protection for monuments located further from the coast.[1593] As is the case in the PWA, the AMAAA aims to protect monuments from interference that might damage or destroy them. Unlike the PWA, however, the notion 'monuments' is not limited to shipwrecks and their cargo. In the AMAAA monuments can include (sites comprising) buildings, structures, works, caves, excavations, the remains of vehicles, vessels, aircraft and other movable structures.[1594] While the AMAAA can apply to many more categories of heritage compared to the PWA, the definition of 'monuments' does not cover all types of UCH as described in the UNESCO Convention. For example heritage such as prehistoric landscapes cannot be protected by the AMAAA.[1595]

Contrary to what the title of the AMAAA seems to suggest by referring to 'ancient monuments', this Act does not contain an age criterion. The AMAAA can thus apply to monuments regardless of their age. Remains from the coal industry, World War II or the cold war can, for example, be scheduled under this Act.[1596]

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[1592] Ancient Monuments and Archaeological Areas Act 1979, 1979 c.46. (AMAAA)
[1593] Section 53 and 45(4) AMAAA.
[1594] Section 61, 2(A)(7) AMAAA.
[1595] DROMGOOLE 2006, 328.
[1596] Historic England, *Scheduled Monuments: A Guide for Owners and Occupiers*, 30 July 2013, available at https://historicengland.org.uk/images-books/publications/scheduled-monuments-guide-for-owners-and-occupiers/, 1.

The Secretary of State of the DDCMS is responsible for compiling and maintaining a schedule of monuments.[1597] Prior to scheduling a monument, the Secretary of State must consult with the Historic Buildings and Monuments Commission, better known as Historic England. [1598] Historic England will give advice to the Secretary of State on whether or not a monument should be scheduled.[1599] While Historic England has its own scheduling programme, anyone can nominate a site to be scheduled.[1600] The condition for a monument to be scheduled and thus protected by the AMAAA is that it is of 'national importance'.[1601] The AMAAA does not provide any further specifications on the meaning of 'national importance'. Non-statutory guidance has, however, been provided in policy documents issued by the DDCMS and Historic England, which is taken into account by the Secretary of State when deciding on whether or not to schedule a monument. The non-statutory criteria provided in these policy documents are the same as the ones for deciding whether a wreck should be designated under the PWA.[1602] These criteria are complemented by a number of detailed guidelines that have been created by Historic England for specific types of monuments.[1603] For UCH there are two sets of guidelines that might be of particular interest namely the "Ships & Boats Selection Guide" and the "Maritime and Naval guide".[1604]

#### 4.4.2.2. Protection of monuments

Without a so-called 'scheduled monument consent', it is prohibited to conduct any activities directed at a scheduled monument which result in its demolition, destruction, or in it being damaged. Similarly, without such consent, no parts of the monument can be removed and no alterations can be made to it.[1605] It is the Secretary of State who can give this scheduled monument consent to which terms and conditions might be attached.[1606] Generally speaking, this consent is

[1597] In Scotland this task is fulfilled by Historic Environment Scotland and in Wales by Cadw.
[1598] Section 1(3) AMAAA.
[1599] Historic England will consult with the owners, planning authorities, the Marine Management Organisation and other relevant bodies such as the Crown Estate or the Receiver of Wreck. DDCMS, *Scheduled Monuments & nationally important but non-scheduled monuments*, October 2013, available at www.gov.uk/government/publications/scheduled-monuments-policy-statement, annex 4, 14. (DDCMS, Scheduled Monuments 2013)
[1600] Historic England, *Scheduled Monuments*, https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments/, consulted 8 August 2018.
[1601] Section 1(3) AMAAA.
[1602] These criteria are period, rarity, documentation/finds, group value, survival/condition, fragility/vulnerability, diversity and potential. DDCMS, Scheduled Monuments 2013, annex 1, 16; Historic England, Selection Guide Ships and Boats, 2017, 15-16.
[1603] R.M. THOMAS, "Heritage protection criteria: an analysis", JPEL 2006, (956) 957. (THOMAS 2006)
[1604] Historic England, *Scheduling Selection Guides*, https://historicengland.org.uk/listing/selection-criteria/scheduling-selection/ (consulted 8 August 2018).
[1605] Section 2(2) AMAAA.
[1606] Section 2(3) and 2(4) AMAAA.

rarely granted, except for rescue excavations, as the generally accepted practice is to preserve these monuments *in situ*.[1607]
When consent has been obtained, the activities must commence within a period of five years from the date on which the consent was granted or else it will cease to have effect.[1608] Anyone who violates either the obligation to obtain consent prior to conducting an activity as specified above or that does not comply with the conditions attached to the consent, will be liable to a fine.[1609] If the consent is withdrawn and because of this a person suffers loss or damages, or when a person has incurred expenditures that have become unnecessary because of the withdrawal of the consent, that person might be entitled to a compensation.[1610]

The AMAAA allows for an intervention to take place when this is necessary to preserve a scheduled monument. In cases of urgency, the Secretary of State may order the execution of works directed at the scheduled site after giving the owner of the monument notice of his intention to do so.[1611] The Secretary of State may proceed to the compulsory purchase of an ancient monument with the objective of preserving it in exchange for a compensation given to the owner.[1612]

#### 4.4.2.3. Ancient Monuments and Archaeological Areas Act or Protection of Wrecks Act

While in theory shipwrecks can both be protected by the AMAAA and the PWA, at first sight it does appear that there is a difference between which ships could be protected under either Act. The selection criterion used in the PWA, is that a wreck must be of 'historical, archaeological or artistic importance' in order to be designated, while a wreck can only be designated under the AMAAA when it is of 'national importance'. This gives the impression that the application of the AMAAA is more stringent as only wrecks that are of importance for the nation can be scheduled. As was explained, however, for both Acts the Secretary of State bases his decision to designate/ schedule on the same set of non-statutory criteria. The wording of the selection criterion under both Acts thus does not amount to a distinct difference in their application to wrecks. There is, however, another fundamental difference between both Acts which has an effect on the decision to protect a wreck under one Act or the other. For both Acts it is prohibited to conduct activities directed at the wreck site without obtaining prior authorisation. However, while following the PWA divers are

[1607] J. LOWTHER, D. PARHAM and M.V. WILLIAMS, "All at sea: when duty meets austerity in scheduling monuments in English water", *JPEL* 2017, (246) 247-248 (LOWTHER, PARHAM and WILLIAMS 2017); DDCMS, Scheduled Monuments 2013, 4 and 8.
[1608] Section 4 AMAAA.
[1609] Section 2(10) AMAAA.
[1610] Section 9(1) AMAAA.
[1611] Section 5(1) AMAAA.
[1612] When this monument is located in England, Historic England will be consulted prior to this. Section 10(1) and (4) AMAAA.

not allowed to visit the site without a license, in the AMAAA divers can visit scheduled monuments without obtaining prior consent on a look-but-don't-touch basis. The AMAAA is therefore generally considered to be more appropriate for protecting relatively robust sites which will not suffer from the frequent visits of divers.[1613] Scheduling under the AMAAA can be very useful for sites that warrant some form of protection but are at same time known as touristic diving attractions. When a site is sufficiently robust and attracts a great number of divers, it would be a huge administrative burden to grant a visitor's license under the PWA to each individual diver in order to visit the site. Scheduling under the AMAAA offers a solution for this. When necessary, however, section 19(2) AMAAA allows for the limiting or even prohibition of public access to the site.[1614] It should be noted that the AMAAA cannot be used to protect wreck sites that are already designated under the PWA.[1615]

### 4.4.3. Rare scheduling in the marine area

The AMAAA has only on rare occasions been used to schedule monuments that are located in the marine area. One of the most famous scheduled monuments that is still submerged is the remains of the seven vessels of a German High Seas Fleet. This site consists of four cruisers and three battleships, which were scuttled in 1919 in Scapa Flow. These wrecks were scheduled under the AMAAA in 2001 by Historic Environment Scotland. This site attracts a great number of tourists every year.[1616] It should be noted that Historic Environment Scotland has recently begun to review the protection given to these wrecks and assesses whether the scheduling of this monument continues to be the best way to protect this important site that is part of the wartime heritage. The reason for this review lies with a recent survey on the Scapa Flow site which revealed that the condition of the wrecks is deteriorating and that the remains will not last forever.[1617] At the moment, however, divers can still visit this site on a look-but-don't-touch basis, as is allowed by the AMAAA. The condition that the site cannot be touched was unfortunately not always respected. In 2016, two divers were convicted to a fine of 18.000 pound each for raiding a number of the scheduled wrecks, including the battleships SMS Markgraf and SMS Kronprinz Wilhelm,

[1613] Hampshire & Wight Trust for Maritime Archaeology (on behalf of English Heritage), *LCT(A) 2428: An assessment for scheduling in the Marine Zone* (Project Report), July 2011, www.maritimearchaeologytrust.org/uploads/publications/LCT2428_FINALREPORT_WEB.pdf, 28-29 (Hampshire and Wight, LCT(A)2428 Project Report 2011); Maritime and Coastguard Agency, The Role of the Receiver of Wreck 2012.
[1614] Section 19(2) AMAAA.
[1615] Section 61 2(A)(8)(b) AMAAA.
[1616] Historic Environment Scotland, *Scapa Flow*, www.historicenvironment.scot/advice-and-support/listing-scheduling-and-designations/marine-heritage/scapa-flow/ (consulted 8 February 2018).
[1617] Historic Environment Scotland, *Recognising the Marine Heritage of Scapa Flow*, 16 November 2017, www.historicenvironment.scot/about-us/news/recognising-the-marine-heritage-of-scapa-flow/.

which constituted a violation of section 2(1) AMAAA.[1618] Question therefore remains whether these wrecks should be protected at a higher level.[1619]

A second example of a wreck site that has been scheduled as a monument is the so-called Kilspindie wrecks which contains the hulls of eight fishing boats. These vessels sank during the late 19th- early 20th century and were scheduled by Historic Environment Scotland in December 2002. These wrecks are located in Aberlady Bay, East Lothian. They are considered to be of importance because they are the rare survival of a type of wrecks that were once intensely used in the Scottish fishing industry.[1620]

In Wales, Cadw scheduled the wreck of the merchant vessel Louisa in December 2001. This wreck is located in internal waters in Grangetown, Cardiff. The Louisa was built in 1851 and is a witness of the transitional period in the building of ships from timber to them being built from iron.[1621]

In England, the AMAAA was only rarely used for the scheduling of submerged monuments. One example that can be given is the Phoenix Caisson, which was scheduled in 2013. It is located in the Straits of Dover, about 0,66 km from the low water mark. This Caisson was part of the Mulberry floating harbour, which during WWII played a key role in the Normandy landings.[1622]

While the AMAAA allows for the scheduling of monuments located in the marine area up to 12nm, only rare examples of this can be found, especially beyond UK's internal waters.[1623] Therefore, it may be concluded that the AMAAA does not in a substantial way assist in the protection of UCH even though in theory this might be possible. Furthermore, the discovery of two sites in English waters for which protection under the AMAAA was requested recently resulted in controversy about the application of this Act to monuments located in English waters. This case is discussed here.

[1618] A. CAMPSIE, "Divers fined after raiding battleship wrecks of Scapa Flow", *The Scotsman*, 30 November 2016, www.scotsman.com/news/divers-fined-after-raiding-battleship-wrecks-off-scapa-flow-1-4305234.
[1619] Such protection could be offered by the Marine (Scotland) Act 2010, 2010 *asp.* 5. (Marine (Scotland) Act) See *infra* section 4.6.5.2. for more on this Act.
[1620] Historic Environment Scotland, *Kilspindie, wrecks of eight fishing boats*, http://portal.historicenvironment.scot/designation/SM10471 (consulted 9 August 2018).
[1621] Coflein, *Louisa*, www.coflein.gov.uk/en/site/405916/details/louisa (consulted 9 August 2018).
[1622] Historic England, *Phoenix Caisson off Littlestone-on-Sea*, https://historicengland.org.uk/listing/the-list/list-entry/1415588 (consulted 9 August 2018).
[1623] Historic England, Selection Guide Ships and Boats, 2017, 14.

4.4.4. A new policy of Historic England for scheduling in the marine area?

About seven years ago, two wreck sites were discovered in English waters. The first is the wreck of His Majesty's Landing Craft (Tank) 427 (LCT427) and the second is the wreck of the Royal Naval Armoured Tank Landing Craft 2428 (LCT(A)2428) as well as an assemblage of armoured vehicles (two tanks, two armoured bulldozers, a jeep, military vessels fixtures and fittings and armament) which landed on the seabed when the LCT(A)2428 capsized. [1624] Both sites are unique time capsules that bare testimony of the events that occurred on D-day. The LCT427 is broken in two parts that lie several hundred metres apart, but that both have been exceptionally well preserved with their equipment and armament, including the ammunition, still in place. Divers from South Sea British Sub-Aqua Club (BSAC) discovered both parts of the wreck in 2011. As for the second site, which comprises of two parts namely the wreck of the LCT(A)2428 and the assemblage, divers from BSAC conducted a first survey of the site in 2008 within the 'Adopt a Wreck' scheme of the Nautical Archaeology Society.[1625] In 2011, further survey of the site was commissioned by Historic England.[1626]

In the 2011 survey of the LCT(A)2428 site an assessment was made of the level of threat at which this site is exposed. Account was *inter alia* taken of activities taking place in the vicinity of the site such as fishing and anchoring, of natural processes and of to what extent divers were removing objects from the site. It was concluded that the part of the site containing the assemblage was under a medium to high level threat while the remains of the LCT(A)2428 were considered to be under a low to medium level threat.[1627] Furthermore, it was felt that both the assemblage and the remains of the LCT(A)2428 are sufficiently robust to allow divers to visit the sites on a look-but-don't-touch basis and can therefore be scheduled under the AMAAA. Finally, it was concluded that the site is of sufficient importance, rarity and preserved in a sufficiently good condition in order to merit protection under the AMAAA.[1628] For the LCT427 site, a similar conclusion was drawn and protection under the AMAAA was considered to be the preferred option.

Following the surveys and assessments of both the LCT(A)2428 site and the LCT427 site, the project leader at Southsea BSAC, Ms. Alison Mayor, who was responsible for the surveys on both sites wanted to see these sites scheduled under the AMAAA as they are rare examples of their type and directly participated in the historical event known as D-day.[1629] The applications for scheduling

[1624] Hampshire and Wight, LCT(A)2428 Project Report 2011, 5.
[1625] LOWTHER, PARHAM and WILLIAMS 2017, 247-249
[1626] Hampshire and Wight, LCT(A)2428 Project Report 2011, 5.
[1627] Hampshire and Wight, LCT(A)2428 Project Report 2011, 26.
[1628] Hampshire and Wight, LCT(A)2428 Project Report 2011, 28-29.
[1629] No application was made for the site of the LCT(A) 2428 itself. Application was only made for the vehicle assemble and LCT427. LOWTHER, PARHAM and WILLIAMS 2017, 249 (footnote 40).

were made in 2011. Due to policy deliberations, however, the determinations on both applications were delayed for a number of years. Finally, in 2015, Ms Mayor received a letter from Historic England in which it was explained that the application for the sites had triggered a discussion within Historic England about whether it is appropriate to schedule monuments at sea under the AMAAA. The result of this discussion was the creation of a new policy within Historic England following which it will not recommend the scheduling of sites to the Secretary of State that are located below the mean low water mark (MLWM) regardless of the merits of each individual case.[1630] In the advice from Historic England regarding the LCT427 site[1631] a number of reasons were cited for this new policy including that the AMAAA was not previously used for scheduling monuments in this zone, that Historic England wished to focus on the application of the PWA and that such scheduling would duplicate the 1986 PMRA.[1632]

Historic England refused to recommend the scheduling of both the LCT427 site and the assemblage originating from the LCT(A)2428 to the Secretary of State based on their new policy. Asides from referring to it in its letter send to Ms Mayor, Historic England has at this time not yet publicly disclosed this new policy. In fact this policy would run counter to both the policy expressed by the DDCMS, to which Historic England is subordinate, and the policy previously issued by Historic England itself.[1633] In its 2013 policy on scheduled monuments, the DDCMS did not distinguish between monuments located on land and those located in the English territorial sea.[1634] Likewise, Historic England itself never mentioned in previously issued policy documents such as the selection guidelines that monuments located below the MLWM will not be considered for scheduling.[1635]

In December 2015, Ms. Mayor received an email from the Secretary of State providing that having considered the recommendations given by Historic England, the Secretary decided not to schedule the LCT427 as a monument. Aside from a general reference to the recommendations of Historic England, no specific reasons were given for this refusal to schedule. As for the assemblage, Ms. Mayor received a similar email in April 2016 in which the Secretary of State refused to schedule this site. [1636]

[1630] The mean low water mark is the lowest level reached by the sea at low tide. LOWTHER, PARHAM and WILLIAMS 2017, 252.
[1631] LOWTHER, PARHAM and WILLIAMS 2017, 251-252 referring to Advice Report, 18 November 2015, Case No.1408027.
[1632] LOWTHER, PARHAM and WILLIAMS 2017, 253. See *infra* section 4.5. for more on the PMRA 1986.
[1633] LOWTHER, PARHAM and WILLIAMS 2017, 255.
[1634] DDCMS, Scheduled Monuments 2013, 16.
[1635] For example on p.14 of the Selection Guide on ships and boats a graphic clearly indicates that the AMAAA 1979 applies below the MLWM as well. Historic England, Selection Guide Ships and Boats, 2017, 15-16.
[1636] LOWTHER, PARHAM and WILLIAMS 2017, 253 referring to Advice Report, 24 March 2016, Case No.1412109.

Lowther *et.al.* point out that this new policy is potentially problematic. The Secretary of State has a discretionary power to schedule monuments. This entails that when a site complies with the criteria set out in the AMAAA, namely the definitional criterion that the site is a monument and the selection criterion that it is of national importance, the Secretary of State can decide whether or not to schedule a monument based on the individual merits of each case.[1637] Policies can be established relating to such a discretionary power. These policies may impose a high standard for scheduling. They cannot, however, introduce an absolute prohibition to schedule regardless of the circumstances of an individual case. Likewise, such a policy cannot constitute an absolute refusal to consider a case on its personal merits, as these merits might constitute an exception to the generally established quality standard in the policy. In this case, however, it is the Secretary of State who must make the discretionary decisions while Historic England merely has advisory powers. The new policy thus does not originate from the authority that has the discretionary power to schedule monuments. Nevertheless, Lowther *et.al.* feel that the question can be asked whether the improper use by Historic England of its advisory power taints the decision made by the Secretary of State and whether this decision can thus be upheld. Lowther *et. al.* provide that this depends on the underlying reasons based on which the decision was taken. If the Secretary of State made his decision based on the recommendation given by Historic England which relies on a policy that is contradictory to its own and does not consider the individual merits of the case, it can be stated that this legally flawed advice might have impaired the decision taken by the Secretary of State.[1638] On the other hand, however, if it can be demonstrated that the Secretary of State refused scheduling because of the merits of each individual case rather than based on the new policy provided by Historic England, the decision can be upheld.[1639]

It appears that this new policy adopted by Historic England would prove to be problematic as it contradicts the general policy issued by the DDCMS and, when followed by the Secretary of State without considering the merits in each individual case, would result in decisions that can be disputed. Considering the limited number of monuments that have been scheduled under the AMAAA and the current position taken by Historic England, it is uncertain whether this Act will play an important role in the protection of UCH located in the UK territorial sea in the future.

[1637] THOMAS 2006, 957.

[1638] Lowther *et. al*. also point out that it can be argued that this new policy from Historic England contradicts the obligation that it has following the 1983 National Heritage Act to, in as far as practicable, secure that ancient monuments in England are preserved. Section 33(1) National Heritage Act 1983, 1983 c. 47. LOWTHER, PARHAM and WILLIAMS 2017, 254-257.

[1639] LOWTHER, PARHAM and WILLIAMS 2017, 254-257.

## 4.5. Protection of Military Remains Act 1986

### 4.5.1. Introduction

In 1986, the PMRA was enacted in the UK following a number of events that took place in the early 1980's.[1640] The first event related to the salvage of gold from the HMS Edinburgh, a British cruiser that was torpedoed in 1942 and sank while carrying almost 5 kilograms of gold.[1641] Newspaper reports, later found to be incorrect, suggested that divers had disrespected and damaged the human remains located in the wreck during their operations. This resulted in public outrage. The 1982 Falklands Campaign, during which many vessels and lives were lost, resulted in a number of new 'war graves' on the seabed. The general public expressed concern about how the sanctity of those 'war graves' could be respected. A final event related to the wreck of the HMS Hampshire, a British cruiser that sank in 1916 off the Orkney Islands with the loss of 643 lives.[1642] While the Ministry of Defence (MOD) refused to grant permission, a German consortium raised a number of items from the wreck site including personal belongings of the men whose remains were still aboard the ship. The MOD realised that without legislation it could not enforce its unofficial policy dealing with 'war graves' and that there was a need to create a mechanism to control activities directed at such wrecks. This resulted in the PMRA to be adopted.[1643] While the primary objective of this Act was to protect the sanctity of 'maritime war graves', the PMRA itself nowhere mentions the term 'war grave' and in fact applies to a wider scope of sunken State craft.[1644]

During the first sixteen years after its enactment, the PMRA was never applied to military vessels. The continuing disturbance of these vessels resulted in growing public concern and a campaign to be set up by a number of interested parties and ex-service associates to have the interference with 'maritime war graves' regulated.[1645] Between the period of 19 October 1999 to 20 April 2000, the MOD received 51 Parliamentary questions requesting information on 'maritime war graves' and the application of the PMRA.[1646] In response to this, the MOD initialised a public consultation process in order to assess the protection given at that time to wrecked military vessels and, more

[1640] Protection of Military Remains Act 1986, 1986 c.35. (PMRA ). This Act was already to a large extent discussed under chapter two of this dissertation. However, in light of offering a clear and complete overview of UK legislation under this chapter, the most important aspects relating to the PMRA are repeated under this section.
[1641] A. TONY and J. LETTENS, *HMS Edinburgh*, www.wrecksite.eu/wreck.aspx?138652 (last update 2 May 2017).
[1642] A. TONY and J. LETTENS, *HMS Hampshire*, www.wrecksite.eu/wreck.aspx?10355 (last update 9 February 2017).
[1643] FORREST 2015, 131-132; DROMGOOLE 2013, 139; DROMGOOLE 1999, 193.
[1644] DROMGOOLE 2013, 139.
[1645] M.V. WILLIAMS, *Merchantman or quasi-warship? R. v .Fogg and Secretary of State for Defence and Short*, *Journal of International Maritime Law* 2007, (112) 116. (WILLIAMS 2007)
[1646] L. MOONIE, *War Graves*, 26 June 2000, Column 415 W-417W, https://publications.parliament.uk/pa/cm199900/cmhansrd/vo000626/text/00626w20.htm.

in particular, 'maritime war graves'. In November 2001 the consultation report was published.[1647] Recommendation was made to protect a total of 21 wrecks under the PMRA. Sixteen of them are located within UK jurisdiction and were considered for protection as controlled sites and five are located outside UK jurisdiction and should be designated as protected places.[1648] This recommendation resulted in the first designation of vessels under the PMRA in 2002. At that time six vessels were designated under the PMRA and eleven controlled sites were established.[1649] The consultation report also suggested that "*a rolling programme of identification and assessment*" of all other British vessels that were in military service when they were lost should take place in order to designate them as protected places. It is estimated that about 4.000 wrecks located in UK waters alone should fall within the scope of the PMRA.[1650] The PMRA thus has the potential to offer a comprehensive protective framework for sunken military vessels. Anno 2018, only 79 vessels have been designated under the PMRA and 12 controlled sites have been established.[1651] Compared to the number of vessels that potentially qualify for protection under the PMRA, only a very limited selection is actually protected under this Act.

### 4.5.2. Protected Places and Controlled Sites

The PMRA provides for the protection of crashed military aircraft and sunken military vessels. Aircraft that crashed while they were in military service are automatically designated under the PMRA. [1652] These include all military aircraft that were crashed within the territory of the UK and in its territorial sea, as well as all crashed British aircraft that are located in international waters. The PMRA does not apply in the territorial sea of a third State.[1653] Unlike aircraft, sunken vessels are not automatically protected under the PMRA, but need to be designated by the Secretary of State for Defence.[1654] In order for the Secretary of State to designate a vessel that was in military service, this vessel must have sunk on or after 4 August 1914.[1655] This entails that State craft that sank during WWI and WWII can potentially be designated, and thus protected under the PMRA. Places that contain the remains of a designated vessel, or aircraft, are considered to be protected

[1647] MOD Consultation Report Military Graves 2001, 1.
[1648] See below section 4.5.2. as well as section 2.2.3.1. chapter two for the difference between controlled sites and protected places.
[1649] The Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2002, 2002, No.1761.
[1650] WILLIAMS 2007, 116.
[1651] The Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2017, 2017, No.147. (PMRA Designation Order 2017)
[1652] Section 1(1) PMRA. For more on the notion 'while in military service' see section 2.2.3.1. chapter two.
[1653] Ministry of Defence, *Guidance Aviation archaeology*, www.gov.uk/guidance/aviation-archaeology (last update 26 July 2018).
[1654] Section 1(2)(a) PMRA.
[1655] Section 1(3)(a) PMRA.

places.[1656] Alternatively, the Secretary of State can designate an area as a controlled site if it contains the remains of a designated vessel or aircraft.[1657] In order for a site to be designated as a controlled site, it must appear to the Secretary of State that less than 200 years have passed since the vessel or aircraft sank or crashed.[1658] The PMRA thus creates two different protective regimes, namely the protected places and the controlled sites.

In the 2001 consultation report a number of non-statutory criteria were created that the Secretary of State should consider when deciding to designate a vessel under the PMRA. These criteria include whether lives were lost when the vessel sank, whether evidence exists of the sustained disturbance and looting of the site, whether designating the wreck is likely to curb or end this disturbance or looting, whether sustained and significant public criticism arises from diving on the site and whether the wreck is of historical significance. While the PMRA does not exclusively apply to 'maritime war graves', the question of whether lives were lost is one of the criteria to determine whether a wreck should be designated.[1659] Many of the wrecks that were designated under the PMRA are in fact 'maritime war graves'. It is also interesting to notice that the criteria used for the designation of a wreck under the PMRA take into account its historical significance. While the PMRA was not created for the purpose of protecting UCH, it can assist in this. This is especially true when considering that a large part of the UCH worldwide consists of the wrecks of State vessels, which were often war vessels. It is, however, clear that the main purpose of the Act is not to protect historical wrecks. This can for example be deduced from the fact that vessels can only be designated if they sank on or after 4 August 1914 and controlled sites can only be designated when the wreck located in the site sank less than 200 years ago. These time-criteria automatically exclude the application of the PMRA to ancient shipwrecks.[1660]

The PMRA can apply to all vessels that sank while in military service that are located within the UK territorial sea regardless of their nationality. For example, a number of German WWI and WWII wrecks have been designated under the PMRA.[1661] The PMRA can also apply beyond UK waters, in

[1656] Section 1(6) PMRA.
[1657] Section 1(2)(b) PMRA.
[1658] Section 1(4)(a) PMRA.
[1659] MOD Consultation Report Military Graves 2001, 1-2.
[1660] It should be noted that this time-criterion does not apply to aircraft as these are automatically protected by the PMRA regardless of when they sank. However, considering the fact that the first 'powered, sustained and controlled flight' took place as late as in 1903, not many aircraft exist that predate the time-criterion of 1914 and none that crashed over 200 years ago. FORREST 2002, 44. One more provision is included in the PMRA that applies to wrecks regardless of when they sank. The PMRA namely provides that excavations are prohibited "*if it is carried out for the purpose of discovering whether any place in the United Kingdom or United Kingdom waters comprises any remains of an aircraft or vessel which has crashed, sunk or been stranded while in military service.*" Section 2(3)(c) PMRA.
[1661] German wrecks that have designated under the PMRA include the U-12, U-714, U-1018, U-1063 and the UB-65. One German wreck has been designated as a controlled site, namely the UB-81. PMRA Designation Order 2017, schedule 1.

the so-called international waters, to UK vessels that sank while in military service.[1662] The PMRA does not, however, protect wrecks of vessels that were used for the armed forces of a third State from interference by British nationals and British flagged vessels outside the UK territorial sea. This is rather unfortunate as such protection could offer a basis for reciprocal respect and result in other States prohibiting their nationals from interfering with the wrecks of British military vessels located in international waters as well.[1663]

### 4.5.3. Licensing regime

Without a license it is prohibited in both protected places and controlled sites to tamper with, damage, remove, move or unearth the remains present in that site. Furthermore no person may enter a hatch or other opening of those remains, which encloses part of the interior.[1664] There is, however, a difference in the level of protection offered to protected places and controlled sites. While it is allowed for divers to visit a protected place on a look-but-don't-touch basis, the PMRA explicitly forbids any diving operations directed at a controlled site for "*the purpose of investigating or recording details of any remains*".[1665] Therefore, protecting a site as a controlled site is considered to be the more stringent approach of the two. Originally, the MOD preferred to designate sites as controlled sites. The underlying reason for this preference was that offences directed at controlled sites are subjected to strict liability while for actions directed at protected places the offender must have believed or suspected that the site contains remains designated under the PMRA in order for the act to qualify as an offence.[1666] It is thus much easier for the prosecutor to prove that an offence took place directed at a controlled site than it is to prove that the same offence took place directed at a protected place. While for both offences the fact that an act took place violating the PMRA must be demonstrated, for protected places the prosecutor must also demonstrate that the offender was aware of the fact that designated remains were or might have been present on the site. This can be challenging and puts an additional burden on the prosecutor.

Following the 2001 consultation report, the approach of the MOD changed and preference is since given to the designation of a site as a protected place rather than a controlled site. This entails that the MOD feels that non-intrusive diving should be allowed on most sites. Going even further, the 2001 consultation report provided that there was a support for the blanket designation of all

[1662] For the purpose of the PMRA international waters "*means any part of the sea outside the seaward limits of the territorial waters adjacent to any country or territory.*" The 'United Kingdom waters' include "*the sea within the seaward limits of the territorial waters adjacent to the United Kingdom*." Section 9(1) PMRA.
[1663] FORREST 2015, 132.
[1664] Section 2(2)(a-b) PMRA.
[1665] Section 2(3)(a) PMRA. Anyone who violates these provisions shall be liable to a fine. Section 2(7) PMRA.
[1666] Section 2(1)(a-b) PMRA. See section 2.2.3.1. chapter two.

military vessels on the condition that access on a look-but-don't-touch basis is permitted for most of them. It was felt that allowing recreational divers to visit the sites would recognise the contribution that was made at that time by educational initiatives, such as the 'respect our wreck' campaign.[1667] Additionally, it was felt that such a blanket protection could provide for an unambiguous enforcement regime of the PMRA.[1668] At this time such a blanket designation of all sunken military vessels has not yet taken place.

For sites located in international waters, the PMRA can only be enforced when the offence took place on board of a British-controlled ship or if a British national committed it.[1669] In order to strengthen the enforcement of the PMRA, provision is made in the Act allowing authorised persons to board and search any vessel located in UK waters as well as British-controlled ships located in international waters, and to seize objects when necessary.[1670] Asides from the enforcement measures included in the PMRA, it is believed that membership of diving associations can aid compliance with the PMRA through educational initiatives and peer pressure. A large number of diving associations have mechanisms in place which allow them to suspend members that bring the association in disrepute.[1671] This can potentially be a strong mechanism for ensuring compliance with the PMRA.

The Secretary of State has the power to grant a license allowing activities to be directed at protected places and controlled sites.[1672] Such a license can be granted to a specific person, to a particular group of persons complying with a particular description or to persons in general. Such a license can already be included in the order that designates a controlled site.[1673] Conditions can be attached to a license and the Secretary of State has the right to amend or revoke it.[1674] In any case, as the UK agreed to uphold the principles set out in the Annex to the UNESCO Convention, these principles must be respected when investigating a historic military wreck.[1675] When it is known or suspected that human remains are present on site, no license will be issued for

[1667] For more on this campaign see British Sub-Aqua Club, *Respect our wrecks policy*, www.bsac.com/advice-and-support/respect-our-wrecks/respect-our-wrecks-policy/ (consulted 9 August 2018).
[1668] MOD Consultation Report Military Graves 2001, 7. See *supra* chapter two section 2.2.3.1. for more on the preference for designation as a protected place since the MOD Consultation Report Military Graves 2001.
[1669] Section 3(1) PMRA.
[1670] Section 6 PMRA.
[1671] MOD Consultation Report Military Graves 2001, 10.
[1672] Section 4(1) PMRA.
[1673] Section 4(2) PMRA.
[1674] Section 4(3-5) PMRA.
[1675] DDCMS and MOD, *Protection and Management of Historic Military Wrecks outside UK Territorial Waters – Guidance on how existing policies and legislation apply to historic military wreck sites*, April 2014 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/307961/Protection_and_Management_of_Historic_Military_Wrecks_outside_UK_Territorial_Waters__April_2014.pdf, 5.

excavation by recovery groups.[1676] The granting of a license is without prejudice to the rights of any person, including the Crown, that is the owner of or has an interest in the land where the remains are located or the remains themselves.[1677] The PMRA does not determine anything on ownership rights. As this Act, however, deals with the protection of wrecks that were in military service, the wreck is likely to be State property, either of the UK or any other State depending on the nationality of the wreck.[1678]

## 4.6. Revision of the framework for heritage protection in the United Kingdom

### 4.6.1. Need for a reform

The legislative framework for the protection of UCH in the UK is rather fragmented and is mainly focussed on safeguarding shipwrecks. Furthermore, only a limited number of wrecks have been designated or scheduled under the existing instruments. Under the PWA a mere 61 wrecks have been designated, under the PMRA only 79 vessels were designated and constitute protected places, as well as all aircraft sites, and 12 controlled sites were designated and finally the AMAAA has only had a very limited application in the marine area. This entails that at the moment a very limited part of all UCH sites located in UK waters are under statutory protection.

At the same time, the UK has a long history of divers recovering souvenirs from wrecks. While the maritime archaeological community as well as diving organisations have attempted to reduce this practice through public education initiatives, Historic England recognises that this practice still forms a threat to maritime heritage sites.[1679] When artefacts are recovered from sites that are not designated or scheduled, this recovery constitutes a lawful act of salvage as long as the statutory requirements contained in the MSA, such as reporting all discoveries to the Receiver, are respected.[1680] This practice can result in the damaging or destruction of historically or archaeologically important sites.

[1676] MOD and Service Personnel & Veterans Agency, *Crashed Military Aircraft of Historical Interest – Licensing of Excavations in the UK – notes for Guidance or Recovery Groups*, June 2011 (revised), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/28264/POMRACTBOOKLET_Jun11.pdf, 3-4.
[1677] Section 4(6) PMRA.
[1678] See chapter two for more on sovereign immunity and State ownership.
[1679] LOWTHER, PARHAM and WILLIAMS 2017, 258.
[1680] LOWTHER, PARHAM and WILLIAMS 2017, 259.

### 4.6.2. Consultation report 2004 Marine Historic Environment

For a long time already, the idea exists to reform the UK statutory framework dealing with heritage in general, as well as with maritime heritage more specifically. In March 2004, the DDCMS, together with the responsible authorities in Scotland, Wales and Northern Ireland, published a consultation document entitled 'Protecting Our Marine Historic Environment: Making the system work better'.[1681] Only a year before, in 2003, another consultation document had already been published by the DDCMS dealing with heritage on land.[1682] Both consultations had the same aim, namely to achieve a positive management approach for the historic environment and to create a legislative framework for its protection.[1683] It is recognised that while the aim of both consultation exercises is the same, account must be taken of the differences between the marine and land-based historic environment in order to tailor the approach that is used for improving and updating their protection to the specific circumstances. Notwithstanding, the proposals given under both consultation documents seek for the close integration of both regimes where possible.[1684]

The 2004 consultation report recognises that the piecemeal nature of the designations that potentially apply to UCH create confusion about which legal rules apply to a find. Therefore a new single definition of 'marine historic assets' encompassing all aspects of the anthropogenic marine historic environment must be created in order to clarify which procedures should be respected after discovering historic remains.[1685] This definition should not only include structures and wrecks, but 'portable' objects as well and "*sites that have demonstrable potential to include physical traces of the historic environment that were once dry land and are now beneath the sea*".[1686] This would allow for the protection of, for example, submerged archaeological landscapes, such as Doggerland, for which at this time no specific statutory protection exists. In any case, the definition of marine historic assets should include all elements of the marine historic environment that are encompassed in the PMRA and the AMAAA.[1687] The question was also raised whether a time cut-off should be included in the new framework. For this purpose, the lapse of 50 years was felt to be appropriate as it allows for the inclusion of important pre-1945 remains while

[1681] DDCMS, Making the system work better 2004.
[1682] Department for Media, Culture and Sport, *Protecting Our Historic Environment: Making the system work better*, July 2003.
[1683] DDCMS, Making the system work better 2004, 6 (point 2).
[1684] DDCMS, Making the system work better 2004, 6 (point 3).
[1685] The consultation report recommends that when a wider definition is given to marine historic assets this would need to be balanced out by inserting a test of 'reasonableness' to such effect that a finder can estimate whether the find would fall within the scope of this definition. DDCMS, Making the system work better 2004, 14.
[1686] DDCMS, Making the system work better 2004, 15.
[1687] DDCMS, Making the system work better 2004, 14-15. When a site is eligible for protection both by the (future) new statutory framework and by the PMRA, the MOD will agree with heritage agencies on a case-by-case basis on the best way in which to protect a particular asset. The government feels that multiple designations of a site are undesirable. DDCMS, Making the system work better 2004, 16.

still leaving the possibility to include more recent assets within the new statutory protection. Alternatively, so-called 'Statements of Significance' could be used for designating sites and objects, which would allow filtering out the significant sites and render the creation of a time cut-off unnecessary.[1688]

The 2004 report provided that blanket protection of all heritage is not the way to go. While it was accepted that all marine historic assets should be subjected to a basic set of rules relating to the reporting duty, the initial treatment of the asset, ownership rights and its recovery, it was stated that not all assets warrant protection under a statutory framework. Such protection should only be awarded to assets that are of sufficient significance justifying the restriction of activities directed at the asset.[1689] In the 2004 consultation report the possibility to provide for interim protection while consultations take place on whether or not to designate a site is provided.[1690] Restrictions should be limited to activities that are likely to damage a site, which entails that non-intrusive diving activities would be allowed on most sites. This stands in contrast to the current approach of the PWA.[1691] A single consent system is proposed allowing for a license to be obtained for certain activities. For each designated site a 'Statement of Significance' should be made not only explaining the reasons for the protection, but as well for which activities a license would be necessary. Activities including the destruction of a site would be unlikely to receive a license, while other activities such as survey, recording, non-damaging fishery and navigation should be allowed as a matter of routine.[1692] In any case, public access to marine historic assets should be promoted by heritage agencies, as is also required by the Valletta Convention.[1693] In England, the national authority responsible for designating marine sites would be Historic England.[1694] It should be noted that the 2004 consultation report on the marine environment only applied to the territorial sea.[1695]

The 2004 consultation report makes no mention of the UNESCO Convention. It is, however, recognised that the accession of the UK to the Valletta Convention in 2001 resulted in the UK having to assess the protection of the marine historic environment taking into consideration the international obligations that it has taken on.[1696]

[1688] DDCMS, Making the system work better 2004, 16.
[1689] DDCMS, Making the system work better 2004, 14.
[1690] DDCMS, Making the system work better 2004, 20.
[1691] DDCMS, Making the system work better 2004, 14.
[1692] DDCMS, Making the system work better 2004, 18.
[1693] DDCMS, Making the system work better 2004, 23.
[1694] Other home country heritage agencies and, for Wales, the National Assembly already have the power to designate wrecks of historic importance. DDCMS, Making the system work better 2004, 16.
[1695] DDCMS, Making the system work better 2004, 6 (point 5).
[1696] DDCMS, Making the system work better 2004, 7.

### 4.6.3. Documents following the 2004 report

In July 2005, an analysis was published of the responses that were received in light of the 2004 consultation report.[1697] In general, the respondents supported the need for change and many of the proposals that were put forward in the consultation document.[1698] In 2007, the DDCMS published a White Paper on Heritage Protection in the 21st Century. This White Paper recommends a number of changes that need to be made to better protect the UK marine historic environment.[1699] These recommendations include widening the term marine historic asset, the creation of statutory criteria for designation, the introduction of interim protection and the introduction of a statutory obligation on the Receiver of wreck to inform heritage authorities when culturally important material has been recovered. In the White Paper, additionally, it was found to be undesirable to attach an age criterion to the definition of marine historic assets.[1700]

These papers and consultation reports paved the way and set out the general outlines for the creation of a new statutory framework for the protection of UCH. This framework was set out in the draft Heritage Protection Bill in 2008.

### 4.6.4. The 2008 Draft Heritage Protection Bill

In 2008 the UK parliament drafted a bill with the objective to reform and unify the terrestrial and marine heritage protection in both Wales and England.[1701] This Act was meant to (partially) replace the Listed buildings and Conservation Areas Act 1990, the Historic Buildings and Ancient

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[1697] DDCMS, *Protecting our Marine Historic Environment - Making the System Work Better: Analysis of responses*, July 2005, available at http://webarchive.nationalarchives.gov.uk/20110118190437/http://www.cep.culture.gov.uk/images/publications/Marine_Analysis.pdf. (DDCMS, Protecting our Marine Historic Environment Analysis of responses 2015)

[1698] One of the more contentious issues was whether marine historic assets should be removed from the application of the law of salvage. The UK did adopt the reservation in article 30(1)(d) of the Salvage Convention, but has at the time not yet excluded cultural heritage from its scope of application. While many of the respondents agreed that heritage should be excluded from the application of the law of salvage, concern was expressed on whether this would not remove the incentive to report a find. DDCMS, Protecting our Marine Historic Environment Analysis of responses 2015, 17-18.

[1699] DDCMS and Welsh Assembly Government, *Heritage Protection for the 21st Century*, March 2007, available at www.gov.uk/government/uploads/system/uploads/attachment_data/file/78116/hrp_whitepaper_doc1.pdf, (43) 71. (DDCMS and WAG, Heritage Protection for the 21st Century 2007) Another interesting document that gives an elaborate representation of the issues that exist concerning the current protective framework and the possible changes that could be introduced in the future is: School of Legal Studies University of Wolverhampton (Commissioned by English Heritage), *Marine Archaeology Legislation Project*, January 2004, available at https://historicengland.org.uk/images-books/publications/marine-archaeology-legislation-project/.

[1700] DDCMS and WAG, Heritage Protection for the 21st Century 2007, 43.

[1701] Draft Heritage Protection Bill, April 2008 available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228585/7349.pdf. (Draft Bill 2008)

Monuments Act 1953, the 1979 AMAAA and the 1973 PWA. The Draft Heritage Protection Bill was published on 2 April 2008 (2008 Draft Bill).[1702]

#### 4.6.4.1. Scope and registration

The 2008 Draft Bill provides for the protection of 'marine assets' and 'marine heritage sites'. 'Marine assets' encompass vessels, structures such as buildings, earthwork, caves or excavations, vehicles, aircraft and other objects evidencing human activity in the past.[1703] This definition allows for the protection of a broad range of marine historic assets.[1704] The 2008 Draft Bill creates a new registration system. When a site located in English waters qualifies for registration, the Secretary of State will direct Historic England to include the site in the heritage register as a marine heritage site. Sites qualify for registration when they contain a marine asset as defined above that is of special historical, archaeological, architectural or artistic interest and when it is found to be appropriate for the site to be registered.[1705] The 2008 Draft Bill imposes a duty on the Secretary of State to create criteria based on which will be determined whether an asset is of special historical, archaeological, architectural or artistic interest.[1706] Such criteria are thus not established in the 2008 Draft Bill itself, but should be created through secondary legislation. Some flexibility is foreseen as it is determined that the criteria may differ depending on the type of marine asset that is being assessed and the different interests (historical, archaeological, architectural or artistic) of the asset.[1707] Prior to registering a marine heritage site, consultations must take place with the

[1702] Draft Heritage Protection Bill, Explanatory Notes, 131. (Draft Bill 2008 Explanatory Notes)
[1703] Section 46 and 2 Draft Bill 2008. Historic England felt that one of the most important developments included in the Draft Bill 2008 for the marine environment was the fact that not just vessels and their content could be protected, but all types of structures and objects.
English Heritage, "Memorandum" in House of Commons Culture, Media and Sport Committee, *Draft Heritage Protection Bill*, Eleventh Report of Session 2007-08, 22 July 2008 available at https://publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/821/821.pdf, (36) 43.
[1704] Based on the text of the Draft, the Joint Nautical Archaeology Policy Committee (JNAPC) remarked that it was not entirely clear whether the definition of marine assets and heritage structures, includes paleo-environmental sites. Similarly, the question arose whether the definition of marine heritage sites can include a wider area of archaeological interest or is limited to point locations. The Joint Nautical Archaeology Policy Committee, "Memorandum" in House of Commons Culture, Media and Sport Committee, *Draft Heritage Protection Bill*, Eleventh Report of Session 2007-08, 22 July 2008 available at https://publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/821/821.pdf, (100) 101 (Joint Nautical Archaeology Policy Committee, Memorandum 2008) . A similar point was made by the National Trust when they expressed their disappointment in the fact that the new definition does not seem to apply to ancient landscapes. National Trust, "Memorandum" in House of Commons Culture, Media and Sport Committee, *Draft Heritage Protection Bill*, Eleventh Report of Session 2007-08, 22 July 2008 available at https://publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/821/821.pdf, (77) 81.
[1705] Section 48(1-2) Draft Bill 2008.
[1706] Section 49(1-2) Draft Bill 2008.
[1707] Section 49(2) Draft Bill 2008.

appropriate persons as set out under schedule 1 of the 2008 Draft Bill.[1708] During the consultation period, an asset can be registered provisionally.[1709] During the period that a site is registered provisionally, it must be regarded as a registered marine heritage site.[1710] A site can thus be given interim protection pending the outcome of the consultation.[1711] Anyone can make a request to the Secretary of State for the inclusion of a site located in English waters in the heritage register.[1712] The Secretary of State must consider such requests and must carry out consultations unless the likeliness that the proposed asset will be included in the heritage register is negligible.[1713] The Secretary of State can also indicate that he will not register a particular site in the near future. On the request of any person, and following consultations, the Secretary of State may issue a certificate in which he states that within the next five years he will not direct Historic England to include the site in the heritage register.[1714]

#### 4.6.4.2. Marine heritage licenses

A system of marine heritage licenses was created by the 2008 Draft Bill. Without such a license it is prohibited to conduct activities directed at a registered marine heritage site including tampering with or damaging a marine asset located in a registered marine heritage site; removing a marine asset located in a registered marine heritage site; conducting diving or salvage activities on a registered site in order to explore a marine asset or to remove marine assets from the seabed; and using equipment for salvage or diving operations in a registered marine heritage site with the objective to survey the seabed.[1715] As for diving operations on the site or in the waters above a registered marine heritage site directed at exploring a marine asset this is permitted under three conditions: 1) the diving operation must be non-intrusive in nature; 2) the diving operation is carried out with the consent of all relevant persons, including the owners of the heritage site and the salvor in possession of a marine asset and; 3) the site must have been designated as a site that is suitable for non-intrusive diving operations.[1716] It has been provided that this list of prohibited activities is largely just a copy from the PWA and is not well thought out. One potential problem, for example, lies with the prohibition to use equipment in a registered marine heritage site, or in the waters above such a site, with the objective to survey the seabed. As virtually all naval craft

[1708] The same consultation obligation exists for the removal or amendment of a registry. Section 50-54 Draft Bill 2008.
[1709] Section 55 Draft Bill 2008.
[1710] Section 65 Draft Bill 2008.
[1711] Draft Bill 2008 Explanatory Notes, 150 (clause 55).
[1712] Section 67(1) Draft Bill 2008.
[1713] Section 68(2) Draft Bill 2008.
[1714] Section 74 (1) and (3) Draft Bill 2008.
[1715] Section 187 Draft Bill 2008.
[1716] For sites located in English waters, the Secretary of State can make such a designation after consulting all relevant persons. Section 198 Draft Bill 2008.

are equipped with sonar equipment which displays an image of the seabed for the purpose of the safety of navigation, it is difficult to see how this provision would be enforced.[1717]

For sites in English waters, Historic England or the Secretary of State can grant licenses.[1718] Persons that violate the duty to obtain a license or that violate the conditions attached to such a license are liable to imprisonment and/or a fine.[1719] All marine heritage licenses must specify the registered marine heritage site to which they relate, the activities that are permitted by the license, the persons that are licensed to conduct the activities and the duration of the license.[1720] Conditions relating to the preservation of a marine asset or to specific reporting duties can be attached to the license as well.[1721] These conditions could, for example, include that the rules set out in the Annex to the UNESCO Convention must be respected. The requester can appeal against the refusal of a license or the conditions attached to it.[1722]

#### 4.6.4.3. Issues with the 2008 Draft Bill

Despite the complete renewal of the protective regime for UCH, a number of issues still exist relating to the 2008 Draft Bill. The most serious of which relates to the law of salvage and the duty to report. The *Joint Nautical Archaeology Policy Committee (JNAPC)* pointed out that no attempts were made under this Draft Bill to reform the salvage regime in relation to marine assets. Such assets will still be the subjects of commercial salvage law, which is in contravention with the Annex to the UNESCO Convention. Additionally, as is provided in the MSA, still only wreck needs to be reported to the Receiver. No additional reporting duty is created by the Draft Bill for other marine assets. While participating in the DDCMS working group on salvage, JNAPC made three recommendations to the DDCMS Ministers in accordance with which the Draft Bill should be adapted: marine assets should be removed from the salvage regime as governed by the MSA; for marine assets the concept 'salvor-in-possession' should be abolished as it can prevent the proper management and protection of registered marine heritage assets; and there should be a statutory duty to report the discovery and disturbance of all marine assets to heritage agencies, which is in line with the Valletta Convention.[1723]

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[1717] M. WILLIAMS, "The Marine Provisions of the Heritage Bill 2008", *Plymouth Law Review* 2009, (112) 120. (WILLIAMS 2009)
[1718] Section 188(2) Draft Bill 2008. As a general rule, licenses should be granted by Historic England. The licensing authority may make provisions for the form and content of marine heritage licenses. Section 192-196 Draft Bill 2008.
[1719] Section 191(1) Draft Bill 2008.
[1720] Section 196(3) Draft Bill 2008.
[1721] Section 197 Draft Bill 2008.
[1722] Section 200-207 Draft Bill 2008.
[1723] Joint Nautical Archaeology Policy Committee, Memorandum 2008, 101.

While the Draft Bill still needs to be improved, it is the first comprehensive framework for the protection of UCH in the UK. To adopt such a framework would entail a big step forward for the UK in the management and protection of its UCH. Furthermore, the adoption of this Bill would offer more clarity regarding the protection of UCH, which is currently managed under fragmentised legislation. Unfortunately, however, the 2008 Draft Bill has up till today not yet been adopted. Despite strong cross-party support, the Bill was shelved shortly after its creation. It was at the time overshadowed by economic matters and has since not been adopted.[1724]

### 4.6.5. New instruments since the 2008 Draft Bill

#### 4.6.5.1. Marine and Coastal Access Act 2009

In England, since the drafting of the 2008 Draft Bill, attention has for a part shifted to what can be achieved for heritage protection by using other regulatory mechanisms, especially the licensing provisions of the Marine and Coastal Access Act 2009 (MCAA).[1725] The MCAA introduced a system of marine planning and a comprehensive approach for licensing marine activities. Explicit reference is made to characteristics of a historical or archaeological nature, which should be taken into account in marine plans.[1726]

As for marine licensing, the MCAA, although not primarily concerned with activities directed at UCH, is formulated in such a way that a licensing duty is imposed for activities directed at UCH. The licensing duty applies in the UK territorial sea as well as on the UK continental shelf and thus has a fairly broad territorial application when considering the fact that for example the PWA and AMAAA are limited to the territorial sea.[1727] A license must be obtained for using a vessel, vehicle, marine structure or floating container in order to remove a substance or object from the seabed.[1728] Likewise, no dredging activity can take place within the UK marine licensing area without a license.[1729] Dredging should be understood in this context as including the use of a device to move material located in the sea or on the seabed to another part of the sea or seabed.[1730] The use of explosives in the sea or on the seabed has also been submitted to a licensing duty in the

[1724] M. FULCHER, "Heritage Protection Bill left out – again", *Architects' journal*, 1 July 2009, available at www.architectsjournal.co.uk/heritage-protection-bill-left-out-again/5204457.article; R. MASCALL, *The Heritage Protection Bill Fundamental reform for England and Wales?*, 2008, available at www.buildingconservation.com/articles/heritagepbill/heritagepbill.htm.
[1725] MCAA; WILLIAMS 2009, 120.
[1726] Section 54 MCAA.
[1727] Section 42(1) MCAA.
[1728] Section 66(1)(8) MCAA.
[1729] Section 66(1)(9) MCAA. The UK marine licensing area encompasses the UK marine area, with the exclusion of the Scottish inshore region. Section 66(4) MCAA.
[1730] Section 66(2)(a) MCAA.

MCAA.[1731] In England, the marine licensing process is administered by the under the MCAA established Marine Management Organisation (MMO).[1732] While at first sight it might appear that without a license no UCH can be removed from the seabed, the MMO has interpreted these provisions in such a way that no license is required for the removal of objects by hand by divers.[1733] In other words, divers can lawfully recover items from the seabed without the need to obtain a license in the MCAA.[1734]
In any case, when deciding on an application for a license, the licensing authority must take into account the need to protect the environment, which includes sites of historic or archaeological interest.[1735]

While parallel legislation such as the MCAA can assist in protecting UCH, it can never be as effective as a complete reform of the heritage protection framework would be. Therefore, reform remains needed as the current framework is unsatisfactory.[1736]

#### 4.6.5.2. Marine (Scotland) Act 2010

Another noteworthy change since the 2008 Draft Bill, was the adoption of the 2010 Marine (Scotland) Act.[1737] The Act applies in Scotland's territorial waters, up to 12nm.[1738] The Act provides, *inter alia*, for a strategic marine planning system and a marine licensing system.[1739] For marine licensing, a similar approach as used in the MCAA can be seen here as well. Without a license the use of vehicles, vessels, marine structures or floating containers for the purpose of removing substances or objects from the seabed is prohibited, as well as any form of dredging and the use of explosives.[1740] This licensing duty can assist in the protection of UCH. Additionally, the Marine (Scotland) Act provides the possibility for the Scottish Ministers to designate an area as a Historic Marine Protected Area (Historic MPA).[1741] An area can be designated as a Historic MPA if this is considered to be desirable for the purpose of preserving a marine historic asset of national importance.[1742] The notion marine historic asset has been widely defined in this context containing

[1731] Section 66(1)(10) MCAA.
[1732] Part 1 MCAA.
[1733] Marine Management Organisation, *Guidance Do I need a marine licence?*, 2 October 2004, www.gov.uk/guidance/do-i-need-a-marine-licence#diving-activities (last update 17 April 2018).
[1734] LOWTHER, PARHAM and WILLIAMS 2017, 259.
[1735] Section 69(1)(a) and 115 (2) MCAA.
[1736] WILLIAMS 2009, 120.
[1737] Marine (Scotland) Act.
[1738] Section 1 Marine (Scotland) Act.
[1739] Part 3 and 4 Marine (Scotland) Act.
[1740] Section 21(1)(6-8) Marine (Scotland) Act.
[1741] Section 67(1) Marine (Scotland) Act. More information on the designated MPA's can be found on http://portal.historicenvironment.scot/.
[1742] Section 73(1) Marine (Scotland) Act.

(the remains of) vessels, aircraft or vehicles or objects contained therein, buildings or other structures, caves or excavations and any deposit, artefact or other thing evidencing previous human activity.[1743] In Scotland, the possibility to designate a site as a historic MPA has replaced the application of section I PWA which allows to designate a restricted area around a wreck site to protect it from uncontrolled interference.[1744] Historic Scotland makes recommendations to the Scottish Ministers for the designation of Historic MPAs. This can either be done following the priorities that are identified by Historic Scotland or following a third party nomination. In any case, Historic Scotland will undertake an assessment to determine whether the site is of national importance in order to ensure the protection of only the most significant sites.[1745] The designation of a site does not prevent responsible public access to the site. Naturally, without a license, removing, altering or disturbing the marine historic assets or carrying out activities in the area which could have such an effect, is not allowed. When particular activities need to be prohibited or regulated on a site, this is done through a Marine Conservation Order.[1746] The Marine (Scotland) Act allows for a seamless approach between the protection of heritage on land and heritage in the marine area as Historic MPAs may be extended from the marine area to the terrestrial area.[1747] At the moment, eight sites have been designated as Historic MPAs.[1748] This Act applies in the Scottish region alongside such other acts as the MSA, PMRA and AMAAA.

## 4.7. United Kingdom and the UNESCO Convention

### 4.7.1. The United Kingdom's abstention from voting in 2001

The UK, being a State with a strong maritime history, attaches great importance to preserving UCH. A large number of historic wreck are located within UK waters and wrecks of British origin are scattered all around the world. Many of them still contain the remains of the British men that perished along with the vessel. For this reason, the UK was committed to creating a global convention addressing UCH and entered into the negotiations on the UNESCO Convention in a positive spirit. While the UK could support most provisions contained in the UNESCO Convention, notably the Rules in the Annex, in the end it felt that it was unable to vote in favour of the

[1743] Section 73(5) Marine (Scotland) Act.
[1744] Historic Scotland, *Historic Marine Protected Areas, a Guide for visitors, investigators and managers*, available at www.historicenvironment.scot/media/2869/historic-mpa-leaflet.pdf/, 5. (Historic Scotland, Historic Marine Protected Areas) See *supra* section 4.3.2.
[1745] Historic Scotland, Historic Marine Protected Areas, 8.
[1746] See section 85-91 Marine (Scotland) Act. Historic Scotland, Historic Marine Protected Areas, 10.
[1747] Hampshire and Wight, LCT(A)2428 Project Report 2011, 28.
[1748] All eight MPAs can be found through the following link: http://portal.historicenvironment.scot/hes/web/f?p=1505:200:::NO:RP:SEARCH_UNDERWAY:1 More information can be found here on the sites, the reason why they were protected and the measures that have been taken to protect them.

Convention.[1749] The UK abstained from voting on the final text of the Convention during the 31st UNESCO General Conference for the adoption of the Convention in 2001.[1750]

Two main reasons were at the basis of the UK's refusal to vote on the UNESCO Convention. The first relates to the treatment of warships, State vessels and aircraft. The UK felt that the UNESCO Convention erodes the fundamental principle of international customary law that the wrecks of warships and other State craft that were used for non-commercial purposes retain sovereign immunity until the flag State explicitly abandons the wreck.[1751] The way in which the UNESCO Convention appears to alter the balance between coastal and flag State rights as consolidated under UNCLOS is unacceptable to the UK. The second issue that led the UK to abstain from voting relates to the absence of a significance criterion in the definition of UCH. The UK did not wish to extend the high level of protection for UCH dictated by the UNESCO Convention from its carefully selected designated sites to all historic assets that have been submerged for over 100 years. At the time the UK government stated that approximately 10.000 wreck sites were located in its territorial sea and that it would be neither desirable nor possible to provide statutory protection for all of them.[1752] The UK not only felt it better to focus its efforts and resources on protecting the most important sites, but recognised that it would plainly be impossible to enforce the Rules set out in the Annex attached to the UNESCO Convention for these thousands of wreck sites.[1753]

Anno 2018, the UK still has not ratified the UNESCO Convention. The British government has, however, accepted the main principles of the UNESCO Convention and adopted the Rules set under its Annex as best practices for archaeology in 2005.[1754] A number of States that had the

[1749] Foreign and Commonwealth Office, "Explanation of Vote to UNESCO
on the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage", 31 October 2001, Appendix 1.1 in UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom*, Final Report, February 2014 available at www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf, 87-88. (UK Explanation of Vote UNESCO Convention 2001)

[1750] LE GURUN 2006, 61.

[1751] See section 2 chapter two.

[1752] The number given in the UK explanation of vote of 10.000 wreck sites was later nuanced and it is generally considered that the real number is lower. See chapter one section 4.3.1.2.
The remark was, however, made that it is not so much the number of sites but rather the number of activities directed at UCH that indicate the difficulty of protecting all UCH sites in conformity with the UNESCO Convention. "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" in UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom*, Final Report, February 2014 available at www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf, (55) 63-64. (UK UNESCO 2001 Convention Review Group, Paper Significance 2014)

[1753] UK Explanation of Vote UNESCO Convention 2001, 87.

[1754] R. CABORN, *Underwater Heritage*, 24 January 2005, Column 46W, https://publications.parliament.uk/pa/cm200405/cmhansrd/vo050124/text/50124w13.htm.

same or similar concerns as the UK at the time of the adoption of the Convention have at this time already ratified the Convention or are considering to do so.[1755] As more and more States become party to the UNESCO Convention and it obtains widespread support, the pressure increases on the UK to consider doing the same. Over the last couple of years, a number of reports were issued relating to the issues that the UK has/had with the UNESCO Convention. In the reports these issues are assessed and consideration is made of the consequences that ratification would have for the UK.

### 4.7.2. The United Kingdom's issues with the UNESCO Convention

In 2014, the 'UK UNESCO 2001 Convention Review Group' presented its impact review for the UK ratification of the UNESCO Convention.[1756]

#### 4.7.2.1. UNESCO Convention and UNCLOS

The first point that is addressed in the final report relates to the compatibility of the UNESCO Convention with UNCLOS. The main issue here is the possibility to interpret the UNESCO Convention in such a way that it affords new jurisdictional competences to coastal States, which is contrary to what was established under UNCLOS. This concern mainly relates to the competences of the coastal State in articles 9 and 10 of the UNESCO Convention.[1757] The report indicated that even though articles 9 and 10 can be interpreted in such a way that additional powers are given to coastal states in their EEZ and on their continental shelves, it can also be read in a manner that is in conformity with UNCLOS. Under the latter interpretation these articles simply give effect to the

[1755] A number of the maritime States that expressed concerns in this sense, such as Spain and France, have already ratified the Convention. While in the beginning of the negotiation process, Spain had its reservations, by 2001 when a vote needed to be cast, Spain felt that the UNESCO Convention did not prejudice its legal position regarding sunken State vessels and supported the Convention. M. AZNAR-GOMEZ, "Treasure Hunters, Sunken State vessels and the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage", *IJMCL* 2010, (209) 219 (AZNAR-GOMEZ 2010). France cited the treatment of sunken State craft as one of the reasons for abstaining from voting in 2001. However, in 2013 France ratified the UNESCO Convention as it felt that the advantages of becoming party to the Convention outweighed the concerns that it had. By 2010 France already concluded that "*practice ... showed that in all cases the co-operation between the concerned States functioned very well and France's sovereign rights were respected*", which brought France to the conclusion that the UNESCO Convention "*does not in fact change the pre-existing legal status of State vessels in a negative way*". M. L'HOUR, "An update on France's position regarding the UNESCO Underwater Cultural Heritage Convention" in R.A. YORKE (ed.), Protection of Underwater Cultural Heritage in International Waters Adjacent to the UK, Proceedings of the JNAPC 21st Anniversary Seminar, available at www.jnapc.org.uk/UNESCO-Seminar-2010-final.pdf, 63. See *supra* section 2.9. for more on the French position regarding the UNESCO Convention.

[1756] UK UNESCO 2001 Convention Review Group, impact review 2014.

[1757] See section 4.5.3. chapter one for more on the issues relating to articles 9 and 10 UNCLOS.

powers that States already have over their nationals and vessels flying their flag.[1758] The latter interpretation is supported by the fact that the UNESCO Convention explicitly proclaims that its provisions must be interpreted in conformity with international law, including UNCLOS. Additionally, at the time it was believed that there were no signs to assume that State practice would result in such creeping jurisdiction.[1759] In any case, it is felt that by ratifying the UNESCO Convention, the UK could help reaffirm the primacy of UNCLOS.[1760]

#### 4.7.2.2. State craft and sovereign immunity

The second issue that is addressed in the impact review is that of warships and State craft. As already explained, the UK is of the opinion that warships and State craft that were used for non-commercial purposes retain sovereign immunity after they sank regardless of the time that has passed, unless the wreck has been explicitly abandoned.[1761] It was felt by the UK, as well as by other maritime States, that the final text of the UNESCO Convention did not address this issue adequately. The UK feared that the provisions dealing with warships and State craft located in the territorial sea of a third coastal State Party to the Convention would erode the rules relating to sovereign immunity under international law and UNCLOS. In light of this, particular concern was expressed relating to article 7(3) UNESCO Convention. The UK is of the opinion that no action can be taken in respect of a sovereign immune wreck located in the territorial sea of a third coastal State without the consent of the flag State. Thereto, the UK, as well as other States, wanted to insert a duty for coastal States to inform the flag State on the discovery of State craft located in their territorial waters. As was discussed under chapter one and two, such an obligation was not included under this provision.[1762] Nevertheless, in the impact review, four main reassurances were

[1758] This viewpoint was also taken in the Dutch Advisory Report as the Netherlands had expressed similar concerns. Advisory Report No. 21 UNESCO Convention.

[1759] In the meanwhile, for example, both in Belgium and in Germany legislation has been or is likely to be enacted concerning UCH located in their EEZ and on their continental shelf. See *infra* section 5 on Germany as well as chapter four.

[1760] UK UNESCO 2001 Convention Review Group, impact review 2014.

[1761] It is believed that sovereign immunity applies in all maritime zones, but is most visible outside the territorial jurisdiction of a coastal State. In the territorial sea tacit acceptance exists amongst States over the fact that the coastal State controls access to the site, but that the rights of the flag State should be recognised to a certain degree. This degree varies in practice from simply informing the flag State to requiring the express permission of the flag State for any activities directed at the wreck. "Paper 2. Sunken Warships and State Vessels" in UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom*, Final Report, February 2014 available at www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf (41) 42-43. (UK UNESCO 2001 Convention Review Group, Paper Sunken Warships and State Vessels 2014)

[1762] It should be noted that article 7(3) UNESCO Convention merely deals with the *discovery* of State vessels and aircraft. This provision thus does not have the effect of contradicting the UK view that the Coastal State must inform, or even require the consent from, the flag State when *interference* with a sovereign immune wreck is proposed. UK UNESCO 2001 Convention Review Group, 46-47.

identified illustrating the potential benefit of ratifying the UNESCO Convention with respect to sunken warships, which also led other maritime States to change their opinion on ratification of the Convention.

The first is that article 2(8) of the Convention, the so-called saving clause, provides that the UNESCO Convention will not affect the legal status of sunken State vessels.[1763] The second is the fact that the definition of State vessels and aircraft in the UNESCO Convention is not based on the concept of sovereign immunity, but rather on whether it was owned or operated by a State and at the time of its sinking was being used for non-commercial purposes. This leaves the question of whether these vessels continue to enjoy sovereign immunity after they have sunk undecided. In fact this UNESCO approach might even result in the UK having certain rights over its former sunken State craft that it does not have under the principle of sovereignty. An example to illustrate this are the wrecks of the former British State vessels Aboukir, Cressy and Hogue located on the Dutch continental shelf. The UK sold these wrecks for salvage in the 1950's. This entails that the UK can no longer claim sovereign immunity over these wrecks as by selling them it has explicitly abandoned them. Following the UNESCO Convention, however, the UK retains rights regarding its former State vessels regardless of whether these were sold or abandoned after they sank. In other words, if both the UK and the Netherlands were party to the Convention, the Netherlands would have to consult with the UK for any activities directed at these wrecks based on article 10(7) of the Convention.[1764] A third reassurance given in the impact review relates to the rights given to flag States and States with a verifiable link to wrecks located in the territorial sea or on the continental shelf of a third State or in the Area. For flag States, it is interesting to ratify the UNESCO Convention as a number of articles only provide for the consultation or notification of flag States when they are party to the Convention.[1765] Additionally, the mechanism of involving States with a verifiable links would allow the UK to be consulted on the protection of wrecks that were not State vessels such as former East India Company wrecks or older vessels of which it is unsure whether these were State vessels.[1766] A final reassurance that is mentioned in relation to the treatment of State vessels is that the principle of cooperation is one of the fundamental principles on which the UNESCO Convention is based. This entails that it is highly unlikely that a State Party would not contact the flag State Party to the Convention when discovering or interfering with the wreck of a State vessel.[1767]

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[1763] For an analysis of article 2(8) UNESCO Convention in light of the status of State craft in the Convention see also AZNAR-GOMEZ 2010.

[1764] UK UNESCO 2001 Convention Review Group, 47.

[1765] This is true, for example, for heritage located in the EEZ or on the continental shelf of a third State (articles 9(5) and 10(3) UNESCO Convention) and for heritage located in the Area (articles 11(4) and 12(2) UNESCO Convention).

[1766] UK UNESCO 2001 Convention Review Group, 47-48.

[1767] UK UNESCO 2001 Convention Review Group, 48. Two other general principles in the UNESCO Convention that are not based on sovereign immunity can help strengthen the protection offered to State vessels, namely that preservation *in situ* should be considered as the first option and that proper respect should be given to all human remains.

#### 4.7.2.3. Significance criterion

A third issue that was addressed in the impact review relates to the lack of a significance criterion, which was one of the reasons cited by the UK to abstain from voting on the Convention. The main concern of the UK lay with article 7(2) UNESCO Convention addressing the protection of UCH in their tidal waters and territorial sea: "*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*".[1768] The report nuances the concerns expressed by the UK from different angles. The first nuance relates to the definition given to UCH, which must have a cultural, historical or archaeological character.[1769] Even though this is a broad definition it was felt in the impact review that this significance criterion allows for some form of judgement on the significance of sites. Secondly, it is pointed out that the Rules should only be applied to activities directed at UCH that may disturb or damage it. This excludes any activities that are directed at UCH but are non-intrusive in nature such as diving on a look-but-don't touch basis and many forms of surveys, as well as activities that damage UCH but did not have this as their primary objective. This leaves some room for interpretation for States Parties to decide to which activities the Rules should apply. The combination of these two elements and the somewhat limited freedom that States have to decide whether an object constitutes UCH, ensures that the Rules will only have to be applied to a limited number of activities. However, when it is determined that an activity is in fact directed at UCH and might disturb or damage this heritage, the Rules must be applied regardless of the importance of the site or whether it has been designated under national legislation. Examples of such activities include the excavation of UCH sites and the recovery of artefacts. It should be noted that these Rules are consistent with the general principles of professional archaeology and with the government policy in the UK relating to the historic environment.[1770]

In its explanation of vote, the UK expressed concern that the UNESCO Convention obliges States to extend their current framework for heritage protection to all archaeology that has been submerged for over 100 years.[1771] No such requirement is, however, imposed by the UNESCO Convention. Under its current legislation, the UK uses a site-based approach in order to protect a select number of submerged assets. The UNESCO Convention, on the other hand, applies an activity-based approach to the protection of heritage. The latter approach requires that authorisation is obtained for all activities dealing with archaeological or historical assets. The fact that implementing the provisions of the UNESCO Convention under its current legislative

[1768] Article 7(2) UNESCO Convention.
[1769] Article 1(1)(a) UNESCO Convention.
[1770] UK UNESCO 2001 Convention Review Group, Paper Significance 2014, 55-67.
[1771] UK Explanation of Vote UNESCO Convention 2001, 87.

framework requires the UK to designate all wrecks that have been submerged for over 100 years is thus not an obligation imposed by the Convention, but rather a consequence of the site-based approach that currently exists in the UK. The UNESCO Convention merely requires the Rules of the Annex to be applied to activities directed at UCH. These rules are for a large part procedural and in no way prevent States Parties from considering the importance of UCH sites when authorising a project design or heritage managers from taking into account the importance of UCH sites when allocating resources and efforts. The UNESCO Convention thus does not require that all sites are treated in the exact same manner without taking account of their importance.[1772] Therefore, the impact review concluded on this point that the UK should not designate more sites, but rather adopt a more activity-based approach as can be seen in the 2009 MCAA and the 2010 Marine (Scotland) Act. Application of these Acts already for a part allow the UK to comply with the requirement set in article 7(2) of the UNESCO Convention. [1773]

#### 4.7.2.4. Effects of ratification

Finally, the impact review assesses the implications that ratifying the UNESCO Convention would have on UK legislation.[1774] A number of substantive changes that need to be made to the legal and policy framework in the UK in order for its legal framework to comply with the UNESCO Convention are identified. Firstly, alterations should be made to ensure that the UK framework is in compliance with article 4 UNESCO Convention which provides for the very limited application of the law of salvage to UCH under strict conditions. The MSA applies to recovered material designated under the PWA, the AMAAA and the Marine (Scotland) Act. While the UK did make a reservation under the Salvage Convention with regard to UCH, it has not yet given effect to this reservation. Many forms of salvage already require a license under the MCAA, the Marine (Scotland) Act or specific heritage legislation. It was felt that by introducing additional policy and administrative measures and setting strict requirements for a license to be obtained, it would be possible for the UK to meet the requirements set out in article 4 UNESCO Convention. Nevertheless, the impact review provides that it would be a more pragmatic solution to simply remove UCH from the application of the law of salvage by primary legislation.[1775]

[1772] UK UNESCO 2001 Convention Review Group, Paper Significance 2014, 62-66.
[1773] UK UNESCO 2001 Convention Review Group, Paper Significance 2014, 67-68.
[1774] For a detailed overview of all provisions that would need to be altered see "Paper 4, Impact: A Clause-by-Clause Review of the Implication of Ratification" in UK UNESCO 2001 Convention Review Group, *The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 - An Impact Review for the United Kingdom*, Final Report, February 2014 available at www.unesco.org.uk/wp-content/uploads/2017/09/UNESCO-Impact-Review_2014-02-10.pdf, 71-85. (UK UNESCO 2001 Convention Review Group, paper impact 2014)
[1775] UK UNESCO 2001 Convention Review Group, paper impact 2014, 73-75.

A second fundamental change, or rather group of changes, necessary to ensure that the UK legislation complies with the UNESCO Convention relate to the protection of UCH outside UK jurisdiction. For UCH located in the UK EEZ or on its continental shelf, the impact review finds that as authorisation must be obtained for activities directed at UCH in those zones under the MCAA/ Marine (Scotland) Act, the UK complies with article 9(1)(a) UNESCO Convention when it comes to the reporting of activities directed at UCH.[1776] On the other hand, however, the UK was found not to be in compliance with the second requirement set in article 9(1)(a) UNESCO Convention, namely the reporting of discoveries in the UK EEZ or on the UK continental shelf. In the MSA a statutory duty exists for a person that finds or takes possession of a wreck and brings it within UK waters, to report this to the Receiver. This obligation does not apply to heritage assets that are not wrecks nor to wrecks that have not been brought within the UK territorial sea. There are, nevertheless, a number of sectorial protocols that require the discovery of UCH to be reported to archaeologists.[1777] While these protocols prove to be highly effective, they do not exist for all marine industries. Full compliance with the UNESCO Convention would thus require either an extension of the reporting duty in the MSA or an extension of the reporting protocols so that they apply in all marine sectors as well as to private persons.

As for UCH discovered on the continental shelf or in the EEZ of a third State, the UK has no mechanism in place to require its nationals or the masters of vessels flying its flag to report either discoveries of or activities directed at such heritage.[1778] The impact review acknowledges that in order to comply with this obligation there are two possible approaches. In the first approach it is assumed that other States have legislation in place dealing with UCH located in their EEZ or on their continental shelf. The UK could then oblige its nationals and vessels to comply with this local legislation in order to ensure that UCH is treated in conformity with the UNESCO Convention.[1779] Alternatively, the UK can impose a reporting duty on its nationals and vessels through primary legislation. If the choice would be made to adopt a regime following option (i) of article 9(1)(b) UNESCO Convention whereby the UK imposes its nationals and vessels to report to the coastal

[1776] As was already explained above under section 4.6.5.1. no such authorisation is required for divers taking objects from sites by hand. This needs to be altered in order to fully comply with the UNESCO Convention.
[1777] For example the Marine Aggregate Industry Protocol for Reporting Finds of Archaeological Interest; the Offshore Renewables Protocol for Archaeological Discoveries (ORPAD) and the Fishing Industry Protocol for Archaeological Discoveries (FIPAD).
[1778] The exception here are wreck sites designated under the PMRA located in the EEZ or on the continental shelf of a third State.
[1779] This is for example the case in the Dealing with Cultural Objects (Offences) Act 2003, 2003 c. 27 (DCOOA). Under this Act, a UK national is guilty of an offence when he dishonestly deals in a tainted cultural object. A cultural object is tainted when its removal constitutes an offence regardless of whether this is an offence under UK law or the law of another country. A similar approach could be used for compliance with article 9(1)(b) UNESCO Convention. In fact, the DCOAA applies to cultural objects removed from certain underwater sites as well and thus already provides a statutory basis for the implementation of a number of clauses from the UNESCO Convention. UK UNESCO 2001 Convention Review Group, paper impact 2014, 72.

State Party to the UNESCO Convention adjacent to the EEZ or continental shelf where the UCH is located, this would entail that no significant additional administrative burden is created for the UK.[1780] For reporting on UCH located in the Area, however, only one option can be identified in order to be in compliance with article 11(1) UNESCO Convention. This option is to insert a legal obligation under UK legislation imposing such a reporting duty on its nationals and vessels. It should be noted that as for heritage located in the Area there are no local authorities, the reporting should be done to UK authorities which entails that the necessary administrative provisions for receiving and addressing these reports would be required.[1781]

Other minor legal gaps are identified in the impact review as well. These relate, *inter alia*, to human remains (article 2(9)), discoveries by UK warships and other State vessels that have sovereign immunity (article 13), the non-use of areas under State jurisdiction (article 15) and measures relating to nationals and vessels (article 16). A number of administrative issues should be addressed as well, mainly relating to the notification of and consultation with other States under the different scenario's set out in the UNESCO Convention. Finally, it was concluded that a reallocation of resources would be necessary.[1782]

#### 4.7.2.5. Pleadings in favour of ratification

In 2014, the British Academy and the Honor Frost Foundation made a case in favour of the UK ratifying the UNESCO Convention.[1783] These two organisations had convened a joint Steering Committee of UCH experts and senior archaeologists in order to work towards the UK ratification of the UNESCO Convention. In their 2014 briefing note, they call upon the UK government to do more for UK's rich maritime legacy by ratifying the Convention. It was felt that without such ratification, the UK was largely unable to protect wrecks that are located beyond its own waters. Five key reasons were identified why the UK should proceed to ratification: 1) ratification of the Convention would help protect UK historic wrecks all around the world; 2) ratifying the Convention would make it easier for the UK to manage its UCH as it could make its waters a 'no go area' for treasure hunters[1784] and increase the international recognition of UK interests in its wrecks; 3)

[1780] As will be discussed in the chapter on the Belgian legislation, the author has her doubts on whether this approach is fully in conformity with the UNESCO Convention.
[1781] UK UNESCO 2001 Convention Review Group, paper impact 2014, 73-79.
[1782] UK UNESCO 2001 Convention Review Group, paper impact 2014, 79-83.
[1783] British Academy for humanities and social sciences and the Honor Frost Foundation Steering Committee on Underwater Cultural Heritage, *2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage: The case for UK ratification*, March 2014, available at www.britac.ac.uk/publications/2001-unesco-convention-protection-underwater-cultural-heritage-case-uk-ratification. (British Academy and Honor Frost, The case for UK ratification 2014)
[1784] In the past the position of the UK on the commercial exploitation of UCH was somewhat ambiguous which attracted financial speculation. British Academy and Honor Frost, The case for UK ratification 2014, 11.

ratification is likely to generate economic benefits and savings as the existing *ad hoc* arrangements can be streamlined and benefits can be gained from recognising UCH as a valuable social and economic resource;[1785] 4) ratification will help reinforce the UK's interpretation of the international law of the sea[1786] as it can present its views within the institutions of the Convention;[1787] and 5) ratification will help enable the UK heritage sector to grow internationally and confirm its leading role in university education and research as well as boost related sectors.[1788]

The briefing note leaves the UK with the warning that if it would continue to refuse ratification of the UNESCO Convention, this will result in its position to become increasingly isolated and irrelevant. The UK will be unable to exercise influence on the way in which the new global standard is implemented and will largely remain incapable of offering effective protection to UK wrecks located outside its territorial waters.[1789]

Following the impact review and the briefing note, the UK National Commission for UNESCO published a policy brief in March 2015 containing the next steps for the UK government.[1790] A number of developments and important factors are highlighted, which were already identified in the impact review and briefing note. These include that the UK has already adopted the Rules of the Annex as government policy, the fact that the scope of the Convention is narrower than presumed as it distinguishes between activities directed at UCH and those incidentally affecting UCH, that several business sectors in the UK would benefit internationally from UK participation in the Convention and that the ratification would increase the opportunities that the UK has to make its mark as a world leader in several academic and professional fields relating to UCH. Another development that needs to be taken into account according to the policy brief is that a number of major maritime States, including Spain, France and Portugal, which initially expressed concerns

[1785] By ratifying the UNESCO Convention, time and effort can be directed to the use of UCH in a positive way. As this Convention supports public access to UCH sites, it forms a basis for actively using UCH as a valuable economic and social resource. Revenues can be made from tourism including diving activities. British Academy and Honor Frost, The case for UK ratification 2014, 17.

[1786] Such views would certainly include the UK's position in relation to coastal States' rights in the Convention and the sovereign immunity of sunken State craft. British Academy and Honor Frost, The case for UK ratification 2014, 19.

[1787] These institutions are the Meeting of States Parties and the Scientific and Technical Advisory Body. See section 4.11. chapter one for more on these institutions.

[1788] These sectors include world-leading conservation facilities for recovered artefacts and structures underwater and survey companies. British Academy and Honor Frost, The case for UK ratification 2014, 3 and 25.

[1789] British Academy and Honor Frost, The case for UK ratification 2014, 3.

[1790] United Kingdom National Commission for UNESCO, *UNESCO Convention on the Protection of Underwater Cultural Heritage: Next steps for the UK government*, March 2015, Policy Brief 17, available at www.unesco.org.uk/wp-content/uploads/2015/05/UKNC-Policy-Brief-17_Underwater-Cultural-Heritage_March-2015_REVISED.pdf. (UK National Commission for UNESCO, Next steps for UK government 2015)

about the UNESCO Convention have ratified it. Other maritime powers such as Germany, the Netherlands and The Republic of Ireland are considering ratification as well.[1791] The UK government was, therefore, recommended to re-evaluate whether it should ratify the UNESCO Convention. A first step thereto would be to conduct an inter-departmental regulatory impact assessment to identify the legal and administrative changes that would be required.[1792]

The UK has at the moment not yet ratified the UNESCO Convention. In January 2017, a written question was posed in UK parliament inquiring about the progress that had been made concerning the ratification of the UNESCO Convention. Parliamentary Undersecretary of State for Sport, Tourism and Heritage, Tracey Crouch, responded that the government is still committed to consider the results of the 2014 impact review in order to determine whether the UK should proceed to ratification of the Convention. The idea was to make a decision on timescales for reviewing the UNESCO Convention in 2017. [1793] The timescale was, however, still under review in September 2017 and since then no indication can be found that it was adopted.[1794] At this moment, it thus remains uncertain whether and when the UK will ratify the UNESCO Convention.

## 5. Germany

### 5.1. Competence for underwater cultural heritage in Germany

As is the case for Belgium, the Federal Republic of Germany is a federal State.[1795] It is made up of 16 federated States, the so-called Länder.[1796] In the context of this dissertation, the phrase 'federated States' will be used when referring to the German 'Länder'. When comparing the German State structure to that in Belgium, two fundamental differences can be identified. Firstly, where in Belgium legislative texts originating from the communities and regions, such as decrees and ordinances, have the same legal value as federal laws, the German Basis Law provides that

[1791] UK National Commission for UNESCO, Next steps for UK government 2015, 11.
[1792] UK National Commission for UNESCO, Next steps for UK government 2015, 5.
[1793] Convention on the Protection of the Underwater Cultural Heritage: written question 59576, asked by R. SMITH (11 January 2017) and answered by T. CROUCH (19 January 2017). www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-01-11/59576/
[1794] Convention on the Protection of the Underwater Cultural Heritage: written question 6228, asked by K. JONES (19 July 2017) and answered by J. GLEN (5 September 2017), www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2017-07-19/6228/.
[1795] In Europe there are 5 federations: Belgium, Germany, Austria, Spain (some discussion exists on whether Spain technically is a federated State) and Switzerland. A. GUNLICKS, *The Länder and German federalism*, Manchestern Manchester University Press, 2003, 3.
[1796] Baden-Württemberg, Bremen, Mecklenburg-Western Pomerania, Saxony, Bavaria, Hamburg, North Rhine-Westphalia, Saxony-Anhalt, Berlin, Hesse, Rhineland-Palatinate, Schleswig-Holstein, Brandenburg, Lower Saxony, Saarland and Thuringia.

"*Federal Law shall take precedence over Land law*".[1797] The reason for this is that in Germany a number of concurrent legislative powers have been identified in which the federated States have power to legislate as long as and to the extent that no federal law has been enacted.[1798] As a general principle all competences in Belgium have been exclusively given to one legislative level. Concurrent legislative powers are very rare.[1799] A second fundamental difference between Germany and Belgium in this respect relates to the manner of competence division. In the German Basis Law the following is provided: "*Except as otherwise provided or permitted by this Basis Law, the exercise of state powers and the discharge of state functions is a matter for the Länder*".[1800] This entails that the legislative competences of the federal State must be explicitly assigned to it while the residuary competences belong to the federated States. In Belgium the competences of the Communities and Regions are listed in the Act of 8 August 1980.[1801] Another approach can thus be seen here where the competences for the Communities and Regions must be explicitly assigned to them and the federal government holds the residuary competences.

The competence division in Germany has been inscribed in articles 71-75 of the Basis Law. These provisions list all legislative powers assigned to the federal level. This entails that all competences that are not assigned in these provisions are competences of the federated States. Generally speaking, the competence for the protection and management of heritage has not been assigned to the federal level, entailing that it is a competence of the federated States. One aspect relating to heritage protection has, however, been exclusively assigned to the federal level because of its transnational character, namely the safeguarding of German cultural assets against the removal from the country.[1802] More generally speaking, the federal government is competent for the State's foreign cultural policy.[1803] A number of other competences that can have an effect on UCH have been assigned as concurrent legislative powers to the federal State as well such as the

[1797] Grundgesetz für die Bundesrepublik Deutschland vom 23. Mai 1949 (*BGBl*. S. 1), article 31. (Basis Law)
[1798] Article 72 Basis Law. In the German Basis Law both exclusive and concurrend legislative competences are identified. Article 70(2) Basis Law.
[1799] M. STORME, *De defederalisering van het gerecht in België: Een model voor bevoegdheidsverdeling*, Lecture at the Flemish Public law conference 2002, available at www.law.kuleuven.be/personal/mstorme/gerechtbevoegdhverdeling.pdf, 16.
[1800] Article 30 Basis Law. "*The Länder shall have the right to legislate insofar as this Basic Law does not confer legislative power on the Federation.*" Article 70(1) Basis Law.
[1801] Bijz. Wet van 8 augustus 1980 tot hervorming der instellingen, *BS* 15 augustus 1980, 9434 (Reform Act 1980). For more on the competence division in Belgium see chapter four.
[1802] Article 73(5a) Basis Law.
[1803] Even though the primary role for cultural heritage lies with the federated States, a programme has been operating at the federal level since 1950 in order to promote conservation measures for the preservation and restoration of immovable cultural monuments of national significance. Furthermore, three acts exist at the federal level that assist in the protection of cultural heritage, namely, the Act on the Protection of German Cultural Heritage against Removal Abroad, the Act on the Return of Cultural Assets and the Act to implement the Hague Convention of 1954. U. BLUMENREICH, "Country Profile Germany" in Council of Europe and ERICarts, *Compendium Cultural Policies and Trends in Europe*, available at www.culturalpolicies.net (last update January 2016), 45-46.

legislative competence for 'war graves',[1804] the promotion of research,[1805] deep-sea and coastal fishing, preservation of coasts[1806] and maritime and coastal shipping.[1807] When exercising these competences, the federal State will most likely have to take account of the protection of UCH as provided for by the federated States which have the primary legislative competence to regulate in this field.

Aside from the material competence division as is set out above, regard must also be taken of the territorial competence division. The territorial sea is considered as a part of the German territory and is therefore administered by the federated coastal States bordering the sea for the competences assigned to them.[1808] For the North Sea, this entails that the cultural heritage legislation of Lower Saxony and Schleswig-Holstein, which border the North Sea, applies to heritage located in their respective parts of the German territorial sea.[1809] An imaginary line runs through the German part of the North Sea dividing it between these two federated States so that it is clear which legislation applies in a certain area, and in this case, to a certain UCH site.[1810] The EEZ and the continental shelf on the other hand do not belong to the territory of the federated States, which entails that they do not have any competence in these maritime zones.[1811] The federal government is thus responsible for any legislation applicable in these zones including that for the protection of UCH.

## 5.2. Protection of underwater cultural heritage in the territorial sea

### 5.2.1. Scope of application of the Lower-Saxony and Schleswig-Holstein Acts

In accordance with the cultural sovereignty of the federated States, Germany has multiple historic conservation laws. In the German territorial sea of the North Sea, the heritage legislation of Lower-

[1804] Article 74(10) Basis Law.
[1805] Article 74(13) Basis Law.
[1806] Article 74(17) Basis Law.
[1807] Article 74(21) Basis Law.
[1808] By a proclamation of 11 November 1994, the outer limit of the German territorial sea was extended from 3 to 12 nm both in the North Sea and in the Baltic Sea. UN General Assembly, *Report of the Secretary-General*, fiftieth session, 1 November 1995, UN Doc. A/50/713, 11.
[1809] Lower Saxony and Schleswig-Holstein are also competent for Marine Spatial Planning in the territorial sea of the German part of the North Sea. For the territorial waters in the Baltic sea this is Schleswig Holstein and Mecklenburg–Western Pomerania. For the EEZ, the federal government has competence over Marine Spatial Planning. European MSP Platform, *Germany – Overview of MSP Related Maritime Uses*, http://msp-platform.eu/countries/germany (consulted 9 August 2018).
[1810] H. BUCHHOLZ, "Deutschlands Meereszonen in Nordsee und Ostsee" in Bundesrepublik Deutschland, *Nationalatlas - Deutschland in der Welt*, http://archiv.nationalatlas.de/wp-content/art_pdf/Band11_44-45_archiv.pdf , 2005, available at http://archiv.nationalatlas.de/?p=877, 44-45.
[1811] On 25 November 1994 Germany made a proclamation establishing an EEZ in both the North and Baltic sea. UN General Assembly, *Report of the Secretary-General*, fiftieth session, 1 November 1995, UN Doc. A/50/713, 11.

Saxony and Schleswig-Holstein applies to UCH.[1812] In Lower-Saxony (L-S), the applicable legislation is the Monument Protection Act of 1978, which was last amended in 2011 (L-S Act).[1813] In Schleswig-Holstein (S-H) the 1983 Monument Protection Act, which was reformed in 2014, applies to cultural monuments in the federated State and the adjacent territorial sea (S-H Act).[1814] These monument protection acts, as well as those of all other federated States in fact, are based on a number of general principles. The protection, conservation and exploration of cultural monuments is defined as a general public task and the monument protection acts set up rules for this purpose. Both the S-H and L-S Act depart from a comprehensive definition of the concept 'monument' which includes visible testimonies as well as objects that can only be discovered through archaeological research. These objects can either be movable or immovable.[1815] In the L-S Act, cultural monuments are defined to include four categories, namely architectural monuments, archaeological monuments, movable monuments and monuments that are witnesses of the earth's history.[1816] A similar categorisation can be seen in the S-H Act, with the difference that the category 'monuments that are witnesses of the earth's history' does not exist and rather a category is included for green monuments, being man-made landscapes and gardens.[1817]Neither legislation makes explicit mention of a specific category for UCH. It seems, however, that most UCH will fall in the category 'archaeological monuments'. The S-H Act defines archaeological monuments as monuments that are or were located in the ground or in a body of water and for which archaeological methods can be used to gain insights in man's past.[1818] While the definition of archaeological monuments in the L-S Act does not explicitly refer to monuments located under water, the provisions of the Act give the impression that UCH will, at least for the main part, fall within the category of archaeological monuments.

A significance criterion is included under both Acts with which cultural monuments must comply. In L-S an object or structure can be considered as an (archaeological) monument if its conservation is of public interest because of its historical, artistic, scientific or urban significance.[1819] In S-H, this is the case when the preservation of the structure or object is of public interest because of its

[1812] For a small part the legislation of Hamburg applies in the North Sea as well. However as for the most part the legislation of Lower-Saxony and Schleswig-Holstein applies, only these two will be assessed in the framework of this dissertation.

[1813] Niedersächsisches Denkmalschutzgesetz vom 30 Mai 1978 (*Nds GVBl*. 1978, S. 517), last amended by Article 1 Gesetzes zur Änderung des Niedersächsischen Denkmalschutzgesetzes vom 26 Mai 2011 (*Nds. GVBl.* 2011 S. 135). (L-S Act 1978)

[1814] Gesetz zum Schutz der Denkmale Schleswig-Holstein vom 30 Dezember 2014 (*GVOB*l. 2015, S. 2). (S-H Act 2014)

[1815] Niedersächsisches Landesamt für Denkmalpflege, *Denkmalschutz und Denkmalpflege in Niedersachsen*, 2015, www.denkmalpflege.niedersachsen.de/download/97512/NLD-Broschuere_Denkmalschutz_und_Denkmalpflege_in_Niedersachsen.pdf, 4. (Lower-Saxony State Office for Monument Preservation, 2015)

[1816] §3(1) L-S Act 1978.

[1817] §2(2) L-S Act 1978.

[1818] §2(2) L-S Act 1978.

[1819] §3(2) L-S Act 1978..

particular historical, scientific, artistic, technical, urban or cultural value.[1820] An object or structure must thus have a particular value, which is defined rather broadly, in order to be considered as a cultural monument under either legislation. Neither of the Acts contain a time-criterion. An object or structure can be considered as a monument regardless of their function, genre, or the time period from which they originate.[1821] This entails that this legislation can apply to, for example, remains from WWII as well.

Interesting to note is that in the L-S Act, sites can be protected as cultural monuments even when they have no relation to or offer information on the past of mankind. These are the so-called monuments of earths' history which was only added to the Act a couple of years ago. This means that outstanding paleontological and geological sites can be protected in the L-S Act, even if they have no relation to human history. These sites can include impressions, deformations or discolorations in rocks such as dinosaur tracks or glacier scratches, as well as fossils and other remains of animals and plants. They provide information about the evolution of the earth and early plant and animal life, millions of years before the first humans walked the earth.[1822] This type of heritage does not seem to be included in the UNESCO Convention as this Convention only applies to traces of human existence.[1823] In the S-H Act, these types of heritage can be protected as well, but here there must be a link with mankind. It is required that from these sites knowledge on the past of mankind can be obtained using archaeological methods.[1824]

Asides from protecting individual monuments, both Acts provide for the designation of zones that are protected from excavations. These are zones in which cultural or archaeological monuments are known or suspected to be present.[1825] In the L-S Act, it is determined that in these zones, which can be designated temporarily or indefinitely, all activities that may unearth or endanger cultural monuments require a permit from the monument protection authority.[1826] In the S-H act the consequence of such a designation will depend on the individual order as this must specify the

[1820] §2(2) S-H Act 2014. Prior to reforming the S-H Act, a distinction was made between simple and special cultural monuments, the former kind being protected to a much lesser extent. This distinction was abolished in the 2014 amending Act and the decision was made to only protect assets or structures that are of high cultural value as cultural monuments. Schleswig-Holstein Ministerium für Justiz, Kultur und Europa, "Häufige Fragen und Antworten zur Novellierung des Denkmalschutzgesetzes in Schleswig-Holstein", *Der Maueranker* 2015, (11) 12-13. (available at www.schleswig-holstein.de/DE/Fachinhalte/D/denkmalschutz/downloads/Fragen_Antworten_Download.pdf?__blob=publicationFile&v=3)

[1821] Lower-Saxony State Office for Monument Preservation, 2015, 4.

[1822] Lower-Saxony State Office for Monument Preservation, 2015, 20.

[1823] Art. 1(1)(a) UNESCO Convention.

[1824] §2(2) S-H Act 2014.

[1825] §2(3) S-H Act 2014. In the S-H Act it is provided that the monuments (potentially) present in such a protection zone should be of outstanding national or cultural-historical significance. §16(1) L-S Act 1978.

[1826] §16(1-2) L-S Act 1978. For more on the monument protection authority see *infra* section 5.2.2.

authorisation requirements necessary to achieve the purpose of the protection.[1827] In the marine area, the S-H Act protects parts of the Waddensea as zones where excavations are not allowed. Because of the frequent visits by hobby archaeologists especially in the 60s and 70s with the objective to recover historical objects it was felt necessary to protect certain areas in the Waddensea. This protection entails that all types of activities affecting the seabed and all ground operations are subjected to obtaining a historic license.[1828]

### 5.2.2. Monument protection authorities

Under both pieces of legislation a number of authorities have been assigned with the task of managing and protecting the cultural heritage. These are the so-called monument protection authorities (MPAs) (Denkmalschutzbehörde).

In L-S, a distinction is made between the lower MPAs, which are the municipalities or the cities (Landkreise), and the highest MPA, which is the Lower-Saxony Ministry for Science and Culture. For coastal waters, it is determined that the highest MPA is competent.[1829] Aside from the MPAs, the State Office for Monument Preservation (Landesamt für Denkmalpflege) acts as the federated State's conservation authority in the implementation of the L-S Act.[1830] The State Office advises on comprehensive and complex questions coming from construction and planning authorities, churches and especially owners and possessors of cultural monuments. This Office is also responsible for other key tasks relating to the conservation, restoration and excavation of cultural monuments as well as for scientific projects taking place in L-S. An advisory commission has been appointed by the Ministry of Science and Culture which advices the federated State on fundamental issues relating to heritage protection. There are two sub-committees: one for architectural and artistic monuments and one for archaeological monuments. The latter sub-committee consists of scientists and professionals in the field of archaeology.[1831]

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[1827] §10(1) S-H Act 2014.

[1828] Landesverordnung über ein Grabungsschutzgebiet im Bereich der Watten und Sände im nordfriesischen Wattenmeer vom 23. August 1973, letzte Version vom 27 April 2015 (*GVOBl.* 1973, 319). Archäologisches Landesamt Schleswig-Holstein, *Denkmalliste der Schutzzonen* available at www.schleswig-holstein.de/DE/Landesregierung/ALSH/Organisation/Abteilungen/Abteilung2/Denkmalliste/20180802_Denkmalliste_Schutzzonen.pdf?__blob=publicationFile&v=2 (last update 2 August 2018), 4.

[1829] §19 (1) and (3) and §20(1) L-S Act 1978.

[1830] §21(1) L-S Act 1978.

[1831] Niedersächsisches Ministerium für Wissenschaft und Kultur, *Denkmalpflege*, www.mwk.niedersachsen.de/startseite/kultur/denkmalpflege/denkmalpflege-18885.html (consulted 9 August 2018); Niedersächsisches Landesamt für Denkmalpflege, *Das Niedersächsische Landesamt für Denkmalpflege*, www.denkmalpflege.niedersachsen.de/wir_ueber_uns/amt/das-niedersaechsische-landesamt-fuer-denkmalpflege-55646.html (consulted 9 August 2018).

In S-H the MPAs are divided in three categories, namely the lower, high and highest MPAs. The lower MPAs are the federated State councils (for the so-called Kreise) or the mayors (for the so-called Kreisfreie Stadte). The high MPAs are the State Office for Monument Preservation and the Archaeological State Office. While the S-H Act does not explicitly state this, most UCH falls within the competence of the Archaeological State Office as this authority is responsible for archaeological cultural monuments and the excavation protection areas. This State Office is responsible for the coastal waters.[1832] Finally, the Ministry of Education, Science and Culture acts as the highest MPA.[1833] The highest MPA has created an independent Monument Council (Denkmalrat) with the task to offer advice to MPAs. The members of the Monument Council are volunteers and are appointed on a temporary basis. It is an independent organ and can comment both on individual cases as well as on fundamental and current issues of monument protection and preservation. To this end, the Council can make recommendations. In any case, the Monument Council must be heard in case of objection to the registration of movable cultural property and to the designation of protected areas. The decisions of this Council are published on the website of the Ministry for Education, Science and Culture.[1834]

### 5.2.3. Authorisation for activities directed at cultural monuments

In the L-S Act it is prohibited to destroy, alter or remove a cultural monument without obtaining prior authorisation from the MPA.[1835] Authorisation can be refused if this would violate the principles set in the L-S Act or can be granted under conditions to ensure compliance with the Act.[1836] For archaeological monuments the idea is to strive to their long-term preservation.[1837] Anyone wishing to dig for cultural monuments, salvage them or search for them using technical

[1832] U. WARNKE, *Die Nordsee - Ein archäologisches Archiv der Neuzeit* in Die Deutsche Gesellschaft Für Archäologie des Mittelalters und der Neuzeit e.V., *Mitteilungen der DGAMN: Archäologie im 19. und 20. Jahrhundert*, 2015, available at https://journals.ub.uni-heidelberg.de/index.php/mitt-dgamn/issue/view/2234/showToc, (37) 39. (WARNKE 2015)

[1833] §3(2) S-H Act 2014.

[1834] Schleswig-Holstein Landesamt für Denkmalpflege, *Denkmalrat, Denkmalbeiräte, Ombudsmann und Vertrauensleute*
www.schleswig-holstein.de/DE/Landesregierung/LD/Organisation/DenkmalratBeiraete/_documents/DenkmalratBeiraete.html (consulted 9 August 2018). Following §6(3) S-H Act 2014 the details of this Council including its composition are regulated in an order adopted by the high MPA, namely Landesverordenung über den denkmalrat (denkmalratsverordnung) vom 10 Juni 2015 (*GVOBl.* 2015, S.152).

[1835] §10(1) L-S Act 1978. Authorisation given under this Act will expire if the activities in question have not commenced within two years after the authorisation was given or if the execution of those activities has been suspended for two years. This period can be extended by the competent MPA. No fees or expenses are charged for obtaining authorisation. §24 L-S Act 1978.

[1836] §10(3) L-S Act 1978.

[1837] §9(1) L-S Act 1978.

aids must thereto obtain the prior authorisation from the competent MPA.[1838] When granting such authorisation provision can be made concerning the search, planning and execution of the excavation, the treatment and securing of finds in the soil, the documentation of the finds and the reporting and final reconstruction of the excavation site. The authorisation can also determine that a specific expert should conduct the work.[1839] Authorisation must be obtained as well for conducting investigations or earthworks at a location of which the requester knows, suspects or, considering the circumstances, should assume that cultural monuments are present.[1840] This can include activities indirectly affecting cultural monuments such as dredging or sand extraction.

In S-H, authorisation must be obtained from the competent MPA for the alteration or destruction of cultural monuments as well as for the transfer of a historical monument of national importance to another place.[1841] Additionally, the authorisation of the high MPA is necessary for all measures taken in monument areas which might substantially affect that monument. Authorisation must also be obtained for all measures undertaken in areas protected from excavations and in world heritage sites when these measures are likely to affect or endanger these areas or sites. Likewise, the S-H Act provides that authorisation must be obtained for interventions with the objective to explore a monument, for using archaeological methods suitable for locating cultural monuments in places known or suspected to contain cultural monuments and for using measuring or searching devices to locate cultural monuments in general. Finally, authorisation must be obtained for investigations, earthworks and salvage by diving in areas known or suspected to contain cultural monuments and for taking possession of a cultural monument that was discovered during excavations or salvage by diving.[1842] Authorisation can be refused when this is necessary for the protection of monuments. On the other hand, authorisation should be granted when this does not conflict with the protection of historical monuments or when an overriding public interest renders the measures for which authorisation is requested necessary. [1843] When the MPA feels that it needs the assistance of experts to decide on an request for authorisation, the applicant will have to pay for this in as far as reasonable.[1844] The action for which the authorisation was obtained must

[1838] §12(1) L-S Act 1978. With the notion 'technical aids', specific attention is given to the use of metal detectors. In order to obtain authorisation for using technical aids in the search of monuments, special courses are foreseen and the requester must agree to be involved in the archaeological preservation of monuments. This way use can be made of the civil support for archaeological research. Lower-Saxony State Office for Monument Preservation, 2015, 19.
[1839] §12(2) L-S Act 1978.
[1840] §13 L-S Act 1978.
[1841] §12(1) S-H Act 2014.
[1842] §12(2) S-H Act 2014.
[1843] §13(2) S-H Act 2014. Conditions and restrictions can be attached to an authorisation. §13(4) S-H Act 2014.
[1844] §13(6) S-H Act 2014.

commence within a time period of three years and cannot be interrupted for more than one year.[1845]

While neither of the Acts explicitly provide for the preservation of UCH *in situ*, the obligation to obtain authorisation prior to moving or excavating heritage indirectly ensures that heritage, at least in first instance, is left *in situ*. Additionally, the authorities have expressed the view that it is best to preserve finds in the soil where they were discovered.[1846] The State Office for monument preservation in L-S provided that as a non-renewable resource, historical objects should be preserved *in situ* as research reserves for future generations. In any case, when monuments are endangered, they must at least be scientifically documented before they are excavated.[1847]

The polluter-pays-principle, or better the damager-pays-principle, as is inscribed in the Valletta Convention has been implemented in both the L-S and S-H Act. For the L-S legislation, this principle was inserted during the last revision of this Act in 2011 in order to create legal certainty for the cost distribution of rescue excavations when necessary.[1848] Anyone who completely or partially destroys a monument, must, in as far as reasonable, provide for the professional investigation, recovery and documentation of the monument. This duty applies regardless of whether or not authorisation is required by the Act.[1849]

#### 5.2.4. Duty to report

A reporting duty is imposed on anyone who discovers objects or traces of which it can be assumed that they are cultural monuments. This person must report this as soon as possible to an MPA, municipality or commissioner for the archaeological preservation of monuments in L-S or to the high MPA in S-H. When this discovery was made following an activity at sea, the manager and contractor of the activity that led to the discovery are bound by this reporting duty as well.[1850] In L-S, such a find must be left unaltered for the period of four working days after the reporting and must be protected against danger unless the MPA permits the activities which led to the discovery to continue.[1851] The competent MPAs and their representatives are entitled to recover the find

[1845] §13(1) S-H Act 2014.
[1846] Lower-Saxony State Office for Monument Preservation, 2015, 4.
[1847] Lower-Saxony State Office for Monument Preservation, 2015, 12.
[1848] Lower-Saxony State Office for Monument Preservation, 2015, 5. The polluter-pays-principle was included as a clarification and supplement to the already existing regulations dealing with activities taking place at sea. Lower-Saxony State Office for Monument Preservation, 2015, 15.
[1849] §6(3) L-S Act 1978; §14 S-H Act 2014.
[1850] §14(1) L-S Act 1978; §15(1) S-H Act 2014.
[1851] §14(2) L-S Act 1978.

and to carry out investigations on site as well as to secure further finds that might be present.[1852] In the S-H Act, it is determined that the cultural monument and site must remain untouched in as far as this can be done without significant disadvantages or expenses. This obligation expires at the latest four weeks after the reporting.[1853]

The L-S State Office stated that as for surface finds the original context is often destroyed, these finds may be picked up from the surface under the condition that the exact location is marked and that contact is sought with the competent authorities. The competent authorities must be able to determine whether the find originates from an unknown site or whether it originates from a known site which has been damaged by ground works in which case rescue operations must be initiated. In no case is it allowed to dig at the site of discovery as this could destroy traces which can usually only be recognised and interpreted by experts.[1854] The L-S State Office did not specifically clarify whether this permission to recover surface finds applies to finds in the marine area as well. Arguments can be given both in favour as well as against such an exception. Unlike on land, the mere act of bringing an object located in the marine area to the surface can already cause damage to it and specific conservation measures might immediately be required which cannot always be offered by the incidental finder of an object. On the other hand, by securing a find from the seabed it can be investigated scientifically as it might be impossible to find it a second time due to it being covered by sand.

Upon request, the owner or possessor of the find is obliged to hand it to the competent MPA or a designated body for a period of twelve months, which can be extended, for scientific evaluation, conservation or documentation.[1855]

### 5.2.5. Ownership rights over cultural monuments

#### 5.2.5.1. Treasure rule

§984 of the German Civil Code governs title to finds, unless special provision has been made for movable cultural property. As a general rule the following applies: "*If a thing that has lain hidden for so long that the owner can no longer be established (treasure) is discovered and as a result of the discovery it is taken into possession, one half of the ownership is acquired by the discoverer,*

[1852] §14(3) L-S Act 1978. The duty to leave the find unchanged for a period of four days and to protect it from danger as well as the right of MPAs to recover the find, carry out investigations on site and secure further finds only applies to excavations that were authorised following §12 L-S Act 1978 and when this was explicitly declared in the conditions attached to the excavation permit. §14(4) L-S Act 1978.
[1853] §15(1) S-H Act 2014.
[1854] Lower-Saxony State Office for Monument Preservation, 2015, 16-17.
[1855] §15 L-S Act 1978.

*and the other half by the owner of the thing in which the treasure was hidden.*"[1856] This would potentially be problematic for UCH as this means that the State would only be the owner of half the find.[1857] The German legislator acknowledged this issue and allows the German federated States to implement the so-called "Schatzregal" or treasure rule which vests ownership over movable objects having a cultural or scientific value in the federated State.[1858] Most federated States have implemented such a rule in their heritage legislation. In the L-S Act, this treasure rule has been implemented for movable objects that have been abandoned or which have been hidden for such a long period of time that the owner can no longer be identified. These finds become the property of the federated State if they were discovered during investigations conducted by the federated State, when they were discovered in excavation protection zones or when they are of outstanding scientific value and were discovered by private individuals by chance and reported immediately.[1859] This provision is fairly limited as it does not apply to a large number of chance finds that were discovered outside an excavation protection zone or to immovable heritage.[1860] As a safety net, however, the L-S Act allows for the expropriation of cultural monuments when this is necessary for the preservation of the monument, in order to excavate or to investigate them. This expropriation can take place when significant deterioration of the movable monument is feared, when it is of considerable public interest and there is no other way to guarantee that it is publicly accessible, or when expropriation is the only way to guarantee that it is available for scientific research. The L-S Expropriation Act must be applied both for movable and immovable heritage.[1861] The application for expropriation has to be made within one year after the discovery of the find.[1862] Additionally, as was mentioned above,[1863] the competent MPA can require that a monument is handed to it for a period of twelve months for scientific purposes.[1864]

In the S-H Act, the treasure rule is implemented as well for the same type of objects as is the case under the L-S Act, with the addition of finds discovered during unauthorised excavations or searches. The finder of a monument can receive a reward for reporting a find, the height of which is decided on by the highest MPA, unless this find was discovered during unauthorised activities or during investigations conducted by the federated State.[1865] When requested by the high MPA, a

[1856] §984 Bürgerliches Gesetzbuch (German Civil Code).
[1857] The same issue can be seen for treasure discovered in the Netherlands. See *supra* section 3.6.
[1858] Article 73 of the preliminary provisions of the German Civil Code.
[1859] §18 L-S Act 1978.
[1860] M. WANTUCH-THOLE, *Cultural Property in Cross-Border litigation – Turning Rights into Claims*, Berlin, De Gruyter, 2015, 39-40.
[1861] Niedersächsisches Enteignungsgesetz of 6 April 1981 (*Nds GVBl*. 1981, S. 83).
[1862] §30 L-S Act 1978. Compensation is given for expropriation as is determined in the Lower-Saxony Expropriation Act. §31 L-S Act 1978.
[1863] See *supra* section 5.2.4.
[1864] §15 L-S Act 1978.
[1865] §15(2) S-H Act 2014.

moveable cultural monument should be handed over for a limited period of time in order to allow it to be scientifically researched. The federated State or local authority in whose territory the find was discovered, can demand that it is delivered to it under the condition that there are facts indicating that the state of preservation of the object deteriorates or that it would be lost for scientific research. This must be demanded within a period of three months after the reporting of the find.[1866] Furthermore, both for movable and immovable monuments, expropriation is possible if there is no other way to ensure its preservation.[1867] A compensation is in this case given to the owner of the monument.[1868]

#### 5.2.5.2. Ownership over non-treasure

For objects that are not considered to be treasure in the sense of the Civil Code, it is determined that the owner has a period of six months from the moment of reporting on to come forth and claim his/her rights.[1869] If no owner comes forward, the finder will become the owner of the object. When the owner does claim his ownership rights within that period, the finder is entitled to a finder's reward.[1870] In the L-S Act, it has been specifically determined that the finder of a movable object in the sense of §18 of the Act receives a reward within the available national budget, the height of which is determined by the State Office for monument preservation depending on the individual circumstances of each case.[1871] It seems that when so desired, the government can in this case proceed to expropriation as well. This provision is not suitable for protecting UCH as title to such discoveries should ideally be awarded to the State rather than to the finder. A reason why for non-treasure such an approach is used while for treasure the State is more likely to obtain title might be the fact that both the L-S and S-H mainly focus on heritage on land. While for UCH, objects and sites might be discovered that do not qualify as 'treasure' as defined above,[1872] for example a shipwreck of which it can still be determined who the owner was, this type of finds are less likely to be discovered on land.

#### 5.2.5.3. Obligations for owners

Under both Acts, a number of provisions are included imposing duties on the owner of cultural monuments to actively protect and maintain the monument. In the L-S Act, for example, the owner should preserve, maintain, protect from danger and when necessary, repair cultural

[1866] §15(4) S-H Act 2014.
[1867] §21(1) S-H Act 2014.
[1868] §20 S-H Act 2014.
[1869] Section 973 German Civil Code.
[1870] Section 971 German Civil Code.
[1871] §18 L-S Act 1978.
[1872] See *supra* section 5.2.5.1.

monuments.[1873] Similarly, in S-H the owner should, within reasonable limits, conserve and preserve the monument from danger. Anyone who by gross negligence damages a monument must compensate the damage caused by this.[1874] It is highly unlikely, however, that such duties apply to the owners of UCH located on the seabed. Such duties for the owners to actively maintain their UCH are not included in the UNESCO Convention and would pose an unreasonable burden especially on the non-State owner of for example a shipwreck. Such duties would most likely result in all owners of UCH to abandon title over it. These maintenance duties under both Acts are mainly directed at the owners or inhabitants of architectural monuments. This demonstrates that these Acts are for a large part focussed on land-based heritage and that it is not possible to apply identical sets of provisions to such heritage and that located in the marine environment.

### 5.2.6. Register for cultural monuments

In both federated States a register has been created that contains information on cultural monuments. In L-S this register is managed by the State Office for Monument Preservation[1875] and in S-H this is done by the high MPA's for their respective areas of control.[1876] The application of the protective regime set out in the L-S and S-H Acts applies for the most part to monuments regardless of whether they have been included in the register or not.[1877] These registers are thus for the main part merely informative. There is, however, under both Acts one exception to this general rule, namely for movable cultural monuments. In the L-S Act, paragraphs 6, 10 and 11, respectively dealing with the preservation and protection of monuments, obtaining authorisation for certain activities directed at monuments and a notification duty in case of the sale of a movable monument only apply to movable monuments which have been registered.[1878] In order to ensure that these monuments are adequately protected, the L-S Act allows for the provisional registration of such monuments, pending a permanent decision to be taken on their significance. [1879] Similarly, in the S-H Act, compliance with the statutory provisions of the Act, can only be requested for

[1873] §6(1) L-S Act 1978.
[1874] §16(3) S-H Act 2014.
[1875] §4(1) L-S Act 1978. As a general rule, this register is publicly accessible. The exception to this rule are movable monuments and accessories of architectural monuments whose entry in the register can only be consulted by their owner, a person holding rights over the object or anyone authorised by either of them. §4(2) L-S Act 1978.
[1876] §8(1) S-H Act 2014. These lists are electronically managed. The highest MPA determines by ordinance what data should be included in the list and which should be published. For movable monuments contained in the register, the information can only be published upon application by the owners. §8(2) S-H Act 2014. See Landesverordnung über die Denkmallisten für Kulturdenkmale vom 10 Juni 2015, (*GVOBl.* 2015, S.157). For the register see: www.schleswig-holstein.de/DE/Landesregierung/LD/Kulturdenkmale/ListeKulturdenkmale/_documents/ListeKulturdenkmale.html#doc1886122bodyText11.
[1877] §5(1) L-S Act 1978; §8(1) S-H Act 2014.
[1878] §5(1) L-S Act1 1978.
[1879] §5(2) L-S Act 1978. Movable monument will only be included in the register when their special importance requires that the monument is subjected to the protection offered under this Act. §4(1) L-S Act 1978.

movable objects from the time of the entry in the register on. When there is a risk of deterioration of the monument or a threat that it will change locations, the high MPA may order the provisional registration of the movable monument.[1880]

As for the inclusion of archaeological sites in the register, in L-S a distinction is made between archaeological monuments that are still visible above the surface of the earth and those that are hidden beneath it. The visible monuments are usually included in the register as archaeological monuments.[1881] Monuments that are not visible, however, but that are known to be there, are only registered when they are of considerable importance or are highly endangered. In addition to the register, the ADADweb digital technical information system contains all known sites in L-S regardless of whether these are visible above the earth's surface or not.[1882]

#### 5.2.7. Enforcement and sanctions

The L-S and S-H Acts allow officials and agents of the MPAs to enter properties after giving prior notification to the owner in order to protect cultural monuments from urgent threats. Owners of a cultural monument have the duty to provide the MPAs with all information necessary for the implementation of the Acts.[1883]

The Acts provide for fines and imprisonment, as well as the confiscation of cultural monuments, in case of violations of the provisions set out for the protection of cultural monuments. Depending on the type and severity of the offence, a person can be sentenced to imprisonment of up to two years and fines of up to 250.000 euros in L-S or even 500.000 euros for particularly severe cases in S-H.[1884]

### 5.3. Protection of UCH in the German Exclusive Economic Zone

#### 5.3.1. Pilot project: Threatened Land Archive North Sea

From 2011 until 2014, one of the first and largest data collection projects on heritage was conducted in the North Sea. This was the pilot project 'Threatened Land Archive North Sea'. The

[1880] §9(3) S-H Act 2014.
[1881] It has been recognised by the State Office for Monument Preservation that not only the structures themselves but their environment as well are of importance as they can provide valuable archaeological insights. Lower-Saxony State Office for Monument Preservation, 2015, 13.
[1882] Lower-Saxony State Office for Monument Preservation, 2015, 13. For the ADADweb information system see www.adabweb.niedersachsen.de/common/control.php?id=0&dialog=desktop&action=loginmask&BID=NI
[1883] §27 L-S Act 1978; §17(4) S-H Act 2014.
[1884] §35 L-S Act 1978; §18-19 S-H Act 2014.

German Maritime Museum in Bremerhaven had requested to conduct this project. It was carried out in collaboration with the German Federal Maritime and Hydrographic Agency (FMHA). The objective of the project was to determine the monumental potential of the German North Sea and to digitise a number of selected finds in that area. The study area for this project was the German EEZ of the North Sea. Unlike the much smaller German EEZ in the Baltic Sea, this vast area had at that time hardly been investigated from an archaeological point of view resulting in limited knowledge on the monument potential there present.[1885] One of the reasons for this lack of research initiatives is that the jurisdiction of the State Offices for Monument Preservation of L-S and S-H ends at the 12 nm limit of the territorial sea.[1886] At the moment, there is no legislation in place offering protection to monuments located in the EEZ.[1887] In terms of monument protection and preservation, the German EEZ is no man's land. When assessing the organisation of the Federal Republic of Germany , it becomes clear that while the federal government is responsible for UCH in the EEZ, no infrastructure is in place for this purpose as there is no federal monument authority.

For the purpose of the pilot project the wreck database established by the FMHA was used as a starting point for the investigations. The FMHA operates as a federal authority within the Ministry of Transport and Digital Infrastructure. The key tasks of this authority include surveying the North and Baltic Sea, the publication of official nautical charts and conducting a number of marine spatial planning tasks for marine use of the German EEZ. The FMHA database records and maps approximately 2.200 positions of obstacles located underwater in the North Sea. These not only include historically interesting wrecks but also containers, stones and other obstacles. During the pilot project the remains of old river systems as well as ten ship wrecks were examined in detail. In total around 8.000 anomalies were entered into the database during the project period of which about 70% were shipwrecks. It was concluded that the North Sea holds great potential for archaeological and historical research, especially originating from the prehistory and modern

[1885] For the Baltic Sea region, a council was established in 1992. This is an informal regional political forum made up of 11 member States, including Germany which has as its main objective to promote integration in the region. A number of experts and workgoups reside under this council, including a monitoring committee on cultural heritage in the Baltic Sea region. This committee was established back in 1998 and comprises of nominated representatives of the authorities in charge of national heritage management in ten countries. In Germany, Mecklenburg-Vorpommern and Schleswig-Holstein, the two federated States bordering the Baltic sea, are members of this committee. The committee aims to promote "*the potential of cultural heritage as a strategic resource for developing the Baltic Sea Region.*" In terms of UCH, this committee assesses the possibility of creating a regional agreement for its protection in the Baltic Sea. This would include a prohibition for the nationals of the committee's members and ships flying their flag from interfering with UCH. Council of the Baltic Sea States, *Baltic Region Heritage Committee*, www.cbss.org/regional-identity/cultural-heritage/ (consulted 10 August 2018). For more on this see http://baltic-heritage.eu/.

[1886] WARNKE 2015, 37-38.

[1887] Deutsches Schiffahrts Museum, *Pilotprojekt "Bedrohtes Bodenarchiv Nordsee" - Maritime Archäologie in der Nordsee*, ww3.dsm.museum/forschungsprojekte/pilotprojekt-bedrohtes-bodenarchiv-nordsee.4749.de.html (consulted 10 August 2018).

times. The spectrum of cultural assets ranges from the remnants of paleo landscapes, which provide information on the livelihood of Stone Age hunters and gatherer cultures, to shipwrecks and cultural monuments of modern times.[1888] The data and locations of the recorded wrecks as well as the remains of archaeological landscapes were included in a digital database within the German Maritime Museum in Bremerhaven. This database is available for experts wishing to conduct further research in the future. It serves as the basis for a system allowing targeted access to data relevant for research and as an up-to-date overview of the recorded cultural monuments in the North Sea. This database also assists the FMHA in its task to monitor the registered monument stock. In light of this, a firm exchange of information has been established between the FMHA and German Maritime Museum in Bremerhaven.[1889]

Following this project, it was recognised that the primary goal of monument preservation should always be to preserve a monument *in situ*. The recovery of shipwrecks should only be considered in exceptional cases and should be done by a team working from a suitably equipped ship. A number of techniques were assessed for investigating wrecks such as 3D documentation.[1890]

### 5.3.2. A new act for the protection of heritage in the German Exclusive Economic Zone

#### 5.3.2.1. A unique act

At the moment, the German legislator is for the first time ever in the process of drafting an Act for the protection of UCH in the German EEZ. One of the main objectives of this act is to implement the principles and provisions of the UNESCO Convention into German legislation. This Act will apply in the German EEZ both in the North Sea and the Baltic Sea. The fact that such an Act is being created is fairly unique in two ways. Firstly, it will be the first act protecting UCH in the German EEZ and, in fact, one of the first acts in the North Sea region specifically addressing the protection of UCH in the EEZ. As was evidenced above France, the Netherlands and the UK do not have comprehensive legislation in place for the protection of UCH located in their EEZ.[1891] Secondly, while it are the federated States that are competent for cultural heritage, this Act is drafted by the federal legislator in Germany due to its territorial scope, being the German EEZ and continental shelf. This Act is thus, in other words, drafted at a legislative level where only very little expertise on heritage protection can be found and where no competent authorities exist for the implementation of the Act.[1892]

[1888] During this project, the importance of protecting 'maritime war graves' was emphasized as well.
[1889] WARNKE 2015, 38-45.
[1890] WARNKE 2015, 44-45.
[1891] See *supra* sections 2, 3 and 4.
[1892] As will be discussed in the final chapter on the Belgian legal framework, a similar situation took place in Belgium a couple of years ago.

The German legislator has already been working on this Act for over a year and it is not yet clear when it will be adopted and whether any further substantial changes will be made to it. It should thus be noted that everything discussed below is based on the current draft of the new Act and can still be altered in the further legislative process.

#### 5.3.2.2. Application and general principles

The Draft departs from the recognition that UCH located in the German EEZ is for the moment unprotected. As technological progress and the higher accessibility of UCH pose considerable threats to UCH sites, it was felt necessary to adopt a protective regime. The Draft Act applies the same definition as is given in the UNESCO Convention for UCH, including a time-criterion set at 100 years. The key principles set forth by the UNESCO Convention have been copied in the Draft Act. These include the preservation of UCH for the benefit of humanity, *in situ* preservation as a first option, the prohibition of commercial exploitation of UCH, the conservation of UCH for the long-term, respect for human remains regardless of how long they have been submerged and the promotion of non-intrusive access to UCH sites.[1893] The Draft Act also aims to contribute to the international protection of common cultural heritage and to preserve it for future generations by including provisions on the import and export of UCH in order to safeguard and return unlawfully salvaged UCH. The main objective here is to combat worldwide illegal trade in cultural heritage.

#### 5.3.2.3. Duty to report

The Draft Act applies within the German EEZ as well as to German-flagged vessels and German nationals regardless of their whereabouts in accordance with the limits of national jurisdiction. A general reporting duty is imposed for all finds discovered in the German EEZ or on the German continental shelf of which can be believed that they constitute UCH. The same reporting duty applies for finds discovered in the EEZ or on the continental shelf of a third State Party to the UNESCO Convention or in the Area. This reporting duty applies regardless of whether the discovery is made during activities incidentally affecting UCH or activities directed UCH.[1894] If Germany were

[1893] As the draft explicitly provides that human remains should not be disturbed regardless of how long they have been submerged, it appears the 100-year time-criterion does not apply for human remains as was argued under chapter one of this dissertation. In any case, at the moment, most World War wrecks, both from WWI and II are considered to be 'maritime war graves' by the German authorities, even if human remains are no longer present in the wreck, and should be respected as such. For these wrecks, this provision might not make a considerable difference. This can, however, be of importance for other types of maritime graves. (Meeting with Birgitta Ringbeck, Berlin, 1 December 2016).

[1894] This reporting must be done within 24 hours after making the discovery or at the latest when reaching the first port.

to adopt this provision under its new legislation, it will be the first State amongst the ones assessed under this dissertation to impose a reporting duty outside of its national waters, including its EEZ. This could set a good example of State practice for other States wishing to implement the UNESCO Convention in their national legislation. It is interesting to note that this duty to report does not apply to UCH discovered in the EEZ or on the continental shelf of a State which is not a party to the UNESCO Convention. This is in conformity with the UNESCO Convention, however, is perhaps regrettable in light of offering worldwide protection for UCH. Especially for maritime powers, such as Germany, who have wrecks scattered all over the world, a universal reporting obligation seems to be desirable.

Germany has opted to impose the reporting duty in such a way that the reporting is done to the German authorities and not directly to the authorities of the State in whose EEZ or on whose continental shelf the discovery was made. This thus requires a reporting authority responsible for receiving and handling such reports to be set up. At the moment, it appears that this task will be fulfilled by the German Foreign Office which will as well carry out all tasks relating to heritage protection in case Germany acts as the Coordinating State as set out in the UNESCO Convention. Of all States assessed under this dissertation, Germany is the first to address the possibility of it acting as the Coordinating State in its national legislation. One of the basic premises of the Draft Act is that outside national jurisdiction, the protection of UCH can only be achieved through international cooperation.

#### 5.3.2.4. Permit system

The Draft Act introduces a permit system for activities taking place in the German EEZ as well as beyond this zone when Germany acts as the Coordinating State under the UNESCO Convention. A distinction is made between activities directed at UCH on the one hand, such as the search for, excavation of, moving of or altering of UCH, for which a permit must always be obtained and activities incidentally affecting UCH on the other hand where a permit must only be obtained if these activities endanger or might endanger UCH. It is interesting to note that the German legislator decided to include the duty to obtain a permit for activities incidentally affecting UCH under this heritage Act as well.

A permit can be issued when the activity makes a significant contribution to the sustainable protection and scientific research of UCH. This provision seems to be based on Rule 1 annexed to the UNESCO Convention.[1895] In any case, the Rules of the Convention as a whole must be respected when granting a permit for activities directed at UCH. As a general principle, the Draft provides

[1895] See section 4.2.3. chapter one for more on Rule 1.

that damaging, illegally salvaging and plundering UCH is prohibited. At the moment requests from divers to visit wrecks located in the German EEZ, even on a look-but-don't-touch basis, are refused as a general rule. The reason for this is that no legislative framework is in place regulating such diving operations and that it is impossible to control the activities of the divers.[1896] Once the Act on the EEZ has been adopted and more tools are created for the regulation of these types of activities, there will be more leniency when assessing such requests. At the moment, however, it is felt that divers do not yet sufficiently know what is allowed and what is not. So a strict approach is applied refusing requests for diving on wrecks in the EEZ.[1897]

Originally, when drafting the Act, the idea was to give the competence for authorising activities directed at UCH in the EEZ to the competent authorities of the federated States. The idea behind this is that there is no desire to create a separate federal archaeological authority for the EEZ as most expertise can be found with the archaeological authorities of the federated States. These are already responsible for UCH in the territorial sea and can therefore easily take on this responsibility for UCH in the EEZ as well. In fact, the MPAs of the federated States were already consulted during the drafting of the Marine Spatial Plan for the EEZ, even when they had no official competence over UCH in the EEZ. They could thus formally be given certain responsibilities for UCH protection in the EEZ in the new Act. The overall competence for UCH in the EEZ, however, remains a federal one. The coordinating body would thus be a federal agency.[1898] It is recognised that in this scenario the federal government would have to give additional funding to the MPAs in order for them to acquire additional personnel to fulfill this task and to allow them to create a common inventory enclosing both UCH from the territorial sea and the EEZ.[1899] Whether this approach will be followed in the final text or whether a new federal authority will be created, is at this time still uncertain.

[1896] For example, a couple of years ago an international diving society requested permission to visit a number of German wrecks in the framework of the 'diving for peace' project. The federal Foreign Office, which is the only federal authority that occupies itself with UCH, refused this. Meeting with Birgitta Ringbeck, Berlin, 1 December 2016.
[1897] Meeting with Birgitta Ringbeck, Berlin, 1 December 2016.
[1898] A federal agency that was considered for this role is the FMHA. The underlying reason is that the FMHA is the authority that receives most information concerning navigation in the German EEZ. For example, when a ship, both a foreign or a German ship, is in danger at sea, the FMHA is the authority which should be notified of this. By giving this competence to the FMHA, information relating to the EEZ would be centralised within one agency which would render the necessity of informing foreign authorities of the existence of a new authority responsible for receiving information on UCH in the EEZ unnecessary. On top of that, the FMHA already has an inventory of shipwrecks. Meeting with Birgitta Ringbeck, Berlin, 1 December 2016.
[1899] Meeting with Birgitta Ringbeck, Berlin, 1 December 2016.

#### 5.3.2.5. Ownership rights over heritage in the Exclusive Economic Zone

The Draft Act seeks to protect UCH from commercialisation. For this purpose, the law of salvage and finds cannot be applied to UCH. Furthermore, it is provided that if no owner can be identified, title to salvaged UCH belongs to the federal government rather than to the finder of the UCH. If this provision was to be adopted, Germany would be one of the first States to claim ownership rights over UCH from its EEZ.[1900] This is not the case in the French, Dutch or UK legislation. As ownership rights over UCH are not regulated in the UNESCO Convention, it is left up to the national governments to adopt legislation on this point. Unlike for UCH originating from the territorial sea where the coastal State has sovereignty, many States, including the Netherlands and France, feel that they are not entitled to claim title over UCH originating from their EEZ or continental shelf. They feel that States were not given this competence by the UNESCO Convention or international law. The question thus remains whether other States will accept such ownership claims from Germany. Nevertheless, such a policy could potentially be beneficial for the protection of UCH as it ensures that the finder cannot obtain title over UCH originating from the EEZ or continental shelf. Account needs to be taken, however, of claims from original owners and the cooperation mechanism in the UNESCO Convention based on the interests of States with a verifiable link.

#### 5.3.2.6. Disturber-pays-principle

In line with the Valletta Convention, the German draft explicitly includes the 'Verursacherprinzip' or causer-principle. This principle is derived from the environmental 'polluter-pays-principle' and entails that the person or company conducting activities must pay for any archaeological measure that is necessary to protect heritage affected by that activity.[1901] This principle is generally applied all over Germany for cultural heritage protection. It can be found either explicitly in the monument protection acts of the federated States or it can be derived from the provisions of these acts when reading them in conjunction with the general rules of administrative law. In the Draft Act, the applicant is responsible for all costs relating to the granting of the authorisation as well as for preliminary archaeological studies, the salvage, documentation and preservation of the UCH. For activities directed at UCH, the applicant will be automatically responsible for all these costs, while for activities incidentally affecting UCH the applicant must bear the costs within the limits of what is economically reasonable.

[1900] A similar approach can be seen in the Belgian legislation. See chapter four.

[1901] For example, if the federal government is building a new motorway and an archaeological discovery is made, the government will have to pay for researching and recovering the heritage as well as for the documentation of the find. Meeting Birgitta Ringbeck, Berlin, 1 December 2016.

#### 5.3.2.7. Deposit of the heritage

When UCH has to be recovered, it is the authority responsible for granting the permit, conducting the research or recovering the find that will be responsible for deciding on the final destination of the UCH. Heritage could, for example, be stored in the German Maritime Museum in Bremerhaven. This is a so-called leibniz-institute which entails that all federated States are co-responsible for the financing of this institute. Cooperation on such leibniz-institutes already exists between the federated States and the federal government. This national museum is thus financed by both the federal government and the federated States. This is an interesting manner of ensuring that the burden for UCH protection is shared between the federal level and the federated States. Federated States can of course also request to have heritage objects placed in a museum in their territory.[1902]

#### 5.3.2.8. Sanctions

The Draft Act provides for penal provisions in the form of both imprisonment and fines for violations of the Act and provides for the seizing and confiscation of UCH not obtained in conformity with it. Such provisions are of course necessary in order to ensure compliance with this newly created set of rules.

As this Draft Act has not yet been adopted, it remains uncertain to what extent the above mentioned principles and provisions will actually be adopted. Nevertheless, it is interesting to, in general lines, assess in what way Germany aims to create a protective regime for the protection of UCH in line with the provisions of the UNESCO Convention.

### 5.4. Germany and the UNESCO Convention

Anno 2018, Germany has not yet ratified the UNESCO Convention. As was the case for France, the Netherlands and the UK, Germany abstained from voting on the UNESCO Convention in 2001. The reasons for this were similar to the ones cited by France, the Netherlands and the UK and will not be addressed here separately.[1903]

In 2014, the German federal government decided that they would start the process of ratification. In light of this a workshop was organised on 22 and 23 September 2014 regarding the implementation of the UNESCO Convention. This workshop was organised by the federal Foreign Office and the German Archaeological Institute and took place in Berlin. Its objective was to

[1902] Meeting Birgitta Ringbeck, Berlin, 1 December 2016.

[1903] See *supra* section 2.9. (France), section 3.8. (the Netherlands) and especially section 4.7. (UK) for a detailed account of the concerns expressed in relation to the UNESCO Convention.

provide guidance on the implementation of the UNESCO Convention into the particular legal framework that exists in Germany.

A number of key issues were identified during this workshop. The first was that the German competent authorities needed to be identified. As UCH is traditionally a competence of the federated States, no competent authority exists at the federal level. This is an issue when wishing to regulate UCH protection in the EEZ. It was recognised that one of the main challenges for Germany is to provide and integrate a coherent framework in accordance with the UNESCO Convention in its federated States which already have legal frameworks for cultural heritage protection in place.

A second issue that was identified is one that many States face when developing a framework for the protection of UCH, namely that financial and administrative means will have to be made available to cope with the additional workload. During the workshop it was, however, considered that this increase in costs would be limited if use is made of the mechanisms that already exist to fight illegal activities at sea and control development projects. In any case, the ratification and implementation of the UNESCO Convention will call for the coordination of activities among several public bodies in order to provide for the consistent treatment of UCH.[1904]

The German ratification and implementation of the UNESCO Convention would mean a great step forward in the protection of UCH. The first reason for this is that Germany has control over a large part of the North Sea. The implementation of the provisions of this Convention in German national legislation could help make the protection of UCH in the North Sea more uniform. Secondly, as Germany was one of the States that abstained from voting on the UNESCO Convention, ratification would be a further breach in the wall of resistance. The fact that the new Draft for UCH in the German EEZ aims to implement the provisions of the UNESCO Convention and is construed in such a way that it is largely consistent with this Convention, seems to indicate that the German ratification might take place soon.

## 6. Conclusions

In this chapter the legislation applicable to UCH in France, the Netherlands, the UK and Germany was assessed. A first observation that can be made, is that a lot of changes were introduced in the applicable acts over the last years. In the Netherlands, a completely new framework was adopted

[1904] G.R. PRADO, *Germany prepares for the ratification of the UNESCO Convention on the Protection of the Underwater Cultural Heritage. Paris, 2nd November 2001*, 13 November 2014, www.unfalumni.org/germany-prepares-for-the-ratification-of-the-unesco-convention-on-the-protection-of-the-underwater-cultural-heritage-paris-2nd-november-2001/.

for UCH protection as recently as in 2016 and further changes will be made with the Environment Act that will enter into force in 2021. Likewise, Germany is working on a new Act regulating the protection of UCH in its EEZ and on its continental shelf. The Acts from S-H and L-S both dealing with UCH located in the territorial sea, are much older as they were originally adopted in respectively 1983 and 1978. Nevertheless, the last amendment to the L-S Act took place in 2011 and the S-H act was reformed as recently as in 2014. Additionally, in the 2014 German workshop on the implementation of the UNESCO Convention, it was stated that upon ratifying this Convention, a coherent framework would need to be integrated in the federated States. This entails that potentially further changes will be made in the near future to the German legislative framework. The French legislation already dates from 1989, but has been included in the Heritage Code in 2004 and was amended several times. The last act that was adopted dealing with UCH in France was the 2016 Act, in which the extension of the French legislation to the EEZ and continental shelf was provided for. Finally, the UK is perhaps a bit the exception to this general wave of changes that is taking place in the North Sea region. While in 2008 a Draft Bill was created in order to replace the fragmented legislation that is in place for the protection of UCH, this Bill has not yet been adopted. This, however, does not mean that no developments have taken place relating to or having an effect on the protection of UCH. Hereto, especially the 2009 MCAA and the 2010 Marine (Scotland) Act should be mentioned. It can thus be said that over the last years States have been reconsidering their approach for dealing with UCH. This is, therefore, the ideal moment for further opening the debate on the protection of UCH both at a national and international level.

One of the main reasons for these changes is the UNESCO Convention. While for a number of years after its adoption, it seemed that this Convention would only know very limited success, it appears that things might change over the years to come. The French ratification in 2013, the so-called breach in the wall of resistance, seems to have triggered other States to reconsider their position on the UNESCO Convention. As was stated, both the Netherlands and Germany are planning on ratifying the UNESCO Convention in the near future. While the UK has not yet formally declared that it will do so, studies have been conducted indicating that in order to stay relevant and to have its views on UCH management respected, it would do well to consider ratification. All studies that were conducted in the assessed States on the possible ratification of the UNESCO Convention pointed out that the reservations that these States initially had on the Convention do not offer a sufficient and justified ground for continuing to refuse ratification. In fact, these studies indicated that at the moment the framework set out in the Convention is the best option for States wishing to protect their State vessels worldwide. Considering that the Netherlands, Germany and the UK all abstained from voting on the UNESCO Convention and that they are important maritime powers, their ratifications of the Convention could potentially kick-start its further application. On the other hand, of course, no miracles can be expected of this as the views pursued by these States

on, *inter alia*, sovereign immunity and coastal State jurisdiction are not shared worldwide. When these States become parties to the Convention and start exercising some pressure in favour of their own interpretations, this might discourage other States wishing to have more coastal State jurisdiction from ratifying the UNESCO Convention.

The assessed States all apply a wide definition of UCH in their national legislation. The main exception here would be the UK, whose legislation and practice is for a large part focussed on managing shipwrecks. It should be noted that none of the discussed pieces of legislation includes a time-criterion. This is interesting as it allows for the protection of more recently sunken shipwrecks, *inter alia* originating from WWII, which in the future are likely to be considered as important historical sites. Once again, however, the rule is confirmed by the exception as the Draft Act for the German EEZ at the moment still includes the time-criterion of 100 years as set out in the UNESCO Convention. It is understandable that States wish to limit the application of their national acts beyond their territorial sea to what is prescribed by the UNESCO Convention as they do not have jurisdiction over UCH in these zones. On the other hand, however, States should consider whether they wish to protect certain younger UCH sites located in their EEZ. In this case, it would be recommended not to include an age criterion but rather to provide for a universal reporting and licensing duty regardless of the age of the UCH. While this would most likely only be enforceable against the States' own nationals and flagged vessels, such legislation can be considered by other States as an example of good State practice and encourage them to do the same in their own legislation. Furthermore, agreements or even regional treaties could be entered into in order to further the protection given by the UNESCO Convention allowing for example younger UCH sites to be protected as well.

As has been evidenced in this chapter, not many States have adopted legislation applying to UCH located in their EEZ or on their continental shelf, let alone beyond these zones. Nevertheless, in order to be in full compliance with the provisions set out in the UNESCO Convention, States must incorporate the reporting duty and cooperation mechanism as set out in articles 9-12 of the UNESCO Convention. Germany has begun to do so under its Draft Act for the EEZ. In France, in the 2016 Act provision is made for the application of the Heritage Code to the French EEZ and continental shelf via ordinances. As France has already ratified the UNESCO Convention, further provisions should still be incorporated in the French legislation dealing with heritage located in the Area or in the EEZ of a third State Party to the UNESCO Convention. In the Netherlands, the Heritage Act does not apply to the EEZ. The competent authorities, however, acknowledge that once the Netherlands ratifies the UNESCO Convention, further provisions will have to be adopted relating to UCH located in its EEZ or on its continental shelf. In the UK, the PMRA can be applied beyond the UK territorial sea and even beyond the UK EEZ. Nevertheless, the PMRA does not create a comprehensive legal framework for the protection of UCH, but rather allows for the

protection of certain State vessels that were in military service when they perished. Likewise, the MCAA applies on the UK continental shelf, but does not have UCH protection as its primary objective. In fact, it would even appear that no UK legislation dealing with UCH applies beyond its territorial sea, in its contiguous zone. While in the French Heritage Code and the Dutch Heritage Act explicit mention is made of their application in the contiguous zone, no such provisions can be found in the PWA and AMAAA. At the moment, UCH remains unprotected in the German contiguous zone as well, as this falls outside of the territorial competence of S-H and L-S. Once the new Act on the EEZ has been adopted heritage located in the German contiguous zone will be protected as well.

While all States are allowed to protect UCH located in their EEZ or on their continental shelf in accordance with the provisions and Rules set out in the UNESCO Convention, Germany seems to go one step further. If the Draft Act for the EEZ were to be adopted in its current form, this would entail that Germany claims title over heritage salvaged from its EEZ. As was stated under this chapter, this could be beneficial for the protection of UCH. However, question remains whether all States would agree with this approach and whether this could be justified under international law. In the Netherlands, it is felt by some experts that neither UNCLOS nor the UNESCO Convention offer a legal ground to extent the national provisions on ownership to UCH located in the EEZ or on the continental shelf. At the moment these experts do not believe that in case of ratification of the UNESCO Convention the provisions on ownership as incorporated in the Dutch Civil Code would be extended to UCH located in the EEZ or on the continental shelf. Likewise, the provisions relating to ownership in the French Heritage Code do not apply to UCH discovered in the contiguous zone as this would be contradictory to international law and mainly article 303(2) UNCLOS. It thus appears that claiming ownership rights over UCH located beyond a State's territorial sea remains problematic.

Within its territorial sea on the other hand, a State would do best to claim ownership rights over all UCH when no original owner comes forward as is also stated in the UNESCO Model Act. Nevertheless, the provisions dealing with ownership rights of UCH in the four assessed States are not always as straightforward. In the French Heritage Code and even for a large part in the British MSA, the State will obtain title over UCH discovered in its territorial sea when no owner comes forth. This is, however, not always the case in the Dutch Heritage Act and the German S-H and L-S Acts. In the Dutch Heritage Act, finds that were discovered incidentally, as in not during an excavation, belong to the finder and the State in equal parts when no original owner can be identified. While this situation is very unlikely to occur as the notion 'excavation' has been defined very widely, it would perhaps be more straightforward to simply award title over such heritage to the government. For treasure discovered in the German territorial sea, the treasure rule ensures that all UCH of which the owner can no longer be identified becomes the property of the

competent federated State. For finds that are not considered to be treasure on the other hand, the finder will obtain ownership rights if the original owner does not come forward. The German authorities can, when this is justified in light of the protection of the heritage or the public interest expropriate such objects. These provisions in the Dutch and German legislation are fairly complicated. It would be much easier if, as a general rule, all UCH finds located in the territorial sea of a State become the property of the State when no owner comes forward. This can be complemented by a system of expropriation which can be used against the original owner in case this is necessary for the preservation or promotion of the heritage. Naturally, the owner must in such a case be compensated for his loss. Under no circumstance should the finder become the automatic owner of his find when it constitutes heritage as defined under national legislation.

All national UCH acts impose a reporting duty for the discovery of heritage in the State's territorial sea. In the Netherlands and France this duty applies for UCH discovered in their contiguous zone as well and for Germany, once the new Act has been adopted, this will also apply in its EEZ. The French Heritage Code, British MSA and German Draft Act include a clear time limit in which the finder must have reported this find.[1905] The L-S and S-H Acts and the Dutch Heritage Act on the other hand merely determine that this must be done 'as soon as possible' which leaves some room for interpretation and discussion. As a general rule all heritage acts require that finds are left *in situ* upon their discovery. One important exception to this is the MSA, which in fact promotes the recovery of UCH. This is one of the main reasons why a reform of the UK legislative framework for UCH seems necessary.

France, the Netherlands, the UK and Germany all have some form of authorisation system in place for activities directed at UCH sites. These systems all serve to protect UCH sites from unauthorised interference resulting in the site to be damaged or removed. While all four States might share this objective in their legislation, a fundamental difference can be seen in the approach on how to protect their UCH sites. On the one hand France, the Netherlands and Germany apply, at least for the main part, an activity-based approach. The UK, on the other hand applies more of a site-based approach. An activity-based approach entails that a site must not be designated or registered as a protected site in order for the rules set out in the national protective legislation to apply to it. An authorisation must in other words be obtained for activities directed at all sites or objects, which fall within the definition of 'heritage' given in the UCH protection act. A site-based approach, on the other hand requires a site to be officially designated in order for the authorisation system to apply to it. The advantage of this approach is that it allows certain sites to be protected to a higher extent as for example activities that might incidentally affect it can be prohibited in the site's vicinity. As was discussed above in the section on the UK, a site-based approach makes it much

[1905] The time limit provided in the MSA of 28 days seems, however, inappropriate for reporting UCH as swift action is sometimes necessary for the protection of such a discovery.

more difficult for a State to implement the provisions of the UNESCO Convention which departs mainly from an activity-based approach.[1906] In order to fully implement the provisions of the UNESCO Convention into a national legislation using a site-based approach, this would require a large number of additional designations, which are costly and time consuming.
Both approaches have their advantages. States should provide for a general system of authorisations when directing activities at UCH in the broad sense of the term. The national legislator can determine for which activities such an authorisation must be obtained which would at least include activities damaging or removing the UCH. Additionally, as is the case in the French and German legislation, the duty to obtain authorisation can be imposed for the search for UCH using certain technical aids as well. The national heritage act, or any of its implementing decisions, should specify the modalities for obtaining such authorisation which includes appointing the competent authority, procedural rules on how to obtain authorisation and the requirements with which the applicant must comply. At the moment this has been done to a certain extent in the French, UK and German legislation, but has mainly been elaborated in the Dutch legislation with its new system of certificates. Asides from a general authorisation system for activities directed at UCH, national legislation can provide for the possibility to designate certain sites as well, as is the case in the UK. Such designation could take place for sites of exceptional value or fragility that require special measures to be taken for their protection. So ideally, national heritage legislation would include a combination of both an activity-based approach complemented with a site-based approach for special sites requiring additional protection.

As a final conclusion, it should be noted that in all assessed States, expert authorities are involved in the process of heritage protection. The experts within these authorities can assist in assessing the heritage value of a site and can offer advice on how to protect it. In France, DRASSM takes on this role of expert body. In the Netherlands this is the NICH. In the UK, more specifically for England, this is Historic England. Finally, for Germany the MPAs and State Offices for Monument Preservation in the federated States take on this role. A strong national expert body in the field of UCH is crucial for the proper execution of a national heritage act in any State as well as for the promotion of knowledge and research on this topic.

[1906] See *supra* section 4.7.2.3.

# Chapter four: the Belgian legal framework for the protection of underwater cultural heritage

## 1. Introduction

In this final chapter, an assessment is made of the legislative framework that is currently in force for the protection and management of UCH in the sea area under Belgian jurisdiction, which is the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf (Belgian sea area). While this area has a limited surface, a number of recent examples can be cited to illustrate that this part of the sea has a high value from a cultural heritage point of view. In September 2017 a German submarine originating from WWI was discovered lying off the coast of Zeebrugge. This wreck sank in the beginning of 1917 after it was struck by a mine. Archaeologist Tomas Termote described this find as a highly unique discovery. Reasons for this include that the submarine is still almost completely intact and that its crew, which consisted of 22 members, still lies in the hull of the wreck.[1907] This submarine was later identified as being the UB-29 and is protected by Belgian legislation (see further). Another interesting discovery is that of the American bomber B-17 in June 2018. The US intensively used these types of bombers during WWII. This wreck was discovered during a geophysical survey prior to the laying of a high voltage cable between the UK and the European mainland. The wreck lies about 40 km off the Belgian coast. It is considered to be fairly spectacular as it does not happen every day that this type of 'flying fortress' is discovered is such good state.[1908] A last example that should be mentioned deals with the exploration of Doggerland, which during the last ice age spread over most of the North Sea area. In April 2018, the research ship Belgica conducted an expedition in the North Sea, a few dozen kilometres off the Belgian coast, hoping to find settlements of a few thousand years old. This first expedition took 10 days, but in later phases drilling activities will take place up to a depth of fifty metres to get a better understanding of prehistoric life.[1909]

These examples illustrate that in the Belgian sea area highly important discoveries are still being made and that much information about our past can be gained from researching the seabed. The

[1907] D. VAN LOO and T. LE BACQ, "Ijzeren doodskist op de bodem van de Noordzee", *het Nieuwsblad*, 20 September 2017, 12-13.
[1908] MYDE, "Vliegend fort op de bodem van de Noordzee", *het Nieuwsblad*, 26 June 2018, 6-7. Unlike for the German UB-29, which the Germans consider to be a maritime grave and is left *in situ*, the B-17 will most likely be recovered by American researchers ensuring that the human remains present in the wreck receive a military burial. This was already mentioned in chapter two of this dissertation.
[1909] J. VANCAENEGHEM, "Eerste zoektocht naar verdronken land in Noordzee", *het Nieuwsblad*, 10 April 2018, 4-5.

importance for Belgium to have a solid framework for the management of cultural heritage in place can thus not be underestimated.

Unlike the States discussed in the previous chapter, Belgium only began to protect UCH located within its sea area as recently as in 2014. All measures that are in place for the protection of UCH sites were thus adopted fairly recently. The objective of the 2014 Act on the Protection of the Cultural Heritage under Water (UCH-Act) was to implement the provisions set out in the UNESCO Convention, which Belgium ratified in 2013.[1910] Now that the first four years after its entry into force have passed, it is time to take a close and critical look at the Belgian legal framework for the protection of UCH. This chapter will assess how this legislation has functioned since its entry into force in 2014 and which steps should be taken to further improve and develop this framework for UCH protection.

Firstly, the specific competence division for the protection of cultural heritage in Belgium, being a federal State, is discussed as this had a considerable impact on the Belgian framework for UCH protection. Secondly, after touching upon the Belgian initiatives predating the UCH-Act, a detailed assessment is made of its provisions, with focus on how the UCH-Act has manifested itself in practice over the last years and to which extent the provisions of the UNESCO Convention have been implemented in the Belgian legal framework for the protection of UCH. A clear overview is given of which provisions need to be further elaborated or altered in national legislation in order for Belgium to fully comply with the UNESCO Convention and to ensure that the UCH-Act fulfils its full potential.[1911] In this section account is, *inter alia*, taken of the recommendations made at the international level by for example the UNESCO Model Act and the UNESCO Meeting of States Parties and the conclusions drawn in chapter three dealing with the legislation of other North Sea States. Thirdly, an overview and assessment is given of the developments since the entry into force of the UCH-Act. This section, *inter alia*, discusses which heritage is protected by the UCH-Act and in what way. Finally, the matter of activities incidentally affecting UCH is discussed and more specifically an assessment is made of the extent in which heritage protection is considered in the procedure for obtaining a permit for conducting activities at sea such as dredging, sand and gravel-extractions and development projects.

[1910] Wet van 4 april 2014 betreffende bescherming van het cultureel erfgoed onder water, *BS* 18 April 2014, 33729. (UCH-Act 2014)

[1911] It should be noted that when in this section it is stated that certain provisions and principles should be included in the UCH-Act, this does not necessarily mean that these should be included in the Act itself. The legislator must decide which aspects should be included in the UCH-Act and which ones should be introduced via implementing decisions.

## 2. Belgium as a federal State

Belgium is a federal State. This entails that there are multiple legislative levels, each with a number of competences within their respective territories. In Belgium, these competences are divided between the federal State, the Regions and Communities. It is crucial to gain some insights into this competence division to fully understand the Belgian legislation for UCH protection.[1912]

### 2.1. Competence division in general and for heritage protection

In 1970, the Belgian legislator created three Communities and inscribed them in the Belgian constitution. Since the 1980 State reform these are known as the Flemish, French and German Community.[1913] The Communities were given autonomy. This manifests itself in two ways: 1. the Communities are entitled to adopt decrees that have the same legal value as federal acts, and 2. a number of exclusive competences have been assigned to them. This entails that the Communities have the exclusive right, excluding all other legislative entities, to legislate within the fields of competence assigned to them. During the State reform of 1980 (Reform Act), two of the three Regions were established, namely the Flemish and the Walloon Region.[1914] They were assigned the competence to adopt decrees. Finally, with the constitutional reform of 1988-1989, the Brussels Capital Region was established and given the competence to adopt ordinances. These ordinances have the same legal value as decrees. Both the Regions and Communities were assigned a number of competences. The residual competences, being the powers that have not been explicitly assigned to the Regions or Communities, reside with the federal State.[1915] When competences were transferred from the federal level to the level of the Communities or Regions during State reforms, the principle of exclusive competence division was followed to a large extent.[1916]

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[1912] This chapter is partially based on the report on the Belgian legislation written within the framework of the SeArch project: T. DERUDDER and F. MAES, *Assessment of the actual legal situation in Belgium*, 2014, WP 2.1.2. (DERUDDER and MAES, SeArch report WP 2.1.2.) This report can be consulted on www.sea-arch.be/nl.

[1913] Originally the Communities were named the 'Culture Communities'. They were established to meet the Flemish request for cultural autonomy. Belgium.be, *De eerste en de tweede staatshervorming*, www.belgium.be/nl/over_belgie/land/geschiedenis/belgie_vanaf_1830/vorming_federale_staat/eerste_en_tweede_staatshervorming (consulted 10 August 2018).

[1914] The three Regions were already inscribed in the constitution during the State reform of 1970, but their council, the predecessor of their parliament, and government were only created during the State reform of 1980. Reform Act 1980.

[1915] In addition to the Regions and the Communities, Belgium is divided into 10 provinces and 589 municipalities that are competent within their respective territories. Belgium.be, *België, een federale staat*, www.belgium.be/nl/over_belgie/overheid/federale_staat (consulted 10 August 2018).

[1916] The constitution mostly lists exclusive competences, but also a very limited number of parallel and concurrent powers. For more information on this see J. VANPRAET, *De beginselen van de bevoegdheidsverdeling in het federale België, het dogma van de exclusieve bevoegdheden gerelativeerd*, Dissertation in Law, University of Antwerp, 2011, 69-77.

The 1980 Reform Act laid down which competences were assigned to the Regions and Communities. In light of this dissertation, the competences for heritage protection and management should be mentioned. The Communities are competent for the cultural patrimony, museums and other scientific-cultural institutions.[1917] The Regions are competent for monument care, including the care for cultural goods that form an integral part of these monuments such as associated equipment and decorative elements.[1918] The Regions are also competent for archaeological heritage, landscapes and town- and villagescapes. In Flanders, the government and the council of the Flemish Community merged with the government and council of the Flemish Region. The Flemish Community and Region thus share one council and government that are exclusively competent for all matters concerning heritage protection mentioned above. The residual competences, as was explained, belong to the federal level. For the protection of cultural heritage, these residual competences are very limited. Only a few fiscal aspects linked to heritage protection and the implementation of Directive 2014/60/EU on the return of cultural objects that were unlawfully brought outside the territory of an EU member State are considered to be federal competences.[1919]

In addition to the material competence division as set out above account must be taken of the territorial competence division as well in order to get a full oversight of which legislative entity is competent for cultural heritage.[1920] In the 1980 Reform Act, it was established that the Flemish Region includes the territory of the provinces Antwerp, Limburg, East-Flanders and West-Flanders, as well as the territory of the administrative districts Halle-Vilvoorde and Louvain.[1921] This entails that the seaward boundary of the Flemish Region coincides with the province boundary of West-Flanders, which in its turn coincides with the boundaries of the coastal municipalities.[1922] Following the arrest of the Council of State of 2 April 1976 on the VZW Royal Belgian Yachting Covenant v. the Province of West-Flanders[1923] and its subsequent advices,[1924] it has been determined in jurisprudence that the seaward boundary of the province West-Flanders coincides with the low

[1917] Article 4, 4° Reform Act 1980.
[1918] Decreet van 3 maart 1976 tot bescherming van monumenten en stads- en dorpsgezichten, *BS* 22 April 1976, 5096, article 2, 2°. (Decree protection monuments 1976)
[1919] Council, Directive 93/7/EEC L074 recasted by Parliament and Council, Directive 2014/60/EU L 159/1; A-M DRAYE, *De bescherming van het roerend en onroerend erfgoed*, Brussel, De Boeck & Larcier, 2007 13-14.
[1920] F. MAES en A. CLIQUET, *Internationaal en nationaal recht inzake de bescherming van de Noordzee*, Deurne, Kluwer Rechtswetenschappen België, 1997, 117-128.
[1921] Article 2 Reform Act 1980.
[1922] F. MAES and A. CLIQUET, *Advies inzake juridische vragen ten gevolge van herstelwerken aan de kustverdediging te Oostende (aangroeistrand)*, Ghent, Belgium Maritiem Instituut, 2003, 7 (MAES and CLIQUET 2003)
[1923] Raad van State, VZW Koninklijk Yachting Verbond t. Provincie West-Vlaanderen, 27 april 1976, No. 17.569, *Adm. Publ.* 1976, 332.
[1924] Raad van State, No. 461/33, *Gedr. St. Kamer* 1977-1978; Raad van State, No. 627/12, *Gedr. St. Kamer* 1979-1980; Raad van State, No. 378/1, *Gedr. St. Kamer* 1981-1982 and Raad van State, No. 679/1, *Gedr. St. Senaat* 1983-1984.

water line or baseline.[1925] This means that the Belgian part of the North Sea (BPNS) is not a part of the Flemish territory. In other words, as a general rule, the Flemish government is not competent in the BPNS, unless it was explicitly made competent for certain activities (e.g. pilotage, dredging and coastal defence). It is, namely, possible to transfer competences in the North Sea from the federal level to that of the Regions by law. This was for example done for fisheries in 2001.[1926] For the protection of UCH, however, no such competence transfer took place, resulting in this competence to remain a federal one. Therefore, based on the territorial competence division, cultural heritage located in the BPNS falls within the competence of the federal government.

This competence division for UCH was affirmed in the advice given by the Council of State in light of the new Belgian UCH-Act.[1927] When asked about the legal basis for this Act, the federal authorised representative responded that the implementation of the UNESCO Convention is a competence of the federal government in as far as UCH within the Belgian sea area is concerned. The Regions and Communities are competent for cultural heritage located in the inland waterways within their respective territories. In its advice the Council of State recognised that the Belgian territorial sea, EEZ and continental shelf are areas that do not belong to the territory of the Regions and Communities. The Council of State referred to one of its earlier advices to further elaborate on this competence division.[1928] As is determined in article 167§1 of the Belgian constitution, the Regions and Communities have the power to regulate international cooperation in all matters for which they are competent at the national level. This includes adopting treaties in these fields of competence. At the international level it is only the material competence division that is of importance.[1929] The Communities and the Regions are, on the other hand, not allowed to give

[1925] MAES and CLIQUET 2003, 7-8.

[1926] D. BOGAERT, A. CLIQUET and F. MAES (eds.), *Kustzonebeleid: samen in zee?*, Antwerp, Maklu, 2008, 49; E. SOMERS and F. MAES, "The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone: The Belgian Perspective", *Ocean Yearbook 2011*, (249) 250.

[1927] Raad van State, Advies over een voorontwerp van de wet 'betreffende bescherming van het cultureel erfgoed onder water', 31 december 2003, 54.639/3, *Parl. St. Kamer* 2013-2014, No. 3397/001. (Council of State Advice draft UCH-Act).

[1928] Raad van State, Advies over een voorontwerp van de wet 'betreffende de vondst en de bescherming van wrakken', 11 september 2006, 41.029/2/V, *Parl. St. Kamer* 2006-2007, No. 2749/001. (Council of State Advice draft Wreck Act)

[1929] Council of State Advice draft Wreck Act. This approach causes an incompatibility with the adagium '*in foro interno, in foro externo*' which entails that the government concluding an agreement should be the government implementing it. Van Eeckhoutte 2006, *supra* noot 38, 854-857; L. LAVRYSEN, "Leefmilieu en waterbeleid" in G. VANHAEGENDOREN and B. SEUTIN (eds.), *De bevoegdheidsverdeling in het federale België*, Bruges, Die Keure, 1999, 5-86; J. VELAERS, *De Grondwet en de Raad van State, afdeling wetgeving*, Antwerp, Maklu, 1999, 55-56 (VELAERS 1999). Velaers believes that the reasoning of the Council of State in which the Flemish government is not competent to issue decrees for the territorial sea, but must potentially agree with treaties applicable in this area, is a good reason the reinvestigate whether the Belgian territorial sea should not fall within the competence of the Flemish government. VELAERS 1999, 55-56. For a discussion on the status of the territorial sea and the question on whether or not it should be considered as a part of the Flemish territory see DERUDDER and MAES, SeArch report WP 2.1.2.,

effect to such treaties outside the territory in which they are competent.[1930] In other words, the territorial competence division does not affect the Regions and Communities' power to enter into international cooperation agreements, but does prevent them from implementing those international agreements in the Belgian legal order in the areas outside their territory. This entails that the Regions and Communities cannot adopt measures for the implementation of the UNESCO Convention outside their territory.

### 2.2. Issues with the competence division

The first act that was adopted in Belgium with the objective to protect UCH located in the BPNS was the federal 2014 UCH-Act. Prior to this Act, no comprehensive protective regime existed for managing UCH beyond the boundaries of the Communities and Regions.[1931] This entails that at the moment of adopting the UCH-Act, the federal government had no notable experience in managing and protecting such heritage. Furthermore, the federal government did not have any of the necessary authorities and experts in place to implement the internationally accepted standards for UCH management. At the Flemish level, on the other hand, more legislation and expertise was at hand. In Flanders, cultural heritage has already been the subject of legal protection for decades. A number of decrees, including the Monument Decree of 1976,[1932] the Landscape Decree of 1996[1933] and the Archaeology Decree of 1993[1934] have been in force for many years.[1935] As for expertise in the field of heritage protection, surely the Flanders Heritage Agency (Agentschap Onroerend Erfgoed) (FHA) must be mentioned. This Agency has the task of protecting immovable heritage located in the Flemish territory and maintains an inventory of this heritage.[1936] Furthermore, it supports heritage management in Flanders and conducts policy-oriented research. The FHA was founded in 2011 following the merger of the previous Flemish Institute for Immovable

15-17. For the purpose of this dissertation the generally accepted opinion that the territorial sea is not part of the Flemish territory but falls within the competence of the federal government is followed.

[1930] Council of State Advice draft UCH-Act, 8.

[1931] Mention will be made of a number of earlier initiatives, namely the cooperation agreement 2004 and Wreck Act 2007. These initiatives only had limited effects. See *infra* section 3.

[1932] Decree protection monuments 1976.

[1933] Decreet van 16 april 1996 betreffende de landschapszorg, *BS* 21 mei 1996, 12887.

[1934] Decreet van 30 juni 1993 houdende bescherming van het archeologisch patrimonium, *BS* 15 september 1993, 20414.

[1935] It should be noted that these decrees were recently replaced by the Immovable Heritage Decree (Decreet betreffende het onroerend erfgoed (Onroerenderfgoeddecreet), *BS* 17 October 2013, 74104) and the Immovable Heritage Decision (Besluit van de Vlaamse Regering van 12 juli 2013 betreffende de uitvoering van het Onroerenderfgoeddecreet, BS 27 October 2014, 82555). Both entered into force on 1 January 2015 for the most part. The section dealing with archaeology in this legislation entered into force in phases starting from 1 January 2016 on. Flanders Heritage Agency, Huidige Regelgeving, www.onroerenderfgoed.be/nl/beleid-en-regelgeving/decreten/huidige-regelgeving/ (consulted 10 August 2018).

[1936] This inventory can be found on the following link: https://inventaris.onroerenderfgoed.be/aanduidingsobjecten/zoeken.

Heritage and the heritage department of the Agency for Space and Heritage.[1937] The FHA, as well as its predecessors, have gathered a lot of experience and knowledge in the field of heritage protection and management over the years. The Agency even manages a database containing all known archaeological sites in the marine area, even though a large number of these sites are located outside the Flemish territory.[1938] When drafting the UCH-Act, the federal government did not have this type of experience nor any agency or database to fall back on. In other words, the knowledge and expertise in the field of heritage management and the competence for heritage protection are for the most part situated at two mutually exclusive governmental and legislative levels. It is clear that in this situation a strict application of the competence division is not the best approach. When drafting the UCH-Act the legislator was aware of this and attempted to make use of the experience and knowledge situated at the Flemish level.[1939]

The importance of having a strong national authority in place cannot be underestimated. In fact the key for creating a well-functioning system for the management and protection of UCH lies with a strong national authority that has sufficient (financial) means and expertise for fully implementing the principles of the UNESCO Convention. This authority must fulfil a wide diversity of tasks including "*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.*"[1940] Not only must the competent authority ensure that all UCH is adequately managed and protected, but it is responsible as well for the wider framework surrounding UCH protection. These responsibilities include the encouragement and fostering of education, the raising of public awareness, stimulating education in cultural heritage, supporting NGO establishment and cooperation and fostering the establishment of museums.[1941]

The pieces of legislation assessed in the previous chapter are all managed by strong national authorities that already exist for many years. In France, DRASSM was given the task of implementing the Heritage Code. This authority was established in 1966 and over the years obtained a reputation of being a highly specialised agency with extensive expertise in the field of

[1937] Besluit van de Vlaamse regering van 10 juni 2011houdende wijziging van het besluit van de Vlaamse Regering van 14 mei 2004 tot oprichting van het intern verzelfstandigd agentschap zonder rechtspersoonlijkheid Vlaams Instituut voor het Onroerend Erfgoed wat betreft de taken, de delegatie en het invoeren van de roepnaam Onroerend Erfgoed, *BS* 8 July 2011, 40634.
[1938] For the origin of this database see *infra* section 3.1. on the 2004 cooperation agreement.
[1939] How this was done is demonstrated in section 4.11.
[1940] Article 22(1) UNESCO Convention. The UNESCO Model Act suggests that this inventory should include a list of important public and private cultural heritage the export of which would result in an appreciable impoverishment of the national cultural heritage and a list of UCH that is located beyond the limits of the Belgian jurisdiction. Such lists might be added to the inventory created by the Receiver. Article 5(2) UNESCO Model Act.
[1941] Article 5(1) UNESCO Model Act.

UCH management. In the Netherlands, the NICH is responsible for the implementation of the national policy for cultural heritage. Its predecessor was established as early as the beginning of the 20th century. For the UK, and more specifically England, the predecessor of Historic England also originates from the beginning of the 20th century and has gained much expertise in UCH protection over the years. Finally, in Germany, the federated States have had several MPA's and a State Office for Monument Protection in place for decades, which are responsible for the execution of the Heritage Acts in their respective territories. When drafting the Act for the protection of cultural heritage in the German EEZ, however, a similar issue as the one the Belgian legislator had to deal with arose. In Germany as well the expertise in the field of UCH management and the competence for UCH protection in the EEZ are situated at two mutually exclusive governmental and legislative levels. In other words, while being competent for UCH in the German EEZ, the federal government does not have a national authority in place nor the necessary expertise to ensure that it fulfils its tasks in this field adequately. When drafting the Act for the German EEZ, the German legislator as well considered how the experience and expertise of the authorities at the level of the federated States can be used at the federal level.[1942]

## 3. Initiatives taken for the protection of underwater cultural heritage prior to 2014

### 3.1. Cooperation agreement 2004

Article 92bis§1 of the 1980 Reform Act offers the possibility to the federal government and the Regions and Communities to conclude cooperation agreements.[1943] Such agreements already exist for several matters relating to the North Sea such as the protection of the North Sea against pollution,[1944] dumping of dredged material,[1945] the coastguard[1946] and research on the effects that the exploration and exploitation of the Belgian continental shelf have on sediment deposits and

[1942] See chapter three section 5.3.2.

[1943] Article 92bis§A Reform Act 1980 provides that the State, Communities and Regions can conclude cooperation agreements for the joint establishment and joint management of common services and institutions, for the joint exercise of their own competences or for the joint development of initiatives.

[1944] Samenw. tussen de Staat en de Gewesten van 20 mei 1989 met als doel een verhoogde bescherming van de Noordzee tegen verontreiniging reproduced in Kabinet van de Staatssecretaris voor leefmilieu IHE-BMM*, De uitvoering van de ministeriële verklaring van de tweede konferentie over de bescherming van de Noordzee: Belgisch voortgangsrapport*, 1990, 106-112. This agreement was signed on 11 November 1990, but never entered into force due to issues of representation. E. FRANCKX, "De Belgische staatshervorming en het zeerecht", *RBDI* 1994, 244-283; Vlaamse Overheid (Nadia), *Catalogus Overeenkomsten*, http://nadia-burger.vlaanderen.be/nadia/repertorium/openindex.do?index=01.02.05 (consulted 24 June 2014).

[1945] Samenw. tussen de Belgische staat en het Vlaamse Gewest van 12 juni 1990 ter vrijwaring van de Noordzee van nadelige milieu-effecten ingevolge baggerspecielossingen in de wateren die vallen onder de toepassing van [het OSPAR-Verdrag], *BS* 22 August 1990, 16129.

[1946] Samenw. tussen de Federale staat en het Vlaamse Gewest van 8 juli 2005 betreffende de oprichting van en de samenwerking in een structuur kustwacht, *BS* 23 October 2006, 56304.

on the marine environment[1947]. At one point, such an agreement was drafted for the protection of UCH as well. On 5 October 2004 Johan Vande Lanotte (federal government) and Dirk van Mechelen (Flemish government) signed it. The agreement was, however, never approved by the Flemish government as a whole and was never published so it remained without legal value.[1948] In this proposed cooperation agreement it was determined that Flanders, more specifically the FHA, would create a database containing all data on archaeological heritage located in the BPNS. The objective was to collect as much information as possible on UCH discovered in the territorial sea, the continental shelf and in the riverbed of the Flemish rivers. This information was to be combined with the existing information on land-based heritage. Despite the fact that this agreement was not legally binding, this database was established in 2006 and is publicly accessible.[1949] The proposed agreement further provided that no archaeological heritage should be destroyed before scientists have had the chance to conduct research on it. Responsibility in light of this would have been given to the Flemish Minister competent for managing and protecting UCH in cooperation with the competent federal minister.[1950] The new UCH-Act codifies this principle and draws a line between the tasks awarded to the federal level and those given to the Flemish level.[1951]

### 3.2. Wreck Act 2007

The UCH-Act, which will be discussed later in this section, was not the first legislative initiative for the protection of UCH. On 9 April 2007 the Act Concerning the Discovery and the Protection of Wrecks was adopted (Wreck Act).[1952] This Act was meant to apply in the Belgian territorial sea and aimed to protect wrecks and wreckage located within this zone.[1953] It sought to regulate the discovery and reporting of wrecks,[1954] ownership rights over these wrecks[1955] and the designation of wrecks with an archaeological and historical value as protected wrecks.[1956] The Wreck Act provided that without prior authorisation it was prohibited to recover wrecks[1957] and that a

[1947] Samenw. tussen de federale Overheid en het Vlaamse Gewest van 21 december 2005 betreffende het onderzoek naar de invloed van de exploratie- en exploitatieactiviteiten op het Belgisch continentaal plat op de sedimentafzettingen en op het mariene milieu, *BS* 26 January 2006, 4356.
[1948] M. DEWEIRDT, "Maritime archaeological heritage legislation in Flanders/Belgium = Wetgeving in verband met het maritiem archeologisch erfgoed in Vlaanderen/België" in M. PIETERS *et al.* (ed.), *Colloquium: To sea or not to sea - 2nd international colloquium on maritime and fluvial archaeology in the southern North Sea area: book of abstracts,* Bruges, VLIZ Special Publication, 2006, 59-64 (DEWEIRDT 2006).
[1949] This database can be accessed via the following link: www.maritieme-archeologie.be.
[1950] DEWEIRDT 2006.
[1951] See *infra* section 4.11.
[1952] Wet van 9 april 2007 betreffende de vondst en de bescherming van wrakken, *BS* 21 juni 2007, 34237. (Wreck Act 2007)
[1953] Article 2 Wreck Act 2007.
[1954] Article 7-8 Wreck Act 2007.
[1955] Article 12-15 Wreck Act 2007.
[1956] Article 16-17 Wreck Act 2007.
[1957] Article 7§2 Wreck Act 2007.

register should be made containing all reported wrecks.[1958] Authorisation from the flag State was required before recovering warships and State vessels.[1959]

The Wreck Act did not apply to wrecks that were salvaged by the government, whose salvage was commissioned by the owner or captain or that were salvaged in the framework of the 1989 Salvage Convention.[1960] It thus appears, especially considering that no age criterion was included in the Wreck Act, that it did little to prevent the application of the law of salvage to wrecks having an archaeological or historical value. In any case, the Wreck Act was of little significance. Additional measures needed to be issued via royal decree in order for the Act to have any effects. These measures included the appointment of a receiver of wrecks, which would have been the authority responsible for executing the Wreck Act.[1961] Additionally, the royal decree needed to introduce further provisions on the reporting and preservation of wrecks[1962] and needed to establish the criteria as well as procedure for protecting wrecks of an archaeological and historical value.[1963] Unfortunately, no such royal decree was adopted resulting in the Wreck Act never to be applied. In 2014, this Act was officially abolished and replaced by the UCH-Act.[1964]

## 4. The Act for the Protection of Underwater Cultural Heritage

### 4.1. Introduction

The UCH-Act was adopted on 4 April 2014. In order for this Act to fully have effect, the necessary royal decree implementing the UCH Act was adopted on 25 April 2014 (royal decree UCH-Act).[1965] Its objective is to further clarify and elaborate the provisions of the UCH-Act.

The objective of the UCH-Act is to provide a legal framework for the protection of UCH in the Belgian sea area. One of the main reasons for its adoption was to implement the provisions of the UNESCO Convention. Belgium ratified it on 5 August 2013 and it entered into force on 5 November 2013.[1966] At this point Belgium was the 45th State to become a Party to this Convention. Unlike the

[1958] Article 10 Wreck Act 2007.
[1959] Article 7§2 Wreck Act 2007.
[1960] Article 3 Wreck Act 2007.
[1961] Article 5 Wreck Act 2007.
[1962] Article 7§1 and 11§1 Wreck Act 2007.
[1963] Article 16§1 Wreck Act 2007.
[1964] Article 20 UCH-Act 2014.
[1965] Koninklijk besluit van 25 april 2014 betreffende de bescherming van het cultureel erfgoed onder water, *BS* 14 mei 2014, 39028. (royal decree UCH-Act 2014)
[1966] Wet van 6 juli 2013 houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen te Parijs op 2 november 2001, *BS* 25 oktober 2013, 82228;
Decreet van de Vlaamse Overheid van 16 juli 2010 houdende instemming met het verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen in Parijs op 2 november 2001, *BS* 9 augustus 2010, 50843;

States discussed in the previous chapter, in 2001 Belgium did not abstain from voting on the UNESCO Convention, but voted in favour of it.[1967]

In this section an analysis is made of the framework set out in the UCH-Act and the protection that is afforded to UCH sites The extent to which the principles and provisions of the UNESCO Convention have been implemented in this Act and how this can still be improved will as well be assessed throughout this chapter.

## 4.2. Scope of application

### 4.2.1. Territorial scope

The UCH-Act applies to finds in the Belgian territorial sea regardless of how long they have been submerged and finds located in the Belgian EEZ or on the continental shelf that have been submerged for at least 100 years.[1968] Two important aspects should be noted here.

Firstly, the UCH-Act applies both in the territorial sea and on the Belgian continental shelf/in the Belgian EEZ. As was already mentioned, some discussion as well as differences in State practice exist with regard to the question whether States are allowed to exercise jurisdiction over archaeological and historical artefacts outside their territorial sea. As the UCH-Act does not provide that the articles dealing with finds located in the Belgian EEZ or on the Belgian continental shelf only apply to its own nationals and flagged vessels, as is for example the case in the UK PMRA, it is uncertain whether the obligations relating to such finds are meant to apply to foreign nationals

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Decreet van de Waalse overheidsdienst van 26 april 2012 houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen op 2 november 2001 en opgemaakt te Parijs op 6 november 2001, *BS* 22 mei 2012, 29469;
Decreet van de Franse gemeenschap van 19 april 2012 houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen op 2 november 2011 en opgemaakt te Parijs op 6 november 2001, *BS* 26 juni 2012, 35504;
Ordonnantie van 4 september 2008 houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, goedgekeurd op 2 november 2001 en gedaan te Parijs op 6 november 2001, *BS* 30 september 2008, 51223;
Decreet van de Duitstalige gemeenschap van 19 maart 2012 houdende instemming met het Verdrag ter bescherming van het cultureel erfgoed onder water, aangenomen in Parijs op 2 november 2001, *BS* 18 April 2012, 24188.

[1967] Upon ratification Belgium did not make a declaration as required by article 9(2) UNESCO Convention clarifying in what way reports as meant in article 9(1)(b) will be transmitted. It did, however, following article 28 UNESCO Convention declare that the Rules of the Annex to the Convention will apply in Belgian inland waters that do not have a maritime character. UNESCO, *Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001) – Deposit of an instrument of ratification by Belgium*, 2013, UNESDOC LA/DEP/2013/027, http://unesdoc.unesco.org/ulis/cgi-bin/ulis.pl?catno=223902&set=0059A2917B_0_200&gp=0&lin=1&ll=1.

[1968] Article 3 UCH-Act 2014.

and foreign flagged vessels as well.[1969] There are no examples nor any case law at this point which clarify the intention of the legislator in this regard.

A second interesting point that merits attention is the time-criterion used in the UCH-Act. In the EEZ and on the continental shelf, the Belgian legislation applies the same time-criterion as was agreed in the UNESCO Convention: the object must have been submerged for at least 100 years. A similar approach will most likely be followed by Germany once the Draft Act for the EEZ enters into force.

An unfortunate downside of this approach is that the UCH-Act does not apply to younger wrecks, including warship wrecks from WWII located in the EEZ or on the continental shelf. These wrecks are the testimony of a major historical event and often lie well preserved on the bottom of the sea. Nevertheless, as WWII only commenced in 1939, it will take at least 21 years and more before wrecks that perished during this war will be covered by the protection of the UNESCO Convention. This time-criterion thus allows these wrecks, as well as other young wrecks, to be looted and destroyed over the next decades. The UNESCO Scientific and Technical Advisory Body explicitly mentioned this issue during its fourth meeting when it recommended the Meeting of States Parties to encourage its members to consider ensuring that proper protection is given to UCH sites from WWII and to educate the public in this regard. The chairman suggested to inform States Parties about the dangers for younger heritage, especially that of WWII, as such sites are pillaged equally often as heritage from WWI. It was recognised that as WWI wreck sites more and more fall under the protection of the UNESCO Convention, WWII artefacts might even be increasingly targeted by treasure hunters.[1970]

As an example of the danger of applying a stringent time-criterion, the case of the wreck of the Tubantia can be cited, which is located on the Dutch continental shelf. A Belgian diver removed a number of copper pipes from the wreck and took them with him into the Belgian territory where he got caught. The Dutch competent authorities felt that this wreck was of considerable scientific and cultural-historical value. Therefore, it was undesirable that objects were removed from the site. Unfortunately, no legal basis could be found justifying the protection of the wreck. One of the main reasons for this was that the wreck at the time of the looting had only been submerged for 99 years and a couple of months. In other words, the wreck did not yet qualify as UCH following

[1969] If the Belgian legislator did mean to impose this obligation on third State nationals and flagged vessels as well, this would entail that it exercises competence over UCH located in its EEZ or on its continental shelf which is highly contentious. Whether it would be possible to enforce such an obligation with regard to foreign nationals and flagged vessels would depend on the national legislation by which the foreign discoverer or the foreign flagged vessel is bound.
[1970] Meeting of the Scientific and Technical Advisory Body, Fifth Meeting, 11 June 2014, Paris, UCH/14/5.STAB/6, 5 and Recommendation 4/STAB 5, 6-7.

the UNESCO Convention and was not protected by any national legislation.[1971] This case clearly demonstrates that using a strict 100-year criterion might encourage divers to loot younger wrecks that are not yet protected as UCH.

In order to enforce the protection of objects located in the EEZ or on the continental shelf that have not been submerged for over 100 years vis-à-vis third State nationals and flagged vessels, agreements would need to be concluded. This would be the case even with third States Parties to the UNESCO Convention as such objects do not fall within this Convention's scope.

In the territorial sea, on the other hand, the UCH-Act does not provide a time-criterion allowing all objects regardless of how long they have been submerged to potentially fall within the application of this Act. Third State nationals and flagged vessels are bound by this provision as Belgium has sovereignty in its territorial sea and can extend the protection as UCH over objects as it sees fit. In fact, none of the national pieces of legislation that were discussed in the previous chapter have a time-criterion in place for finds located in their territorial sea. It thus seems that while the UNESCO Convention imposes a 100-year time-criterion regardless of the maritime zone wherein the UCH is located, a number of States feel that a wider approach should be used in their territorial sea, and perhaps even beyond this zone, allowing younger sites to be protected as well. As States have sovereignty in their territorial sea, this approach is acceptable and must be respected by third States.

#### 4.2.2. Material scope

The UCH-Act applies to 'finds' which are defined in the UCH-Act in a very similar manner as UCH is defined in the UNESCO Convention. Finds include "*all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously*".[1972] This general definition is followed by a non-exhaustive list of objects that are included by this definition such as sites, structures, buildings, artefacts, human remains, vessels, aircraft and objects of a prehistoric character.[1973] While it is clear that the Belgian legislator copied this definition from the UNESCO Convention, there is one fundamental difference. In the UCH-Act, this definition is used for finds rather than for UCH. The Belgian legislator opted to distinguish between finds and UCH. It is only in a later phase that it is determined whether a find in fact constitutes UCH and should be protected as such. This entails that in the UCH-Act a selective approach is applied when determining which sites should be awarded protection. While in the

[1971] In the end the diver was willing to cooperate and returned the copper pipes to the competent Dutch authorities.
[1972] Article 2,1° UCH-Act 2014 and for the original English text Article 1(1) UNESCO Convention.
[1973] Article 2, 1° UCH-Act 2014.

UNESCO Convention no strong selective criterion was inserted, Belgium has, to a certain extent, done so in its national legislation.[1974]

Following the UCH-Act, an object will only qualify as a find when the discoverer was reasonably able to suspect that the object constitutes UCH and when the object has not yet been registered in conformity with article 7.[1975] This additional requirement, which comprises of two parts, can potentially cause some difficulties. The first part, namely that the finder must reasonably be able to suspect that the object constitutes UCH, seems to require that the finder has knowledge on the subject.[1976] In the Netherlands a similar requirement was introduced in the Heritage Act. There, it is provided that anyone who discovers a find of which he knows or should reasonably suspect that it is an archaeological find should report this. Following the definition given to 'archaeological find' in the Dutch Heritage Act, the finder should thus be able to assess whether an object is a remain, an object or other trace of human presence in the past that originates from an archaeological monument.[1977] This is a very limited assessment as every object that is not clearly something that has been lost at sea recently or that can be considered as trash will most likely comply with this definition. In the UCH-Act, on the other hand, the finder must not only assess whether an object is a trace of human presence in the past but must assess whether this object could qualify as UCH. As was said, in the UCH-Act it is only determined in a later phase whether or not a find constitutes UCH.[1978] Furthermore, the UCH-Act does not contain any criteria based on which the finder should make such an assessment. This results in this provision to be very vague and ambiguous. So far only a very limited number of objects, namely eleven, have been recognised as UCH by the UCH-Act. All of these objects are shipwreck sites.[1979] This gives finders reason to believe that other objects, which do not originate from shipwrecks, should not be considered as a find in the sense of the UCH-Act as they can reasonably suspect that these will not qualify as UCH in a later phase. When a finder does not report a find based on the fact that he reasonably believed that this find would not be considered as UCH, it might be difficult to prove otherwise as such an assessment is in essence a subjective one, lacking objective criteria.[1980] The finder is given the competence to judge on the find, which can constitute a potential problem especially considering the unclear

[1974] The procedure for selecting UCH and which criteria are used is set out below in sections 4.4.1. and 5.2.2.
[1975] Article 2, 1° UCH-Act 2014. See *infra* section 4.3.1. for more on this registration.
[1976] In theory, a finder could be any type of person ranging from an archaeologist to an amateur diver. The requirement that this person must 'reasonably suspect' needs to be interpreted in different ways as the level of knowledge that the finder has on archaeological and historical objects can differ considerably. This allows for two persons to make a different assessment on the same object.
[1977] See chapter three section 3.2.1.
[1978] The procedure for the recognition of a find as UCH is explained below in section 4.4.1..
[1979] These recognitions will be discussed below in section 5.2.
[1980] For more on the reporting duty of finds see *infra* section 4.3.1..

notion of 'UCH' in this Act.[1981] It should be noted, however, that while it is not ideal to give finders discretion to judge on finds, the value that the diving community and other sea users can offer for UCH protection cannot be underestimated as they are the eyes and ears on site.[1982]

The last part of the definition, namely 'that the object has not yet been registered in conformity with article 7' is also cause for a number of concerns. Question arises whether this entails that all objects that were discovered prior to the enactment of the UCH-Act and which have been included in the register as determined in article 7 do not qualify as finds. If this is the case, the UCH-Act and the protection it offers does not apply to such objects. This would exclude a large part of all known historical and archaeological sites from the scope of the UCH-Act. It can be assumed that this was not the intention of the legislator.[1983] The author believes that the aim of this phrase was to exempt finders from reporting the 'discovery' of a find that has already been registered. The underlying reason is of course that this site is already known to the authorities. However, as the reference to article 7 has been included in the general definition of the notion 'finds' rather than in the provisions dealing with the reporting duty, this seems to limit the application of the UCH-Act to objects that have not yet been registered.

The UCH-Act does not apply to wrecks or wreckage that fall within the scope of application of the International Nairobi Convention on the removal of wrecks of 16 May 2007.[1984] The Act also does not apply to pipelines and cables located on the seabed[1985] and to other installations that are located on the seabed and that are still being used.[1986] These exceptions are similar to the ones provided in the UNESCO Convention.

[1981] This difficulty to prove and enforce such provisions was also recognised in light of the UK PMRA where for actions directed at protected places the offender must have believed or suspected that the site contains remains designated by the PMRA in order for the act to qualify as an offence. See chapter three section 4.5.

[1982] When a couple of years ago the Dutch diving community expressed concerns relating to the definition of 'excavation' in the new Heritage Act, a symposium on volunteers in underwater archaeology was organised by the NICH *inter alia* to address these issues and define the role of the diving community in the new Act. This offered divers the opportunity to have their concerns addressed and directly communicate with the authorities responsible for executing the Heritage Act. For the Dutch competent authorities this gathering was very important as they acknowledge the crucial role that amateur divers play in the protection of UCH.

[1983] The fact that the UCH-Act can apply to finds discovered prior to its enactment is evidenced by the sites that have been recognised as UCH as will be discussed in section 5.2.

[1984] Article 4, 1° UCH-Act 2014. Nairobi International Convention on the Removal of Wrecks of 18 May 2007, 46 ILM 697. Flanders adopted this Convention in 2013 (Decreet van 12 juli 2013 houdende instemming met het internationaal verdrag van Nairobi betreffende de verwijdering van wrakken, 2007, en de bijlage, opgemaakt in Nairobi op 18 mei 2007, *BS* 13 augustus 2013, 53256.) The Nairobi Convention entered into force on 14 April 2015.

[1985] Article 4, 2° UCH-Act 2014.

[1986] Article 4, 3° UCH-Act 2014.

## 4.3. Reporting and protection of finds

### 4.3.1. Duty to report

Any person that discovers a find as defined above in the Belgian territorial sea or in its EEZ/ on its continental shelf must report this as soon as possible to the Receiver of Wreck.[1987] The governor of the province of West-Flanders has been appointed as the Receiver of Wreck (Receiver).[1988] This reporting must be done electronically via the website 'www.vondsteninzee.be' or via mail to gouverneur@west-vlaanderen.be. The elements that can be reported are the following: the identification and contact data of the finder, the location of the find in coordinates, the date of the find, a general description of the find, its estimated measurements, information on the material from which the find is manufactured and a clear picture of the find. The first four elements are mandatory in order for the report to be valid.[1989] The legislator chose not to impose a strict time-criterion on the duty to report as this could deter finders from reporting their find after the deadline has elapsed. The reporting should merely be done within a short, but reasonable period of time.[1990] This approach of not attaching a clear time limit to the duty to report can also be seen in the Dutch Heritage Act and the German L-S and S-H Acts. On the other hand this approach seems to leave some room for interpretation as it might be difficult to prove that a finder complied with this reporting duty 'as soon as possible'. To avoid any issues in relation to this, a clear timing to comply with the reporting duty could be introduced in the UCH-Act as has been done in for example the French Heritage Code and will be done in the German EEZ Act. Here the reporting must be done respectively within 48/24 hours after the discovery was made or alternatively upon arrival in the first port. A much longer period is provided by the British MSA where reporting must be done within 28 days following the recovery. This period of time is, however, much too long considering that swift action might be necessary for the protection of the discovered site.[1991]

The Receiver has the task of creating and maintaining a publicly accessible electronic register that contains all reported finds.[1992] Finds that were discovered prior to the UCH-Act entered into force can be included in this register as well.[1993] This way, in the future, the register can evolve into a

[1987] Article 5§1 UCH-Act 2014.
[1988] Article 1 royal decree UCH-Act 2014.
[1989] Article 2 royal decree UCH-Act 2014.
[1990] Explanatory memorandum UCH-Act 2014, 5.
[1991] See chapter three for more on the reporting duty in these States.
[1992] This register can be found on the website www.vondsteninzee.be and already contains numerous objects including a large number that were discovered prior to the entry into force of the UCH-Act in 2014. When the disclosure of information on a find poses a threat or risk for its preservation, it will not be included in the register. Article 7§2 UCH-Act 2014. This is in conformity with article 19§3 UNESCO Convention.
[1993] Article 7§1 UCH-Act 2014.

database listing all objects that are located underwater or that were discovered there.[1994] This register contains all information on the find that was given upon reporting, the date of the reporting, and, when applicable, the decision of the competent Minister concerning whether or not the find constitutes UCH.[1995]

Finally, it should be noted that when human remains are discovered, these must be treated with respect.[1996] With this provision, the UCH-Act implements article 2(9) UNESCO Convention, as was recommended by the Council of State.[1997] This provision applies to both human remains that are located underwater and human remains that have been recovered.[1998]

#### 4.3.2. Incidentally recovered finds

Without prior authorisation from the Receiver it is prohibited to intentionally bring a find above water.[1999] As is indicated from the use of the word 'intentionally', no offence is committed when a find was recovered incidentally as a consequence of for example dredging activities or sand extraction. These finds must, however, still be reported to the Receiver.[2000] Asides from this duty to report, the UCH-Act does not offer any guidance or rules on what should be done when a find is recovered incidentally during an activity that was not directed at UCH.[2001] The UNESCO Model Act provides that when UCH is recovered incidentally the finder should deposit it with the competent national authority, being the Receiver, or hold the UCH at the disposal of this authority in such conditions that its preservation is ensured.[2002] Such an approach can for example be found in the French Heritage Code where alongside the reporting duty for MCAs, a duty exists for the holder of the MCA to deposit it with the authority or to keep it at its disposal. A provision in this sense should be introduced in the UCH-Act as well.[2003] The double option of either depositing the find with the Receiver or holding it at his disposal should be preserved as the Receiver might not consider it desirable to have all finds delivered to him. This is especially true considering the fact that whether a find constitutes UCH and should be protected as such is only decided in a later phase. While at the moment no such provision is in place yet, it should be noted that within the

[1994] Explanatory memorandum UCH-Act 2014, 11.
[1995] See *infra* section 4.4.1. for more on the role of the Minister in recognising UCH. Article 3 royal decree UCH-Act 2014.
[1996] Article 5§3 UCH-Act 2014.
[1997] Council of State Advice draft UCH-Act 2014, 9.
[1998] Explanatory memorandum UCH-Act 2014, 10.
[1999] Article 6§1 UCH-Act 2014.
[2000] Explanatory memorandum UCH-Act 2014, 10.
[2001] The explanatory memorandum accompanying the UCH-Act merely provides that in case a find is recovered incidentally, no one can be held responsible. Explanatory Memorandum UCH-Act 2014, 10
[2002] Article 6(3) UNESCO Model Act.
[2003] Alternatively, such a provision could be introduced in sectorial legislation dealing with activities taking place at sea or perhaps in the legislation dealing with the environmental impact assessment. See *infra* section 6.3.

framework of the SeArch project a number of protocols were created dealing with the reporting and initial preservation of finds.[2004] Such protocols were adopted for the reporting of archaeological finds discovered during activities at sea, on the beach or in the tidal zone and on sites for sea granulates.[2005] A best practice brochure was created as well directed at all sea users and the government.[2006] While these protocols provide useful information on how to treat finds, they do not constitute a legally binding duty to preserve them and keep them at the disposal of the Receiver.

### 4.3.3. Reward

An interesting consideration in regard to the reporting duty is whether an incentive in the form of a reward should be given to the discoverers of finds in order to ensure that they report those finds and treat them in conformity with the UCH-Act.[2007] Upon drafting this Act the choice was made not to include the possibility of granting a reward. The underlying reason here was that the legislator feared that this would encourage treasure hunting. Nevertheless, offering divers and other sea users the possibility to receive a reward when they come forth and report finds could be beneficial in ensuring the full implementation of the UCH-Act. Such a reward should be given at the discretion of the Receiver under the condition that the provisions of the UCH-Act have been fully respected. This might encourage sea users to safely preserve an incidentally recovered find rather than simply tossing it back in the water and ignoring it. The UNESCO Model Act provides for the possibility to offer a reward at the discretion of the competent national authority to any person

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[2004] S. VAN HAELST, M. PIETERS and I. DEMERRE., *Protocol voor het melden van archeologische vondsten gedaan tijdens werkzaamheden op zee*, SeArch brochure, Brussels, 2016, available at www.sea-arch.be/sites/sea-arch.be/files/public/docs/Protocollen/Def/Search-ProtocolAlgemeen%20LR.pdf. (VAN HAELST *et al.*, Brochure for finds discovered during activities at sea 2016)

[2005] VAN HAELST *et al.*, Brochure for finds discovered during activities at sea 2016. All heritage that was discovered on the beach falls within the Flemish competence and needs to be reported to the FHA. S. VAN HAELST, M. PIETERS and I. DEMERRE, *Protocol voor het melden van archeologische vondsten op het strand of in de getijdenzone*, SeArch brochure, Brussels, 2016, available at www.sea-arch.be/sites/sea-arch.be/files/public/docs/Protocollen/Def/Search-ProtocolStrandGetijdenzone%20LR.pdf; S. VAN HAELST, M. PIETERS and I. DEMERRE, *Protocol voor het melden van archeologische vondsten op werven voor zeegranulaten*, SeArch brochure, Brussels, 2016, available at www.sea-arch.be/sites/sea-arch.be/files/public/docs/Protocollen/Def/Search-Protocol_zeegranulaten%20LR.pdf.

[2006] T. MISSIAEN, *et al. Erfgoed in zee: wat moet ik ermee? Richtlijnen voor de gebruikers van de Noordzee met betrekking tot het cultureel erfgoed onder water*, SeArch brochure, Ghent, 2016, www.sea-arch.be/sites/sea-arch.be/files/public/docs/Protocollen/Def/BestPractice%20LR.pdf.

[2007] With respect to leisure diving activities, States parties are encouraged to collaborate with and raise awareness of diving operators by for example promoting the UNESCO Code of Ethics for Diving on Submerged Archaeological Sites proposed by the Scientific and Technical Advisory Body. The Code of Ethics is available at www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/partners/diving-community/code-of-ethics/. Scientific and Technical Advisory Body, First Meeting, Cartagena, 13-15 June 2010, UCH/10/1.MAB/220/6REV and Recommendation 7/MAB 1, 5; Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fourth Session, Brussels, 28-29 May 2013, UCH/13/4.MSP/220/10, Resolution 4/MSP 4 recommendation 7.

that discovered UCH.[2008] In a number of the States discussed in the previous chapter such an option to grant a reward exists as well. This is for example the case in the French legislation for certain MCAs that are the property of the State. Such a reward can either consist of an amount of money or in obtaining custody over the heritage. Following the British MSA a reward can be given as well, although this is a salvage reward to which the finder is entitled following the successful salvage of the heritage. Because of the nature of this reward, which does not serve the protection and conservation of UCH in conformity with the UNESCO Convention, salvors are asked to waive their right to such a reward. Finally, in the German L-S and S-H Acts the possibility exists to give a reward for the reporting of certain finds. A number of States thus clearly consider that the possibility of offering a reward creates an incentive for reporting and acting in accordance with the provisions set out in the national legislation. A reward system would of course require that additional financial means are made available to the competent authority. The legislator and policy makers will thus have to balance the benefits against the costs of such a reward system to determine the best course of action.[2009]

## 4.4. Recognised underwater cultural heritage

### 4.4.1. Process of recognition

The Receiver must draft a research report on the reported finds in which he gives a motivated advice to the federal Minister competent for UCH[2010] (the Minister) on whether or not the find should be considered as UCH.[2011] For finds that were discovered in the Belgian EEZ or on the Belgian continental shelf, the Receiver will consult with all States that have made a declaration as meant by article 9(5) UNESCO Convention with respect to Belgium.[2012] After receiving the report, the Minister will determine whether the find is in fact UCH.[2013]

When the Minister decides that the find constitutes UCH, a ministerial decision is adopted officially recognising the find as such. A royal decree can also be adopted determining that the UCH must be preserved *in situ*. The UCH-Act does not specify whether, when no such royal decree is adopted, this entails that the find should be recovered or whether the find should be left *in situ* for the time being, but can be recovered in the future when necessary or desirable. It is, in other words, not

[2008] Article 17(3) UNESCO Model Act.
[2009] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fourth Session, Brussels, 28-29 May 2013, UCH/13/4.MSP/220/10, Resolution 4/MSP 4 recommendation 8.
[2010] Article 2, 5° UCH-Act 2014.
[2011] Article 8§1, 1 UCH-Act 2014.
[2012] Article 8§1 UCH-Act 2014. This is in conformity with the obligation for States Parties to consult with each other as is provided in article 10(3) UNESCO Convention.
[2013] Article 8§1 UCH-Act 2014.

clear what the effect is of not explicitly protecting an UCH site *in situ*.[2014] In any case, as a general rule and in line with the provisions of the UNESCO Convention, *in situ* preservation and protection of UCH is preferred.[2015] When activities directed at *in situ* preserved UCH do need to be conducted, this can only be done after obtaining authorisation from the Receiver. The Receiver must hereto take into account the Rules contained in the Annex to the UNESCO Convention.[2016]

The UCH-Act determines that measures both of an individual or regulatory nature can be adopted for the protection of UCH sites.[2017] Prior to adopting such measures, advice must be sought from the Advisory Commission as meant in article 5bis§3 of the Act of 20 January 1999 for the protection of the marine environment and the organisation of the marine spatial planning in sea areas within the Belgian jurisdiction.[2018]

The Receiver has the task of making all finds that have been recognised as UCH known via a publicly accessible website.[2019] He must notify the Director-General of UNESCO as well.[2020]

When the Minister decides that the find does not constitute UCH, the application of the UCH-Act ends. The prohibition to recover the find without prior authorisation from the Receiver no longer applies. Furthermore, it is determined that title to a find that is not considered to be UCH will be granted to its discoverer.[2021] It is strange that the UCH-Act automatically awards title to a find that is no UCH to the finder. When the original owner or one of his/her successors comes forward to claim title over the find, account should be taken of this. The UCH-Act does provide for one exception to this rule, namely that title to the wrecks of State craft remains with the State that was the owner at the time of sinking.[2022] Because of the wording of this provision it seems to be irrelevant whether or not the State has abandoned the wreck.

[2014] All practice relating to recognised UCH sites will be discussed in section 5.2 and 5.3.
[2015] The activities meant by the UCH-Act are activities that are directed at UCH and that can physically affect or directly or indirectly cause damage to the UCH. Article 2, 7° UCH-Act 2014.
[2016] Article 8§3 UCH-Act 2014.
[2017] When adopting such measures account must be taken of their potential impact on activities in the vicinity of the site. Article 8 §3 UCH-Act 2014.
[2018] This Advisory Commission was established in a royal decree of 13 November 2012 on the set up of an Advisory Commission and the procedure for adopting a marine spatial plan in the Belgian sea areas. Koninklijk besluit van 13 november 2012 betreffende de instelling van een Raadgevende Commissie en de procedure tot aanneming van een marien ruimtelijk plan in de Belgische zeegebieden, *BS* 28 november 2012, 76072.
[2019] Article 9§1 UCH-Act 2014.
[2020] Article 9§2 UCH-Act 2014.
[2021] Article 8§2 UCH-Act 2014.
[2022] Article 8§2 and 5§2 UCH-Act 2014.

### 4.4.2. Limited protection for finds

The main focus of the UCH-Act and the decrees flowing from it lies with protecting formally recognised UCH. For finds that have not yet been recognised as UCH, the only protection that is offered is that they cannot be recovered without the consent from the Receiver and that they become the property of the Belgian State.[2023] No provisions are included to ensure that these finds are not damaged by divers or activities directed at them nor are there any provisions on how to obtain authorisation for such activities. As was already briefly mentioned, at the moment only eleven sites have been recognised as UCH sites.[2024] This entails that up till today most finds are only protected to a limited extent. Nevertheless, the UNESCO Convention defines the notion UCH in a very wide manner to ensure the comprehensive protection of the marine historic environment. The very limited number of sites that are fully protected by the Belgian heritage legislation does not seem to be sufficient in order to achieve this objective. Therefore, the UCH-Act should provide for a wider protection of finds in the BPNS.

A first option to achieve this would be for the Minister to formally recognise a large section of all finds as UCH and to protect them *in situ*.[2025] Article 8§3 UCH-Act provides that no activities directed at UCH can take place without authorisation from the Receiver. 'Activities directed at UCH' are defined as all activities having UCH as their primary object and which may disturb or damage it.[2026] By recognising a large number of finds as UCH, authorisation from the Receiver would be required in most cases. This would ensure that the protection offered by the UCH-Act is more in line with what is foreseen in the UNESCO Convention. Furthermore, when necessary, additional specific measures could still be taken to protect and preserve vulnerable or highly valuable UCH sites. On the other hand, while this approach would amount to a more comprehensive protection, it would be very time and cost consuming as this requires an assessment to be made of all finds and an explicit decision to be taken on each of them. Additionally, this site-based approach would require a speedy and efficient procedure for finds to be recognised and protected as UCH. In order to determine whether a find qualifies as UCH, sufficient information must be available in order to fully assess the find's historical, archaeological and cultural value. This might require additional

[2023] The ownership rights over UCH are discussed below in section 4.5.
[2024] These sites will be discussed in detail below in section 5.2.
[2025] It is difficult to establish what is 'a large section' of all finds. A double criteria could be used for this. Firstly, the Minister should ensure that sufficient finds are recognised so that, as a whole, they form a good representation of all types of heritage originating from different eras. The protection of heritage should thus not remain limited to shipwrecks, but should be extended to all types of objects. Secondly, all finds that following the FHA criteria to determine a find's heritage value, as will be discussed in detail below, are awarded certain scores should automatically be protected. Which scores these should be must be determined by the Minister in consultation with the FHA. See *infra* section 5.2.2.
[2026] This definition includes the activities mentioned by the UNESCO Model Act such as the search for, intervention, recovery, displacement, excavation or alteration of UCH. Article 8 UNESCO Model Act.

research and studies to take place, which can once again potentially be very time and cost consuming.[2027] Therefore, even when the majority of finds are recognised as UCH in the end, there will still be a need for provisional measures protecting finds pending the final decision on their legal status.[2028] It, therefore, seems that this approach might overcomplicate matters. That is why the second option seems to be preferable.

The second option would be to alter the general scheme of the UCH-Act to apply more of an activity-based approach combined with a limited site-based approach. This would entail that all activities directed at finds must be authorised regardless of whether or not those finds are recognised as UCH. Additionally, the possibility to recognise certain finds as UCH when it is felt that additional protective measures need to be adopted for their protection, can be retained. Strangely enough, in the initial draft version of the UCH-Act provision was made to offer such general protection to finds. In the draft version, article 6§1 not only prohibited the recovery of finds without the authorisation of the Receiver, but all activities directed at a find without prior authorisation.[2029] In the end, the legislator removed this provision from the text. In order to comply with the UNESCO Convention such an authorisation duty could once again be inserted in article 6§1 UCH-Act.[2030] This allows for a wider protection to be given by the UCH-Act, without the excessive burden of having to explicitly recognise all finds as UCH sites.

#### 4.4.3. Formalities and practicalities for obtaining authorisation

While the UCH-Act has a system of obtaining authorisations for certain activities in place, it hardly provides any information on the modalities of such an authorisation and on how to obtain it. The only substantive information that is given is that the Receiver will take the Rules of the Annex to the UNESCO Convention into account when granting authorisation for activities directed at UCH.[2031] In light of creating a transparent regime, it is important that the Act offers further specifications on the authorisation procedure and the authorisation itself. This would especially be of importance if more of an activity-based approach were to be applied in the future as proposed above.

[2027] The Minister must exercise care when assessing the value of these finds. When a find is not considered to be UCH, the finder obtains title over it and no further authorisation is required to recover the find. This entails that once the decision is made not to recognise a find it can be damaged, destroyed or sold. Article 8§2 UCH-Act 2014.
[2028] Such a provisional protection can for example be seen in the German L-S and S-H Acts for the protection of heritage in the German territorial sea.
[2029] This would entail that any activity directed at UCH needs to be reported in order to obtain authorisation.
[2030] In this case the definition of 'activities' as provided in article 1,7° UCH-Act 2014 needs to be altered as well. The term 'UCH' needs to be replaced with the term 'finds'.
[2031] Article 8§3 UCH-Act 2014.

Most national legislation discussed in the previous chapter can serve as examples of how to further specify the authorisation procedure. In light of this, special mention needs to be made of the Dutch Heritage Act that only recently introduced a completely new system of certificates. The Heritage Act provides detailed information on the functioning of the new system, both directly and by reference to other instruments.[2032] These provisions offer a clear guideline for anyone wishing to apply for a certificate to fall back on. The Belgian UCH-Act should as well offer a set of guidelines on how to obtain authorisation for activities directed at UCH. These guidelines should at least explain how to apply for authorisation, the criteria with which the applicant must comply and the conditions that must be respected once the authorisation is given. The UNESCO Model Act gives a number of examples of provisions that should be introduced in national legislation.[2033]

It should be noted that for activities directed at UCH or finds located beyond the Belgian territorial sea, the Belgian competent authorities can only grant authorisation when Belgium acts as the Coordinating State. The exception to this rule is that the Belgian competent authority can give authorisation if the heritage is threatened by immediate danger or, for heritage in the Belgian EEZ/ on the Belgian continental shelf, to prevent interference with the Belgian sovereign rights or jurisdiction.[2034]

## 4.5. Ownership rights over UCH

### 4.5.1. Initial claim by the State over finds

The UCH-Act provides that, at least initially, title over finds reported in accordance with article 5§1 is awarded to the Belgian State.[2035] It is felt by the legislator that this is necessary in order for Belgium to comply with its obligations in the UNESCO Convention.[2036] The Council of State expressed concerns with regard to the fact that the State claims title over finds discovered in the Belgian EEZ and on the continental shelf as well. While for finds in the territorial sea, the Belgian sovereignty as determined by article 2 UNCLOS forms the legal basis for such an ownership claim,

[2032] See chapter three section 3.5.
[2033] The UNESCO Model Act suggests that rules should be introduced indicating during which period an authorisation is valid, leaving open the possibility for renewal after a revision of the project by the Receiver. National legislation should also provide that the authorisation can be revoked in case of non-compliance with the conditions set out in it, the Rules of the Annex, the project design that was deposited with the Receiver or when this is in the interest of the proper protection of the UCH. Mention could also be made of the fact that authorisation is non-transferable and that the project needs to be executed under the supervision of the person authorised to do so while respecting the proper safety measures and the environment. Finally, rules could be set out prescribing a clear timeline for applying for an authorisation. Article 6(6) and 8 UNESCO Model Act.
[2034] Article 8(8) UNESCO Model Act.
[2035] The exception to this rule are once again the wrecks of State craft which remain the property of the State that was the owner at the time of sinking. Article 5§2 UCH-Act 2014.
[2036] Explanatory memorandum UCH-Act 2014, 9.

this is much less evident for heritage originating from the EEZ and continental shelf where Belgium merely has a number of sovereign rights. As is provided in the previous chapter both France and the Netherlands feel that under international law States were not given the competence to claim title over UCH beyond the territorial sea. Nevertheless, as discussed, it appears that Germany following its new EEZ Act might claim title to UCH located beyond its territorial sea as well.

In response to the concerns expressed by the Council of State on this issue, the federal representative pointed out that as in the EEZ or on the continental shelf the UCH-Act only applies to objects that have been submerged for over 100 years the likelihood of an original owner or his successors being able to prove title to the object is virtually non-existent. Furthermore, it was stated that this ownership claim by the Belgian State is only of a temporary nature when the find does not constitute UCH or when an owner comes forward to claim his rights over UCH that is not protected *in situ*.[2037] Finally, the federal representative explained that the legislator considered this ownership transfer to be necessary in order for Belgium to implement article 2 of the UNESCO Convention. Without transferring title over finds to the Belgian State it is impossible to ensure the effective protection of UCH when this is located in the EEZ or on the continental shelf. In other words, this is considered to be a necessary measure in order for Belgium to comply with its international obligations. The Council of State was rightfully not completely convinced by this reasoning. The Council pointed out that the UNESCO Convention does not provide for such a transfer of ownership rights to the coastal State. Additionally, this Convention needs to be implemented in accordance with UNCLOS.[2038] The Council found it doubtful whether the provisional acquisition of ownership by the State is necessary and proportionate to ensure the protection of UCH as provided by the UNESCO Convention. In any case, account must be taken of the fact that third parties, especially the original owner, can come forward to claim their rights.[2039] In the explanatory memorandum accompanying the UCH-Act it is stressed that this transfer of ownership rights is in fact necessary. Firstly, reference is made to article 4 of the UNESCO Convention in which the application of the law of salvage and finds is discussed. The fact that the ownership rights are initially awarded to the Belgian State entails that the finder cannot apply the law of finds upon discovering a find. Additionally, it is once again stated that the likelihood of owners or their successors coming forward to claim title to objects that have been submerged for over 100 years is very small. Specific mention is also made of the fact that this transfer of ownership rights to the Belgian State does not apply to ships or parts of ships that belong to another State.[2040] Finally, it is stressed that this provision can in fact be in the interest of the original owner. When a find is considered to be UCH and costs are made for its protection, these can be

[2037] See *infra* section 4.5.2.
[2038] Article 3 UNESCO Convention.
[2039] Council of State Advice draft UCH-Act 2014, 31-32.
[2040] The status of State vessels will be further elaborated in section 4.6.

recovered from the owner. These costs can run fairly high as works might need to be conducted under water. The original owner might wish to avoid paying for this and can opt not to claim his ownership rights. In this case the State will remain the owner and will bear the costs for all measures taken for the preservation of the UCH.[2041]

It is clear that the Belgian legislator is unable to demonstrate a clear legal basis for claiming title over finds located in its EEZ or on its continental shelf. While there is truth in many of the justifications cited for such a claim, this does not mean that it is necessary or justified from an international point of view. Considering the fact that the fear of creeping jurisdiction for the coastal State was one of the main issues for a number of States when adopting the UNESCO Convention, it seems likely that third States might disagree with this Belgian, and potentially in the near future German, approach. On the other hand, it might be stated that as long as Belgium respects the rights of third States, the outcome of the consultation mechanism of the UNESCO Convention[2042] and the claims of original owners, claiming title over UCH located in its EEZ or on its continental might only have limited effects. It remains to be seen whether issues will arise regarding this approach in the future.

#### 4.5.2. Ownership rights over underwater cultural heritage not protected *in situ*

As was explained, the Minister must determine whether or not a find qualifies as UCH. For finds that are officially recognised as UCH, a royal decree can be adopted providing that the UCH should be protected *in situ*. When such a royal decree has been adopted for an UCH site, the UCH-Act does not provide the option for the original owner to come forward and claim his ownership rights. In other words, *in situ* preserved UCH sites remain the property of the federal State.[2043] This might be problematic as this constitutes a form of expropriation. It seems that this practice could potentially give rise to a compensation claim based on article 16 of the Belgian constitution.[2044]

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[2041] Explanatory Memorandum UCH-Act 2014, 9.

[2042] This mechanism has not yet been fully implemented at this point. See *infra* section 4.8.

[2043] Article 8§3 UCH-Act 2014 provides that articles 10-13 UCH-Act 2014, which deal with the ownership rights over the UCH, do not apply when the UCH is preserved *in situ*.

[2044] This article provides that no one can be deprived of his or her property unless for the public benefit. This deprivation can only take place under the circumstances and in the manner determined by law and providing that a fair and prior compensation has been given. For an interesting overview of the relationship between the protection of cultural heritage and the private interests in such heritage see M. De CLIPPELE and L. LAMBRECHT, "Art & law balances. Increased protection of cultural heritage law vs. private ownership: towards clash or balance", *IntIJCultProp* 2015, 259-278. This publication assesses the approach both from the European Court of Human Rights as well as Belgian courts when balancing out the general interest in the protection of cultural heritage against private interests of owners. This matter will not be assessed in detail within the framework of this dissertation. The reason for this is twofold. On the one hand UCH is likely to have been submerged for quite some time, reducing the likelihood of an owner coming forward and on the other hand many wrecks are State vessels and the Belgian State will not claim title to these. Nevertheless, especially for wrecks located in the territorial sea that have not yet been

When, on the other hand, no royal decree has been adopted stating that the UCH should be protected *in situ*, the rules dealing with ownership rights as set out in articles 9-13 UCH-Act become applicable. These provisions allow for several persons or institutions to obtain title over the UCH, depending on the circumstances as is set out below.

A person, both natural or legal, can claim title over UCH if he can prove that he was the owner of the UCH at the time of its sinking. This must be done within a time period of nine months commencing at the moment of publication on the website of the Receiver of the decision to recognise the find. The evidence supporting this claim must be presented to the Receiver. The ownership rights over the UCH can be transferred to this person by royal decree after he has reimbursed all costs that were made with a view to protecting the UCH.[2045] It should be noted that the original owner must be able to prove that he was the owner of the UCH at the time of its sinking. This seems to entail that what has happened since the UCH sank is of no importance. Even when for example the owner has abandoned a wreck, either explicitly or implicitly, he can still claim title to it.

A second possibility created by the UCH-Act is that a public administration, an institution of public utility or a recognised museum can declare that it wishes to become the owner of the UCH.[2046] It has nine months to do so after which title can be granted to it by royal decree on the condition that it has reimbursed the costs that were made with a view to protecting the UCH. This declaration should be addressed at the Receiver.[2047]

In case a person proves that he is the original owner of the UCH in conformity with article 10(1), and at the same time, an administration, institution or museum as stated above indicates that it wishes to become the owner of the UCH in conformity with article 11, title to the UCH can only be granted to the administration, institution or museum after it has compensated the original owner for the value of the UCH. This value is determined by mutual agreement. Evidence of this agreement must be presented to the Receiver. In case no agreement can be reached on the amount of the compensation, the ownership rights are granted to the original owner of the UCH.[2048]

submerged for 100 years, it is not unthinkable that an owner could come forth and claims compensation following article 16 of the constitution.

[2045] Article 10 UCH-Act 2014.

[2046] In order to make such a claim, a museum must be officially recognised by a Belgian or foreign government. Explanatory Memorandum UCH-Act 2014, 14.

[2047] Article 11 UCH-Act 2014.

[2048] Article 12 UCH-Act 2014.

Finally, in case no one claims ownership rights over the UCH, title to it can be transferred to the person who discovered it. The latter can refuse this.[2049]

At the end of the nine month period during which the ownership claims can be made, the Receiver will send a proposal to the Minister concerning the application of articles 10-13 UCH-Act.[2050] This provision was inserted following the advice given by the Council of State providing that in light of the legal certainty an explicit decision on the assignment of the ownership rights should be made in the end. When all the legal requirements are met, the Minister can present his draft for a royal decree in which ownership rights over the UCH are definitively assigned. Against this royal decree an administrative appeal before the Council of State is possible.[2051]

Regardless of who obtains the ownership rights at the end, that person or institution has the responsibility of storing, conserving and managing the recovered UCH with a view to preserving it for the long term.[2052] This provision as well was inserted following the advice of the Council of State to ensure that article 2(6) UNESCO Convention is implemented correctly.[2053] This obligation might form a reason for the original owner not to come forward to claim his ownership rights over the UCH or for the finder to refuse title to the UCH. However, the preservation of the UCH should be the priority and therefore such a conservation obligation seems to be justified in light of protecting the UCH in conformity with the UNESCO Convention.

As a final remark, it should be noted that for finds that were already in the possession of persons (either natural or legal) prior to the enactment of the UCH-Act, the principle applies that possession amounts to title.[2054] In other words, the Belgian State does not become the owner of finds recovered prior to the entry into force of the UCH-Act and the rules on ownership rights as set out in article 10-14 UCH-Act do not apply to them. One of the underlying objectives here is to get persons that already have certain finds in their possession to come forward to report them without the fear of losing the find. If no such policy had been introduced, this might have resulted in many finds discovered in the past to remain unknown to the competent authorities and thus in a lot of knowledge about our past to be lost.

[2049] Article 13 UCH-Act 2014.
[2050] Article 14 UCH-Act 2014.
[2051] Explanatory memorandum UCH Act 2014, 14-15.
[2052] Article 8§4 UCH-Act 2014.
[2053] "*Recovered underwater cultural heritage shall be deposited, conserved and managed in a manner that ensures its long-term preservation.*" Article 2(6) UNESCO Convention. Council of State Advice draft UCH-Act, 12.
[2054] Explanatory memorandum UCH-Act 2014, 11.

## 4.6. Special regime for State vessels and aircraft

### 4.6.1. Definition of State vessels and aircraft

As is the case in the UNESCO Convention, the Belgian UCH-Act applies to State vessels and aircraft, but creates a special regime for their protection. State vessels and aircraft are defined as "*warships, and other vessels or aircraft that were the property of a state or were operated by a state, that were used at the time of sinking exclusively for non-commercial purposes of public service and that have been identified as such and that comply with the description of UCH*".[2055]

First and foremost, it should be noted that there seems to be a problem concerning the definition given to State vessels and aircraft in the UCH-Act. The definition for State vessels and aircraft was copied from the UNESCO Convention which, as will be demonstrated, is problematic considering the fact that the Belgian legislator chose to introduce a distinction between finds and UCH in the UCH-Act.[2056] The issue with this definition lies with the last part "*and that meet the definition of underwater cultural heritage*". While in the UNESCO Convention UCH is defined rather extensively, including most if not all State vessels and aircraft that have been submerged for over 100 years, this is not the case in the UCH-Act. In order for a State vessel or aircraft to meet the definition of UCH, it must first be recognised by the Minister as such. Therefore, because of this definition, at the moment the specific provisions dealing with State vessels and aircraft in the UCH-Act only apply to a very limited number of State craft. It does not seem, however, that this was the intention of the legislator when drafting the UCH-Act. The first reason for this assumption is that most provisions of the UCH-Act dealing with State craft are included in the part dealing with finds rather than the part dealing with UCH.[2057] The second reason is that the explanatory memorandum explains that the legal basis for not allowing activities to be directed at State vessels and aircraft without the consent from the flag State is that these wrecks enjoy sovereign immunity.[2058] It is highly unlikely that the Belgian legislator meant to let the question of whether sunken State craft enjoy sovereign immunity depend on whether they are recognised as UCH by the Minister. Rather,

[2055] Article 2, 7° UCH-Act 2014.

[2056] Article 1(8) UNESCO Convention and article 2,2° UCH-Act 2014.

[2057] Article 5§2 UCH-Act 2014 and article 6§2 UCH-Act 2014.

[2058] Explanatory memorandum UCH-Act 2014, 10. In order to help further this view expressed by Belgium and to ensure full respect for its own sunken State craft worldwide, Belgium would do well to clearly express its vision on this matter not only in the UCH-Act, but internationally as well by for example issuing a statement. As is explained in chapter two, a number of States including Germany, the UK, France, Spain and the US gave such a statement in 2002-2003. They claim that a flag State retains ownership rights over its sunken State vessels and aircraft as long as they have not explicitly abandoned it. In a number of these statements, reference is also made to the principle of sovereign immunity. The idea that State craft retains sovereign immunity is not (yet) a generally accepted rule of customary international law, but could potentially be so in the future. By clearly proclaiming its view on this matter at the international level, Belgium could assist in the creation of such a rule and in the long run perhaps protect its sunken State vessels, regardless of when they sank, worldwide.

it seems much more plausible that the legislator meant for the specific provisions relating to State craft to apply to all sunken State craft that fall within the application of the UCH-Act. In order to ensure that this issue is resolved only a small amendment of the definition of State vessel and aircraft in the UCH-Act is required. In the definition the term 'UCH' needs to be replaced by the term 'find'. This way all provisions relating to State craft would apply regardless of whether such a wreck is recognised as UCH in the sense of the UCH-Act. Most likely, this was the intention of the Belgian legislator when drafting the Act, but by literally copying the definition from the UNESCO Convention while altering the meaning of UCH, this error crept into the Act.

#### 4.6.2. Specific provisions for State vessels and aircraft

In general lines, the same provisions as for other finds apply to State craft. A number of substantial differences were, however, inserted for dealing with this specific type of wrecks.
The discovery of State vessels and aircraft needs to be reported to the Receiver, but unlike for commercial vessels, no (temporary) transfer of ownership rights will take place in favor of the Belgian State. State vessels and aircraft remain the property of the flag State that was the owner at the time of sinking. The UCH-Act determines that the Receiver shall consult with the flag State with a view to protecting State craft located in the BPNS.[2059] When this wreck is discovered in the territorial sea, this duty to consult goes beyond what is required by the UNESCO Convention as article 7 of that Convention merely provides that the coastal State 'should inform' the flag State. Additionally, the UCH-Act does not limit this duty to consult to the flag States that are party to the UNESCO Convention but seems to require consultation with all flag States, regardless of whether they are party to the UNESCO Convention. While this goes beyond what was determined in the Convention, it is in line with the views expressed by a number of maritime powers during the negotiations on the Convention and the general principle of cooperation inscribed in it. When the wreck is located in the Belgian EEZ or on the Belgian continental shelf, these consultations conducted by the Receiver could form a part of the consultations initiated by Belgium when it acts as the Coordinating State as provided by the Convention.[2060]

This duty to consult the flag State was inscribed in the UCH-Act in the provisions setting out the tasks of the Receiver in relation to the reporting of finds. As was explained, the Receiver drafts a research report on the find based on which the Minister decides whether or not to recognise it as UCH. The explanatory memorandum provides that the Minister can decide autonomously on whether or not to recognise a find as UCH. The UCH-Act nowhere mentions to what extent account should be taken of the report drafted by the Receiver. Nevertheless, as no further consultation

[2059] Article 5§2 UCH-Act 2014.
[2060] This consultation mechanism set out in the UNESCO Convention has not yet been adequately implemented in Belgian UCH legislation. This will be discussed more in detail in section 4.8.

duty is foreseen in a later phase, for example when measures are adopted for the protection of UCH sites, account should be taken of the remarks given by the flag State to the Receiver in order for the UCH-Act to be in compliance with article 10(7) of the UNESCO Convention.

The UCH-Act also provides that it is prohibited to conduct activities directed at State craft without the consent of the flag State, except in the case of immediate danger.[2061] This prohibition also applies to State craft located in the Belgian territorial sea. For this maritime zone this provision goes beyond what is required by the UNESCO Convention.

### 4.7. Import and export of UCH

The UCH-Act provides that it is prohibited to possess or trade in finds that were obtained not in conformity with the Act. This includes finds that have been recovered incidentally without reporting them to the Receiver or finds that were recovered intentionally without prior authorisation from the Receiver. This provision partially implements article 14 of the UNESCO Convention which provides that States must take measures in order 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.*"[2062] This is only a partial implementation as no provisions have been adopted in the UCH-Act relating to the entry of UCH that was recovered or exported illicitly into the Belgian territory. In fact, when assessing this provision even more in detail, the partial implementation of article 14 does not cover the same load as was meant in the UNESCO Convention. As this Convention applies to finds worldwide and the Belgian UCH-Act is limited to the BPNS, the phrase 'finds that were not obtained in conformity with this Act' as provided in article 15 UCH-Act, does not encompass the same objects as are included in the phrase "*underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention*" as provided by article 14 of the UNESCO Convention.[2063] In order to ensure full compliance, the wording of article 15 UCH-Act could potentially be altered so as to include all UCH meant by the UNESCO Convention.

Belgium is legally bound by a number of international instruments concerning the export and import of cultural goods that can assist in the implementation of article 14 of the UNESCO Convention. These instruments include the 1970 UNESCO Convention,[2064] the 2014 EU Directive

[2061] Article 6§2 UNESCO Convention.
[2062] Article 14 UNESCO Convention.
[2063] Artcle 15 UCH-Act 2014 and 14 UNESCO Convention.
[2064] The UNESCO Convention 1970. A number of provisions that deal with the export of heritage and the return of illegally trafficked cultural heritage are included in the UNESCO Model Act implementing the 1970 UNESCO Convention. (Article 10 and 23 UNESCO Model Act) Potentially these provisions could be introduced in the UCH-Act as well requiring that an export certificate, for which a model is provided by the UNESCO Model Act, is obtained from

on the return of unlawfully removed objects from the territory of a Member State[2065] and the 2009 Council Regulation on the export of cultural goods[2066].[2067] These instruments, however, all have their limits and the mere implementation of their provisions in the Belgian legislation does not suffice for Belgium to be in compliance with article 14 UNESCO Convention. The 2009 Council Regulation deals with the export of cultural goods to outside the territory of the European customs union. This Regulation does not provide for any measures to be taken regarding the import of cultural goods in the European customs union or the import and export of cultural goods within the territory of the customs union.[2068] The 2014 EU Directive deals with the restitution of cultural goods that are considered to be part of the national property of a Member State and were illicitly taken from the territory of that State.[2069] This Directive is only applicable to cultural goods originating from the territory of EU member States and thus does not adequately address the issue of illicitly exported heritage worldwide as is meant in the UNESCO Convention. Additionally, this Directive does not prevent the entry into the territory of unlawfully removed cultural goods, but merely provides for their return. Finally, the 1970 UNESCO Convention creates a framework for preventing the illicit import, export or transfer of cultural property. This instrument will in many cases be valuable in light of UCH protection and will apply in case of illicit import or export of UCH. At the moment, however, the Belgian legislator has not yet adopted any provisions for the implementation of the 1970 UNESCO Convention in its national legislation. In 2009, when Belgium ratified this Convention, a consultation platform was created concerning the import, export and restitution of cultural goods. As a result of this platform a draft act for the implementation of the 1970 UNESCO Convention was created that was presented in 2012.[2070] The federal government at

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the competent national authority when wishing to export UCH. The conditions for and modalities of such an export permit can also be included in the UCH-Act. (Article 10 UNESCO Model Act) Alternatively, these provisions could be implemented via more general legislation applicable to all cultural property as is currently being prepared. See *infra* in this section.

[2065] Parliament and Council, Directive 2014/60/EU L 159/1.

[2066] Council Regulation 116/2009 L39/1.

[2067] Another important instrument in this respect is the UNIDROIT Convention in stolen or illegally exported cultural objects of 24 June 1995. This Convention has, however, not been ratified by Belgium.

[2068] Regulations have direct effect in the EU member States and thus do not require conversion into national legislation.

[2069] Wet betreffende de teruggave van cultuurgoederen die op onrechtmatige wijze buiten het grondgebied van bepaalde buitenlandse staten zijn gebracht, *BS* 21 December 1996, 31865. This Act further elaborated and implemented the principles of the 2014 Directive (or rather its predecessor 93/7/EEG) in Belgian national legislation. This Act was altered several times. The last time was on 4 May 2016 (Wet tot wijziging van de wet van 28 oktober 1996 betreffende de teruggave van cultuurgoederen die op onrechtmatige wijze buiten het grondgebied van bepaalde buitenlandse Staten zijn gebracht, *BS* 23 May 2016, 32827. Parliament and Council, Directive 2014/60/EU L 159/1.

[2070] The key aspects of this proposal are the prohibition of the import of cultural goods that were exported or stolen from a museum, archive, library or monument of a State Party to the treaty, and the obligatory restitution of cultural goods that are located in Belgium illicitly on the condition that a correct compensation is provided for the possessor that acted in good faith. Department of Culture, Youth and Media, *UNESCO '70 – Convention on the restitution of*

that time did not consider this draft. In 2016, it was, however, once again placed on the agenda and it is currently being discussed within the Ministry of Justice.[2071]

Two more reasons why these instruments cannot replace a full implementation of article 14 UNESCO Convention should be mentioned. The first reason is that the UNESCO Convention creates a specific regulatory scheme with which the recovery of UCH must comply. For example, in order for such recovery to be done in conformity with the Convention, the Rules of the Annex must be respected. When these Rules were not complied with, the UCH has been recovered illicitly and following article 14 UNESCO Convention should not be allowed in the territory of any State Party to the Convention. As the Rules and provisions laid down in the UNESCO Convention are very specific, what is considered as illicit recovery following this Convention might not be considered as illicit recovery in another instrument such as the 1970 UNESCO Convention. Specific provisions thus need to be implemented in national legislation to prevent that any UCH recovered not in conformity with the Rules of the UNESCO Convention is brought in the territory of a State party. The second reason why the above-mentioned instruments are inadequate to ensure compliance with article 14 UNESCO Convention is because they depart from a territorial point of view dealing with cultural objects that originate from the territory of States. Article 14 on the other hand addresses all UCH worldwide regardless of whether this was discovered in a State's territorial sea or beyond that. In order to prevent the entry into a State's territory of UCH illicitly recovered from the continental shelf, EEZ and in any case from the Area, additional national legislation is required. For these reasons, it is important that Belgium includes a provision dealing with the import of UCH following article 14 UNESCO Convention in its national legislation. This is also suggested by the UNESCO Model Act.[2072]

### 4.8. Extraterritorial application of the underwater cultural heritage act

One of the main objectives of the UNESCO Convention was to create a legal regime for the protection of UCH outside States' territorial waters. The Convention provides rules on how to protect UCH in the EEZ, on the continental shelf and in the Area. For all these zones a specific reporting and cooperation mechanism has been created that should be applied when managing UCH located in these zones.

*culture goods*, www.kunstenenerfgoed.be/nl/beleid/unesco/unesco-%E2%80%9970-conventie-inzake-restitutie-van-cultuurgoederen (consulted 10 August 2018).

[2071] Flemish Parliament, written question from S. DE BETHUNE, 7 April 2017 to S. GATZ (Flemish Minister of Culture, Media, Youth and Brussels), 7 April 2017, nr. 217.

[2072] Article 21(1) UNESCO Model Act.

### 4.8.1. Belgian EEZ and continental shelf

In the Belgian UCH-Act a reporting duty exists for finds located within the Belgian EEZ or on the Belgian continental shelf.[2073] When drafting his research report on the find, the Receiver is bound by a duty to consult with all States that have declared to have a verifiable link with the find as was foreseen in article 9(5) of the UNESCO Convention.[2074] While this is in conformity with the UNESCO Convention, no further mention is made of the result of these consultations and the role of Belgium as the (potential) Coordinating State. The UCH-Act, for example, does not contain provisions on the fact that all measures agreed on during the consultations should be implemented by the competent Belgian authority and that all authorisations necessary therefore shall be issued by this authority. This is nevertheless the basis of the consultation regime in the UNESCO Convention. At the moment the wording of the provisions of the UCH-Act give the impression that the Belgian authorities can autonomously decide whether a find should be recognised as UCH and which measures must be adopted for its protection. No distinction is made in this regard between finds located in the territorial sea, where Belgium indeed has such competence, and those located in the EEZ or on the continental shelf. Except in order to prevent interference with its sovereign rights or jurisdiction and in case of immediate danger, all measures that are taken for the protection of UCH located in the Belgian EEZ or on the Belgian continental shelf should be adopted following consultations with all States that have declared an interest. This distinction between the territorial sea and the EEZ or continental shelf should be reflected in the Belgian UCH-Act.

The UNESCO Model Act provides for the clear implementation of the consultation regime of the UNESCO Convention, and Belgium would do well to do the same. Firstly, the Model Act makes provision for the competent national authority, or potentially foreign office, to assume the role as Coordinating State and consult with all other States Parties to the UNESCO Convention that declared to have an interest on how to protect the heritage based on a verifiable link. Naturally, the competent authority, or the foreign office, can refuse to assume the role of Coordinating State when a reasonable motive exists for this.[2075] Further provision needs to be made describing the role of the competent national authority in case it assumes the role of Coordinating State. The UCH-Act should provide that the national authority has the task of implementing all measures that were agreed on during the consultations and should issue all permits necessary thereto in conformity with the Rules of the Annex.[2076] In order to fully implement the UNESCO Convention, it would be advisable to explicitly mention that the national authority will exercise these tasks

[2073] Article 5§1 UCH-Act 2014.
[2074] Article 8§1 UCH-Act 2014.
[2075] Article 13(1) UNESCO Model Act and article 13(5) UNESCO Convention.
[2076] Article 14(1) UNESCO Model Act and article 10(5) UNESCO Convention.

while acting "*on behalf of all concerned states and for the benefit of humanity*"[2077] and paying particular regard to the preferential rights of the States of origin.[2078]

In order to implement these provisions, clarification must be given on who is the competent authority in this regard. At the moment, the UCH-Act provides for a division of competence between the Receiver, the Minister adopting ministerial decrees and the King and government adopting royal decrees. These authorities will each need to be assigned a well-defined set of tasks in order to ensure that it is clear which authority is responsible for the consultations and which one must ensure that all measures decided on are implemented in a later phase. In any case, following article 22 of the UNESCO Convention the names and addresses of the competent authorities need to be communicated to the Director-General of UNESCO.[2079] It should be clear, both for the Director-General and other States Parties, which authority they need to address in order to initiate or participate in the consultation and cooperation procedure set out in the UNESCO Convention. [2080]

### 4.8.2. EEZ and continental shelf of third States and the Area

The UCH-Act protects UCH located outside the BPNS to a very limited extent. The only provision that can be mentioned in this regard is article 16, which provides that ships flying the Belgian flag cannot be used for activities contrary to the UNESCO Convention regardless of where they are located.[2081] This provision is in fact a partial implementation of article 16 UNESCO Convention which requires States Parties to adopt measures in order to ensure that their nationals and the vessels flying their flag do not engage in activities directed at UCH in a manner that is not in conformity with the UNESCO Convention.[2082] The UCH-Act has implemented this obligation for ships sailing the Belgian flag, but should do this for Belgian nationals as well. As a side note it should be mentioned that the Belgian legislator made the same mistake in article 16 UCH-Act as it did when copying the definition for State vessels and aircraft from the UNESCO Convention. Article 16 UCH-Act provides that ships flying the Belgian flag cannot be used for *activities* contrary to the Convention. The issue here lies with the word 'activities' which in the UCH-Act includes 'all activities having underwater cultural heritage as their primary object'. This definition is copied from the UNESCO Convention. However, as in the UCH-Act, the category 'UCH' is at the moment

[2077] Article 14(2) UNESCO Model Act and article 10(6) UNESCO Convention.
[2078] Article 14(3) UNESCO Model Act and article 10(6) UNESCO Convention.
[2079] As the UNESCO Convention applies to Belgian internal waters as well, the names and addresses of the authorities competent for UCH located in the Regions must be communicated as well.
[2080] The list of national authorities can be consulted on the following website: www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/competent-authorities/.
[2081] Article 16 UCH-Act 2014.
[2082] Article 16 UNESCO Convention.

limited to eleven sites that were formally recognised, this provision does not even come close to covering the same load as meant in the UNESCO Convention. In order to resolve this issue, the term 'finds' should be used rather than 'UCH'.

The UCH-Act makes no provision for the reporting or protection of UCH located in the EEZ or on the continental shelf of a third State. In the previous chapter, and more specifically in the section on the UK and the UNESCO Convention, a possible solution was identified to implement this reporting duty while imposing a minimal burden on the British national authorities.[2083] The UK 2001 UNESCO Convention Review Group provided that following option (i) of article 9(1)(b) UNESCO Convention a State can impose a duty on its nationals and the vessels flying its flag to report any discovery or activity to the coastal State Party to the UNESCO Convention adjacent to the EEZ or continental shelf where the UCH is located. This was considered to be a good option as it entails that no significant additional administrative burden is created for the flag State or State of nationality, being in that case the UK.

While indeed applying this option would limit the burden for the Belgian competent authorities, question arises whether this approach is in fact in conformity with 9(1)(b) of the UNESCO Convention. In the author's view, both options set out in article 9(1)(b) of the UNESCO Convention require Belgium to receive the reports on finds located in the EEZ or on the continental shelf of a third State as well. The first option provides that "*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*".[2084] In this case Belgium, being the State of nationality or the flag State, needs to impose a duty to report both to the Belgian authority as well as to the authority of the third coastal State. The Belgian authority in this case thus needs to be equipped to receive such reports and to notify the Director-General of UNESCO following article 9(3) UNESCO Convention. This is the option adopted by the UNESCO Model Act.[2085] Alternatively, the second option provides that "*a State Party shall*

[2083] See chapter three section 4.7.

[2084] Article 9(1)(b)(i) UNESCO Convention.

[2085] Article 6(7) UNESCO Model Act; article 9(1)(b) UNESCO Convention and article 11(1) UNESCO Convention. In article 9(1)(b) UNESCO Convention, this obligation to report discoveries and activities must only be imposed in the EEZ and on the continental shelf of other State parties to the UNESCO Convention. In the UNESCO Model Act, however, it is provided that such an obligation must be inserted in national legislation for all cultural heritage located beyond the limits of national jurisdiction (article 6(7) UNESCO Model Act). No distinction is made between UCH located in the territory of other States Parties to the Convention or third States in general. While not explicitly required by the UNESCO Convention, this approach seems to be a more practicable one. If the UCH-Act would provide that the reporting duty only applies in the EEZ/ on the continental shelf of other States Parties to the Convention, this would assume that Belgian nationals and masters of vessels flying the Belgian flag are at all times aware of which States are party to the UNESCO Convention, which can easily alter. Additionally, regardless of whether or not another State is a party to the UNESCO Convention, Belgium, by ratifying this Convention, took on the task of assisting with the protection of UCH worldwide, which is not limited to heritage located in the EEZ or on the continental shelf of other State Parties. Similarly, in article 6(10) of the UNESCO Model Act, it is provided that the

*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*".[2086] Likewise, in order to implement this provision in its national legislation, Belgium will have to impose a duty to report to its own competent authorities and ensure the transmission of such reports to all other States Parties. While indeed some discussion exists regarding the question whether article 9(1)(b) allows a coastal State to impose such a reporting duty on third State nationals and vessels, it seems to go too far to assume that when the coastal State would be allowed to do so,[2087] this would exempt the flag State or State of nationality from imposing such a duty on its own nationals and flagged vessels. In other words, there does not seem to be an acceptable interpretation that can be given to article 9(1)(b) UNESCO Convention which includes that the competent authorities of the flag State or State of nationality do not need to receive and address the reports made following this provision. Sufficient administrative and financial means thus need to be in place to ensure the full implementation of these provisions.

For finds located in the Area, this point is clearer and there is no discussion on the fact that the UCH-Act will have to impose a duty on the Belgian nationals and the vessels flying the Belgian flag to report any discoveries or activities directed at finds located in this zone directly to the Belgian authority.

In order to fully implement the mechanisms for the extraterritorial protection of UCH set out in the UNESCO Convention, additional provisions need to be implemented besides the mere reporting duty. These provisions relate to the tasks of the competent national authority. This authority must, *inter alia*, notify the Director-General of UNESCO of any reported discoveries and intended activities. When these discoveries or intended activities take place in the Area the Secretary-General of the ISA must be notified as well.[2088]

The Belgian competent authority needs to declare an interest in all UCH located in the EEZ or on the continental shelf of another UNESCO State Party or in the Area when it is believed that Belgium has a verifiable link with this heritage.[2089] When the national authority is invited by the Director-

flag State or State of nationality should impose a duty to report to the competent authorities of the third coastal State as well regardless of whether this coastal State is a State party to the UNESCO Convention or not. This provision goes one step beyond what is required by the UNESCO Convention. Nevertheless, especially in light of reciprocity and providing for a worldwide protection of UCH, it seems advisable to inform the coastal State of discoveries made in its EEZ or on its continental shelf. Article 6(10) UNESCO Model Act.

[2086] Article 9(1)(b)(ii) UNESCO Convention.

[2087] As was explained in chapter one and three, the idea that the coastal State can oblige third State nationals and flagged vessels to report the discovery of UCH in its EEZ or on its continental shelf to it is far from internationally accepted.

[2088] Article 11(1) UNESCO Model Act, article 9(3) UNESCO Convention and article 11(2) UNESCO Convention.

[2089] Article 12(2) UNESCO Model Act, article 9(5) UNESCO Convention and article 11(4) UNESCO Convention.

General of UNESCO to consult on the protection of UCH located in the Area, it must declare how this UCH should be best protected, which State should be appointed as Coordinating State and it must conduct and coordinate the consultations if Belgium were to be appointed as Coordinating State.[2090]

By altering and adding all the above mentioned provisions, the UCH-Act will provide for the extraterritorial protection of UCH as required by the UNESCO Convention. This will also ensure that the sanctions as set out in the UCH-Act "*discourage violations wherever they occur*" as is required by article 17(2) UCH-Act.[2091]

## 4.9. Sanctions and enforcement

### 4.9.1. Sanctions

In order to enforce the UCH-Act, sanctions are imposed to punish any offence committed under the Act. These sanctions include imprisonment of eight days going up to two years and/ or a fine of 26 up to 500 euros. When the infringement of the Act is directed at State vessels or aircraft, the punishment increases to imprisonment of up to five years and an automatic fine of 26 up to 500 euros.[2092] A specific provision has been made for the seizure of finds that were not reported in conformity with article 5§1 UCH-Act and that were taken or traded illicitly.[2093] These finds then become the property of the Belgian State.[2094]

The UNESCO Convention imposes three requirements with which the sanctions in national legislation must comply: 1) the sanctions must be adequate in severity in order to ensure compliance with the UNESCO Convention; 2) the sanctions must discourage violations wherever they occur; and 3) the sanctions must deprive offenders of the benefit that they derived from the illegal activities.[2095]

In the UCH-Act, the first requirement seems to be fulfilled as the Act provides for the option to impose both a prison sentence and a fine. Merely imposing a fine could be insufficient for people that repeatedly and intentionally recover finds with a view to selling them as the profits of such practice could exceed the potential fine. On the other hand, for persons accidentally breaching the

[2090] Article 13(2) UNESCO Model Act.
[2091] Article 17(2) UNESCO Convention. See *infra* section 4.9.1.
[2092] Article 17 UCH-Act 2014. The provisions of book I of the criminal code should be applied to the infringements mentioned in article 17 UCH-Act 2014. Article 19 UCH-Act 2014.
[2093] Article 18 UCH-Act 2014.
[2094] Explanatory memorandum UCH-Act 2014, 15-16.
[2095] Article 17 UCH-Act 2014.

UCH-Act, a small fine will often be sufficient to ensure that no further violations take place in the future. Interestingly, the sanctions increase in case the object of the offence is a State vessel or aircraft. This illustrates the importance that the Belgian legislator attaches to both Belgian and foreign State craft. On the other hand, this also entails that when a person for example does not report a find to the Receiver, this person might be punished more severely when this find constitutes a State vessel or aircraft, regardless of whether he was aware of this or not. This might be considered as an unfair distinction in penalty.

The third requirement, namely that offenders must be deprived from the benefit derived from their illegal activities is implemented in article 18 of the UCH-Act. This article provides that finds that were not reported and were illicitly taken or traded can be seized.[2096] This provision is based on article 18 UNESCO Convention, which provides that State Parties must take measures to provide for the seizure of UCH that has been recovered in a manner not in conformity with the Convention.[2097] It appears, however, that article 18 of the UCH-Act does not completely implement this provision. Seizure only seems to be possible in case a find was not reported and subsequently taken into possession or traded illicitly. No mention is made of the possibility to seize an object which is, for example, recovered in a way not in conformity with the Rules of the Annex. The same is true for finds that were in fact reported to the Receiver, but that are subsequently recovered without his authorisation. This provision should be formulated in a broader sense allowing for the seizure of all finds that were obtained in a manner not in conformity with the UCH-Act or UNESCO Convention.

As for the second requirement, namely that the sanctions must discourage violations wherever they occur, it appears that the UCH-Act at the moment still falls short of implementing this. The UCH-Act is mainly focussed on the BPNS and only has limited application outside this area. The only provision dealing with UCH worldwide is article 16 UCH-Act prohibiting the use of ships flying the Belgian flag for activities that are contrary to the UNESCO Convention.[2098] The sanctions provided for in the UCH-Act mainly apply to finds and UCH located in the BPNS. As is explained above, no provisions have been adopted in the UCH-Act requiring Belgian nationals or ships to report finds worldwide or to abstain from damaging them. The sanctions of the UCH-Act therefore at this time do not discourage violations of the UNESCO Convention wherever they occur.

[2096] Article 18 UCH-Act 2014.
[2097] Article 18 UNESCO Convention.
[2098] Article 16 UCH-Act 2014.

### 4.9.2. Enforcement

In order to ensure compliance with the UCH-Act, supervisory tasks for its enforcement should be awarded to such authorities as the coast guard, customs and police services. In the French Heritage Code a large number of persons and entities are given responsibilities to assist in the enforcement of this Code including police officers, customs officers and commanders of ships. Especially when considering the difficulty of monitoring at sea, as many entities as possible should be involved to assist in the enforcement of the UCH-Act. In fact, during the third Meeting of States Parties of the UNESCO Convention, it was stated that national authorities, ministries and departments that undertake activities on the seabed should be required in national legislation to confidentially communicate information relating to UCH or activities affecting it to the national competent authorities. These entities include coast guards, the navy, dredging companies, research services and companies responsible for the monitoring of fishing activities.[2099]
Furthermore, provisions could also be included specifying the competences of these authorities in terms of enforcement. For example in the UK MSA it is explicitly provided that the Receiver can obtain a search warrant in order to enter a house or vessel to search for and detain a wreck not obtained or managed properly.[2100] Similar provisions clearly determining the responsibilities and competences of each authority should be included in the UCH-Act.

## 4.10. Law of salvage and finds and commercial exploitation

An important aspect to note with regard to the implementation of the UNESCO Convention in the UCH-Act is the limited application of the law of salvage and finds, combined with the prohibition to commercially exploit UCH. As is discussed in chapter one, article 4 of the UNESCO Convention provides that the law of salvage and finds can only apply when three conditions are fulfilled: 1) the competent authorities must have authorised the application of the law of salvage and finds, 2) the salvage operation must be conducted in conformity with the Convention, and 3) each salvage operation must guarantee the maximum protection of the heritage.[2101] In its advice on the UCH-Act, the Council of State pointed out that the last two requirements of article 4 UNESCO Convention had not been implemented.[2102] The explanatory memorandum accompanying the UCH-Act, however, contradicts this and provides that article 4 UNESCO Convention has in fact been fully implemented, be it implicitly. Firstly, article 6 UCH-Act prohibits the recovery of finds without the explicit authorisation from the Receiver. This provision thus automatically excludes the

[2099] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Third Session, Paris, Paris, 13-14 April 2011, UCH/11/3.MSP/220/11REV2, Resolution 6/MSP 3, 3.
[2100] See chapter three section 4.2.5.1.
[2101] Article 4 UNESCO Convention.
[2102] Council of State Advice draft UCH-Act, 9.

application of the law of salvage. Secondly, article 5§2 UCH-Act provides that title to finds, with the exception of State craft, is in first instance awarded to the Belgian State. Therefore, at least initially, the application of the law of finds is excluded. Only when the Minister decides that the find does not constitute UCH, title over it will be transferred to the finder. When the Minister determines that the find in fact does constitute UCH, it can either be protected *in situ* or not. When the decision is made that the UCH should be protected *in situ*, the application of the law of finds and salvage is automatically excluded. When the UCH is not protected *in situ*, title over it must be awarded in accordance with articles 10-13 UCH-Act. In this case, the law of finds will only be applicable when the finder obtains the ownership rights following article 13 UCH-Act.

When the decision would be made to recover an UCH site, the question arises whether the Rules of the Annex to the UNESCO Convention should be respected as this is not explicitly provided for in the UCH-Act. In order to comply with article 4(b-c) UNESCO Convention the recovery of UCH should be subjected to these Rules. The UCH-Act does determine that the owner must store, preserve and manage the UCH in such a way that its long term preservation is ensured. For this reason the explanatory memorandum concluded that article 4 UNESCO Convention was fully implemented.[2103] While not explicitly provided for in the UCH-Act, it is very important that the Rules of the Annex are respected for all activities directed at UCH regardless of whether this UCH is preserved *in situ* or not. This is necessary in order to comply with article 4 UNESCO Convention.

The prohibition to commercially exploit UCH is not explicitly included in the UNESCO Convention either. The explanatory memorandum accompanying the UCH-Act once again explains that this implementation was done implicitly. Firstly, this principle is partially implemented in article 15 UCH-Act dealing with the prohibition of possession and trade in illicitly obtained UCH.[2104] The second part of the implementation according to the explanatory memorandum can be seen in articles 10-13 UCH-Act regarding ownership rights to UCH that is not protected *in situ*. The reasoning here is similar to the one set out above for the application of the law of salvage and finds. As heritage is either protected *in situ* or title to it is awarded to a person or institution who must ensure its long-term preservation, the UCH-Act does not allow for the commercial exploitation of the UCH. The explanatory memorandum points out that this does not entail that no financial benefit can be gained from the UCH. A museum can display the heritage for the general public and charge a fee to its visitors. The owner of the UCH can also chose to sell the heritage as long as he can ensure that it will be stored, preserved and managed with a view to its long term preservation.[2105]

[2103] Explanatory memorandum UCH-Act 2014, 6-7.
[2104] Explanatory memorandum UCH-Act 2014, 15.
[2105] Explanatory memorandum UCH-Act 2014, 13.

## 4.11. Competent authorities in light of the specific Belgian competence division

As was explained above,[2106] one of the main challenges that the Belgian legislator faced when drafting the UCH-Act was the competence division in the field of cultural heritage protection. The legislator needed to integrate the experience and knowledge that already existed at the Flemish level into federal legislation while still respecting the competence division as established in the Belgian constitution. This balancing exercise is reflected in the UCH-Act and the policy surrounding it.

The UCH-Act determines that the final decision on whether or not a find is to be recognised as UCH is a federal matter. Likewise, any measures that need to be adopted for the protection of these sites are adopted at the federal level through ministerial or royal decree. The main decision power thus lies with the federal authorities. However, efforts have been made to involve the Flemish authorities competent for heritage protection as well. For this purpose, the province governor of West-Flanders, who has been designated as the Receiver, already serves as some sort of intermediary. The governor is namely a commissioner of both the Flemish and the federal government and fulfils tasks linked to both Flemish and federal competences.[2107]

In order to support the governor in his role as Receiver, a protocol was concluded in 2014 between the Flemish government, represented by the administrator-general of the FHA, and the governor.[2108] This protocol determines that during the first two years after the entry into force of the UCH-Act the FHA would advise the governor on several aspects of its duty such as registering, publishing and preserving a find; granting authorisations for recovering UCH; conducting activities directed at *in situ* preserved heritage and drafting research reports on the heritage value of reported finds.[2109] After these first two years, which ended in June 2016, it was foreseen that this advisory role would decrease and that the FHA would become part of an advisory council.[2110] In November 2016, it was decided that the protocol would remain in force for two more years, until

[2106] See *supra* section 2.
[2107] The governor has tasks in the field of local governments, hunting, water policy, environmental enforcement, beach concessions, the provincial fishing commission, safety, delivering traveling documents for *inter alia* certain Belgians and recognised refugees, provincial tasks and a large number of tasks relating to the North Sea such as presiding over the meetings of the coast guard, presiding over the safety consultation of the coastal majors, acting as the general coordinator of incidents at sea and presiding over the Flemish Institute for the Sea. Carl Decaluwé – Governor of West-Flanders , http://gouverneurwest-vlaanderen.be/ (consulted 11 August 2018). As the protection of UCH is only one of the many tasks of the governor, caution must be taken that in case of more urgent matters this topic does not disappear into the background and is inadequately addressed.
[2108] Protocol between the Flemish Region, represented by Miss Sonja Vanblaere, administrator-general of the Flanders Heritage Agency, and the governor of the province of West-Flanders in the framework of executing the law on the protection of underwater cultural heritage, 2014, unpublished. (Protocol UCH-Act 2014)
[2109] Article 2 Protocol UCH-Act 2014.
[2110] Article 3 Protocol UCH-Act 2014.

June 2018.[2111] Meanwhile the governor established some form of informal council. This council is mainly composed of divers and marine archaeologists and has the objective of advising the governor in his role as Receiver.[2112] In addition to giving advice, the 2014 protocol requires the FHA to make all available data on UCH from the last decennium accessible to the governor.[2113] As for the tasks of the governor, the protocol determines that he must ensure that the expertise necessary for him to fulfil his task as Receiver is gathered within his office.[2114] Furthermore, he must make sure that all information on reported finds, on requests for authorisation for recovering finds and for conducting activities directed at finds is transferred efficiently to the FHA in order to allow them to include this information in their database on marine archaeology.[2115] Finally both the FHA and the governor must inform each other of activities relating to UCH in the North Sea (co)organised be them and must invite each other to cooperate.[2116] The cooperation must be evaluated by the parties every two years.[2117]

This protocol expired in June 2018. Since then no formal cooperation agreement has been concluded with the FHA. While it is true that at the moment the FHA is part of the informal council of the Receiver, its role remains fairly limited. However, as this institution is one of the few government agencies that conducted research on UCH over the last decade and gathered large amounts of expertise, consideration should be given to concluding a formal cooperation agreement between the FHA on the one side and the Receiver and Minister on the other. This way it can be ensured that all knowledge and expertise that already exists in the field is used for UCH management.

## 5. Developments since the entry into force of the underwater cultural heritage act

Since the entry into force of the UCH-Act, a number of finds have already been reported, the Receiver has created a register as requested in the Act, a number of finds have been recognised as UCH and further legislative measures have been taken in order to protect the UCH sites.

### 5.1. Register

Following articles 7 and 9 UCH-Act the Receiver created a register containing all finds located in the BPNS, both the ones that were reported following the UCH-Act as well as those that were

[2111] Letter from Sonja Vanblaere to Carl Decaluwé, 25 November 2016, unpublished.
[2112] Reports of the council of the Receiver of 27 October 2014, 22 March 2017 and 18 September 2017, unpublished.
[2113] Article 4§1 Protocol UCH-Act 2014.
[2114] Article 1 Protocol UCH-Act 2014.
[2115] Article 4§2 Protocol UCH-Act 2014.
[2116] Article 5 Protocol UCH-Act 2014.
[2117] Article 6 Protocol UCH-Act 2014.

already known prior to this.[2118] The register consists of a number of categories such as 'UCH sites for which protective measures have been taken', 'UCH sites', 'sites that are still being assessed by the Minister' and 'other finds at sea'. The last category is by far the largest and the one that raises the most questions. It is not clear whether at one point an assessment will be made of the heritage value of the objects contained in this category to determine whether these are UCH. For finds discovered after the enactment of the UCH-Act, such an assessment needs to be made following the Act and a final decision needs to be taken about their nature and fate. Most finds were, however, already known prior to the enactment of the UCH-Act. Question thus arises in what way such finds are protected. The only reference that is made to finds discovered prior to the Act is that they can be included in the register of the Receiver. No specifications have been given on whether an assessment should be made of the heritage value of such finds or in what way they should be protected. Nevertheless, the UCH sites that were recognised up till this point mainly consist of wrecks that were already known prior to the enactment of the UCH-Act. Clarification on this point is thus highly needed.

## 5.2. Recognised underwater cultural heritage sites

At the moment eleven sites have been officially recognised as UCH sites. These sites are the following: 't Vliegent Hart, the Branlebas, HMS Brilliant, the wreck on the Buiten Ratel Sandbank, the Kilmore SS, the West-Hinder, the HMS Wakeful, the remains of a wooden vessel, the Motor Launch 561, the UB-29 and the U-11 SM. A number of observations can be made concerning these recognised UCH sites.

### 5.2.1. Limited application of the underwater cultural heritage act

The first observation that can be made is that all the finds that were recognised as UCH are (parts of) shipwrecks. No other types of finds have at the moment been recognised as UCH. A number of reasons can be thought of explaining this. Firstly, in the BPNS, the major part of all known underwater sites consist of shipwrecks. About 290 wreck sites have been identified. Of these sites about 236 are located within the Belgian territorial sea and the rest is located on the Belgian continental shelf. These wreck sites have been preserved over the years in varying degrees ranging from very bad to excellent. In the database for maritime archaeology of the FHA about 108 wreck sites are considered to be excellently preserved.[2119]
A second reason might be that the locations of shipwrecks are often known by divers and are popular spots for tourism. This entails that these wreck sites might be in danger from being looted.

[2118] This register can be consulted at the following link: www.vondsteninzee.be
[2119] J. VERMEERSCH, I DEMERRE, M. PIETERS and S. VAN HAELST, *Definitions and criteria for tailoring the management regime, Part 1 Wrecksites*, SeArch Report WP 2.2.2., 3-4. (VERMEERSCH *et al*., SeArch report WP 2.2.2.)

Furthermore, when these wreck sites lie on the seabed, activities taking place in their vicinity might damage them. For this reason wrecks often are in need of protection. Isolated objects, such as prehistoric finds, are in many cases much more difficult to locate and are less likely to be preserved *in situ*. At the moment, the Minister is assessing twelve more finds to determine whether they should be recognised as UCH. Most of them are (parts of) shipwrecks and aircrafts. A number of these finds were already recovered and will thus not be protected *in situ*. In any case, it seems that most of the UCH protected by the UCH-Act will continue to consist of (parts of) shipwrecks and aircrafts.

### 5.2.2. Criteria for recognition

#### 5.2.2.1. Criteria for shipwrecks

A second observation that can be made is that seven out of the eleven shipwrecks recognised as UCH can be qualified as maritime graves.[2120] It appears that this is one of the criteria taken into account by the Minister when deciding on whether or not a shipwreck should be recognised as UCH. From 2013-2016 in light of the so-called 'SeArch project', research was conducted on archaeological heritage in the North Sea. One of the main objectives of this project was to further a clear policy and help create a comprehensive legislative framework for managing UCH.[2121] Within the framework of the project, a number of criteria were created by the FHA to valuate and score wreck sites.[2122] These criteria are divided into three categories that must each be assessed to determine the heritage value of the site.

The first category relates to the quality of the wreck site. Under this category an assessment is made of the rarity of the site within the BPNS, the date of its sinking, the question of whether the wreck is a maritime (war) grave, the wreck's surroundings as well as its historical or archaeological context and finally, whether the wreck has a link with an important historical event.[2123] It is interesting to note that a higher score is given to wreck sites that are maritime 'war graves'

[2120] 't Vliegend Hart, HMS Wakeful, West-Hinder, U-11, Branlebas, H.M. Motor Launch 561 and UB-29 are maritime graves. The U-11, HMS Wakeful, Branlebas, H.M. Motor Launch 561 and UB-29 are considered to be 'maritime war graves' following either the register of the Receiver or the database for maritime archaeology of the FHA.
[2121] For more on this project see www.sea-arch.be
[2122] Such criteria for assessing the heritage value of a site have been created in other States as well. For example, in the Netherlands these are included in the assessment guideline and quality standards and in England these can be found in the guidelines set out by Historic England. See chapter three.
[2123] The idea is that when more than three questions on the quality of a wreck cannot be answered, additional research needs to be conducted. This additional research can consist of desk research, field research making use of geophysical techniques and/or underwater research. In accordance with the UNESCO Convention, such surveys must be conducted by qualified persons and in consultation with the competent authorities to determine which techniques and methodology should be used. VERMEERSCH *et al*., SeArch report WP 2.2.2., 7-9 and 18.

compared to wreck site that are maritime graves without a link to any military event. 'Maritime war graves' are the wrecks of ships that sank while in military service with the loss of lives. This includes the wrecks of merchant vessels that were taken into service in times of war and sank during hostilities.[2124]

The second category of criteria assesses the value of the experience that the wreck site offers. In light of this, the remembrance value of the wreck and the frequency with which the site is visited are taken into account. When the site scores low on both remembrance value and diving frequency, the potential for making the site accessible should be considered. A site can be made accessible by organising diving excursions or by any other means such as brochures, education and exhibits. It is, in other words, important that people are aware of the existence of a site and that they can enjoy it in one way or another. [2125]

Finally, a last category of criteria relates to the physical state of the wreck site. Account is taken of the integrity of the wreck, its state of preservation and the extent to which the seabed covers it. The physical state of a wreck site is only assessed in second instance as this should not be a decisive factor to determine the heritage value of a site. A poorly preserved site can still have great heritage value.[2126]

Based on the assessment of these categories of criteria, two decisions need to be made. The first decision is whether or not a wreck should be recognised as UCH. For this purpose the first two categories should be looked into. The final category of criteria relating to the physical state of the wreck site should be used to decide what kind of measures need to be taken for its protection and management.[2127]

It has been recognised that even when a wreck has a low score following the criteria set out above, it might still be of considerable historical importance. To ensure that such wreck sites do not fall outside the protection of the UCH-Act, the additional criterion of representativeness might offer a solution. This criterion assesses the extent to which a wreck is characteristic for a certain period of time or area. Representativeness is not considered as a separate criterion, but can be used to correct assessments that would result in important sites not to be recognised as UCH.[2128]

[2124] The SS Storaa as discussed in chapter two would most likely be considered as a 'maritime war grave' following these criteria.
[2125] VERMEERSCH *et al*., SeArch report WP 2.2.2., 4-13.
[2126] VERMEERSCH *et al*., SeArch report WP 2.2.2., 4-13.
[2127] VERMEERSCH *et al*., SeArch report WP 2.2.2., 4.
[2128] VERMEERSCH *et al*., SeArch report WP 2.2.2., 17-18.

It is interesting to note that some of the wreck sites that obtain the highest scores when assessed according to these criteria, have not yet been recognised as UCH. Of the wreck sites that were assessed in light of the SeArch project and that scored the highest in terms of heritage value, only three out of the ten were recognised as UCH sites, namely the HMS Wakeful, the HMS Brilliant and the West-Hinder.[2129] The other seven sites have at this point not yet been recognised, while, considering the high heritage value of these sites, this seems to be desirable and even necessary in light of complying with the obligations set out by the UNESCO Convention. All of these sites can in theory be recognised as UCH sites. Out of these seven, five are located in the Belgian territorial sea, where it does not matter when they sank.[2130] The other two are located on the Belgian continental shelf, but have been submerged for over 100 years and thus qualify as UCH.[2131]

#### 5.2.2.2. Criteria for other finds

The criteria set out in the previous section were designed to assess the heritage value of wreck sites. Nevertheless, during the SeArch project it was established that the BPNS has a large potential for discovering other types of finds as well.[2132] These other finds can include all types of objects such as prehistoric settlements, material used for fishing, submerged harbour structures and cities. In light of the SeArch project, the FHA wished to address these type of finds and created a separate set of criteria that should be used to assess the heritage value of such finds. As in the BPNS the main part of all known finds consists of wreck sites, it was believed that there was no need to further distinguish between the different categories of 'other finds' in terms of which criteria should be used.[2133] A set of generally applicable criteria is therefore formulated that applies to a wide scale of finds without surpassing the specificity of each find.[2134] Four main categories of criteria were created of which the first three are the same as the ones for shipwrecks. These

[2129] VERMEERSCH *et al*., SeArch report WP 2.2.2., 24.
[2130] These are the Bourrasque which sank in 1940, the HMS Sirius which sank in 1918, the UB-20 which sank in 1917, the UB-57 which sank in 1918 and the HMS Waverly which sank in 1940. See Flanders Heritage Agency, *Database on Maritime Archaeology*, www.maritieme-archeologie.be/.
[2131] These are the UB-13 which sank in 1916 and the UB-16 which sank in 1918. Since this year, both these wreck sites can potentially be recognised as UCH in the UCH-Act. See Flanders Heritage Agency, *Database on Maritime Archaeology*, www.maritieme-archeologie.be/.
[2132] On the beaches of Raversijde-Mariakerke and Wenduine Roman traces and artefacts have been discovered. Based on these finds the presence of a roman settlement can be assumed of which traces are likely to be found in the BPNS as well. Likewise traces of medieval settlements have been discovered along the Belgian beaches including on the beaches of Raversijde-Mariakerke, Bredene, Wenduine and Heist. A number of medieval islands such as Waterdunen, Wulpen, Koezand and Schoneveld, as well as medieval Ostend are now submerged and remnants of them can still be found. Even though to date little research has been conducted on these sites, these finds do indicate that the BPNS has potential for the discovery of UCH other than shipwrecks. H. LETTANY, M. PIETERS and S. VAN HAELST, *Definitions and criteria for tailoring the management regime, Part 2 Other finds*, SeArch report WP2.2.2., 5. (LETTANY *et al*., SeArch report WP 2.2.2. part 2)
[2133] LETTANY *et a*l., SeArch report WP 2.2.2. part 2, 3.
[2134] LETTANY *et al*., SeArch report WP 2.2.2. part 2, 14.

categories have, however, been filled in somewhat differently than is the case for wreck sites. The assessment of a find's quality is based on its (archaeological) information value, rarity, representativeness and contextual value. To determine the value of the experience that the find offers for the general public account is taken of the visibility of the find in its surroundings, its aesthetic value, its remembrance value and the potential for making the find accessible. As is the case for wrecks, the physical integrity of the find is taken into account not to assess its heritage value, but to determine a management strategy for its preservation when necessary. A final criterion that is assessed when dealing with finds other than wreck sites is the possible change of the find. As is the case with the physical state, this criterion does not determine the heritage value of the find but rather allows an assessment to be made on the extent in which specific processes can alter it. By considering the heritage value, the physical quality and to what extent a find's heritage value might be altered, a suitable management strategy can be created that fits the specific needs of each individual find.[2135]

### 5.2.3. Location of underwater cultural heritage sites

A third observation that can be made on the sites that have been recognised as UCH relates to their location. Of the eleven sites that have been recognised, only three are located on the Belgian continental shelf. These are the UB-29, West-Hinder and the SS Kilmore. All other wrecks are located in the Belgian territorial sea. In order to fall under the UCH-Act, sites located on the continental shelf must have been submerged for at least 100 years. This is the case for the UB-29, West-Hinder and SS Kilmore, which respectively sank in 1916, 1912 and 1906.[2136] Following the UNESCO Convention, for these wrecks the cooperation and consultation mechanism as set out in articles 9-10 UNESCO Convention should have entered into force. Most likely, being the coastal State, Belgium should act as the Coordinating State in this process. In the UCH-Act, however, no provisions can be found clearly implementing this mechanism. Likewise, it does not appear that such negotiations in the form as set out in the UNESCO Convention took place prior to adopting the measures for the protection of these sites. Maybe these consultations will take place at one point in the future. In any case, when activities are directed at these UCH sites, the consent of the flag State will be required following the UCH-Act.[2137]

In the territorial sea, finds fall under the UCH-Act regardless of how long they have been submerged. A number of the recognised UCH sites in the Belgian territorial sea have not yet been submerged for 100 years. The HMS Wakeful, for example, sank in 1940 at the beginning of WWII. It will thus still take 22 more years for this UCH site to fall under the UNESCO Convention. The HMS

[2135] LETTANY *et al*., SeArch report WP 2.2.2. part 2, 6.
[2136] Flanders Heritage Agency, Database on Maritime Archaeology, www.maritieme-archeologie.be/.
[2137] Article 6§2 UCH-Act 2014.

Brilliant only very recently reached the 100 year-benchmark as it sank on 23 April 1918. This wreck was, however, already recognised as an UCH site in 2016. Finally, the H.M. Motor Launch 561 sank on 21 October 1918 and will thus have been submerged for 100 years only in October 2018.[2138]

As was already pointed out, the fact that for finds on the continental shelf the UCH-Act only applies when the find has been submerged for over 100 years can leave potentially interesting sites unprotected. When having a look at the assessments by the FHA based on the criteria set out above, it becomes clear that a number of wreck sites located on the continental shelf with high heritage value remain unprotected at the moment. The wreck of the LCT(R)-457 HM, a British Royal Navy landing craft that was leased by the US, scored a seven after being assessed in accordance with the heritage criteria. When considering that the highest ranked wreck sites got a score of eight, it can be said that this wreck is of considerable importance. However, as this wreck only sank in 1944 after hitting a mine, it will not fall under the protection of the UCH-Act and the UNESCO Convention for another 26 years. By that time, the wreck can be completely destroyed or looted by divers. The same is true for two other wreck sites that scored a six in the assessment. These are the wreck of the Rijnstroom SS which sank in 1940 and the wreck of the Vorpostenboot V-1302 which sank in 1942.[2139] It is likely that these wreck sites will in the future qualify as UCH following both the UNESCO Convention and the UCH-Act. In order to ensure that these wrecks are not completely looted or destroyed by the time that they qualify for recognition, measures should be adopted for their protection.

A solution could potentially be to completely abolish the 100-year time-criterion in the UCH-Act. This would allow younger finds located in the Belgian EEZ or on the Belgian continental shelf to be protected as 'finds', or even UCH, as well. Additionally, it would be beneficial if such younger finds located in the EEZ or on the continental shelf would fall under the reporting duty as set out in the UCH-Act as well. This way the Receiver will be informed of any discovery regardless of how long the find has been submerged.[2140]

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[2138] Flanders Heritage Agency, Database on Maritime Archaeology, www.maritieme-archeologie.be/.

[2139] VERMEERSCH *et al*., SeArch report WP 2.2.2., 24. It is interesting to note that all three of these wreck sites are considered to be 'maritime war graves'. (Flanders Heritage Agency, Database on Maritime Archaeology, www.maritieme-archeologie.be/.) As no legal framework exists for the protection of 'maritime war graves', however, this does not offer a solution for ensuring the safekeeping of these sites.

[2140] As a general remark, it should be noted that it is not easy for the finder of an object or site to assess how long it has been submerged. For many sites, it will be impossible to determine this at first sight and further research will be necessary to identify, for example, a discovered wreck. Therefore, it might be difficult for the finder to assess whether he is bound by the reporting duty set out of the UCH-Act. To avoid confusion on this and to ensure that the competent authority gathers as much information as possible on what is located in or on the seabed, the reporting duty should ideally apply in all maritime zones regardless of how long a find has been submerged.

Alternatively, a separate piece of legislation could be drafted prohibiting the search for, recovery, damaging, looting, destruction… of wreck sites located in the Belgian EEZ or on the continental shelf regardless of their age without prior authorisation. This legislation would ensure that wreck sites remain intact until the moment that they fall under the UCH-Act and might be considered as UCH. While the creation of such a separate legislation would amount to a similar result as altering the UCH-Act, it does not seem to be desirable to do so since this would only lead to legal fragmentation. Furthermore, in practice it is likely that the same authorities that are competent under the UCH-Act would be competent for this new legislation as well. This would needlessly complicate things.

As is explained in this chapter and the previous ones, it is not generally accepted that coastal States have jurisdiction over UCH located in their EEZ or on their continental shelf which entails that provisions unilaterally protecting such heritage made by the Belgian legislator are likely not to bind third State nationals and flagged vessels. This, however, does not mean that no provisions in this sense should be adopted. On the one hand, provisions dealing with younger finds must at least be respected by Belgian nationals and Belgian flagged vessels. This can already help ensure that future UCH sites are not looted or destroyed. On the other hand, in order to expand the effect of such provisions Belgium could enter into bi- and multilateral agreements with other States, for example a North Sea agreement.[2141] Asides from Germany and indirectly the UK in the PMRA, none of the States assessed in chapter three are planning to adopt provisions dealing with UCH located in their EEZ or on their continental shelf. It seems that the reason for this is not a disinterest in the protection of UCH beyond their territorial sea, but rather the fact that these States do not believe that the coastal State has competence over UCH in its EEZ or on its continental shelf. This was also one of the main issues which resulted in these States to abstain from voting on the UNESCO Convention. Entering into a multilateral agreement for the North Sea would in fact strengthen their position in this matter, confirming that one coastal State by itself cannot impose a binding reporting duty and measures to ensure the protection of UCH in its EEZ or on its continental shelf. Whether the North Sea States would be willing to enter into an agreement that also covers discoveries that have not yet been submerged for over 100 years is another matter. As this would go beyond what is required by the UNESCO Convention, this might discourage States from entering into such an agreement. This is especially true for the UK, which at the moment still heavily relies

[2141] Such an agreement could be adopted in conformity with article 6 UNESCO Convention. This would be the first regional agreement to be adopted based on this provision since the failed attempt to conclude such an agreement for the Mediterranean. Following article 6 UNESCO Convention, such an agreement must be in conformity with the provisions of the Convention. Within this framework, however, such an agreement would further the protection of UCH for example by protecting heritage that has not yet been submerged for 100 years located in the EEZ and on the continental shelf. Such an agreement could also strengthen the cooperation between the North Sea States in the training in underwater archaeology, information sharing, conservation and study of UCH as is required in articles 19 and 21 UNESCO Convention. Belgium could in this regard take the initiative for such an agreement for the North Sea.

on a site-based approach. On the other hand, Germany, the Netherlands and France do not apply a time-criterion in their territorial sea and thus already go beyond what is required by the UNESCO Convention. Furthermore, much would also depend on whether entering into such an agreement would benefit those States. For example, of the three younger wrecks located on the Belgian continental shelf that score high in terms of heritage significance, two are German and one is British. This might be an incentive for these States to enter into an agreement for the protection of these wrecks.

#### 5.2.4. Nationalities of underwater cultural heritage sites

A final observation that can be made is that the UCH sites protected by the UCH-Act are of different nationalities. 't Vliegent Hart and the wreck on the Buiten Ratel Sandbank were sailing the Dutch flag at the time they perished. The HMS Wakeful, HMS Brilliant, SS Kilmore and H.M. Motor Launch 561 operated under the British flag. The UB-29 and U-11 sank while sailing under the German flag and the Branlebas while sailing under the French flag. The West-Hinder was a Belgian vessel. The SS Kilmore, UB-29 and West-Hinder are located on the Belgian continental shelf, while the other wreck sites can be found in the territorial sea. This practice of protecting wreck sites regardless of their nationality or owner complies with the underlying idea of the UNESCO Convention that all States should cooperate in protecting UCH, regardless of in which maritime zone this heritage is located. By ratifying the UNESCO Convention, Belgium has accepted the responsibility to protect all UCH regardless of its origin. Additionally, this approach can prove to be valuable and set an example in light of reciprocity between States in protecting UCH worldwide.

### 5.3. Measures adopted to protect the recognised heritage sites

The UCH sites recognised by the UCH-Act are protected by a number of measures set out in ministerial and royal decrees.

On 21 September 2016 a royal decree was adopted containing regulatory measures for the protection of UCH (royal decree on regulatory measures).[2142] These measures apply to all *in situ* preserved UCH sites. *In situ* preserved heritage is defined as finds that have been recognised as UCH following article 8§1 UCH-Act AND that are being protected *in situ* as determined by article 8§3 UCH-Act.[2143] Article 8§3 provides that the King, through royal decree, can protect UCH *in situ*. This implies that *in situ* preservation, even though it is the preferred option, may not be assumed but that there should be an explicit decision in this sense. At the time, no such decision has been

[2142] Koninklijk besluit van 21 september 2016 betreffende de reglementaire maatregelen ter bescherming van het cultureel erfgoed onder water, *BS* 4 november 2016, 72763 (royal decree regulatory measures 2016).
[2143] Article 1, 1° royal decree regulatory measures 2016.

taken concerning the eleven recognised wreck sites. This could lead to the conclusion that the royal decree on regulatory measures does not apply to any of these UCH sites. On the other side, even though no such explicit decision was taken, the wrecks have in practice been left *in situ* and, as will become clear when assessing the individual measures taken to protect these wreck sites, the legislator has the intention to protect them *in situ*.[2144] Additionally, as most of the recognised UCH sites are State vessels from third States, the permission of those States is necessary before the wrecks can be recovered. Finally, interpreting the requirement that a royal decree needs to be adopted in order for a site to be protected *in situ* too stringently would result in the royal decree on regulatory measures to be without subject matter at this time. Therefore, from a practical point of view it seems preferable to assume that the recognised UCH sites should be considered as *in situ* preserved sites and are thus included in the provisions of the royal decree on regulatory measures. Nevertheless, the legislator should in the future explicitly state that a site will be preserved *in situ* in order to avoid interpretative issues.

The royal decree on regulatory measures lays down a number of practical measures for the protection of the UCH sites. It determines that the Receiver must inform all seafarers of newly recognised UCH sites, as well as all authorities competent for drafting sea charts with a view to indicating the position of these UCH sites on those charts.[2145] Unless stated differently, the protected UCH sites remain accessible for the public.[2146] All dives directed at an UCH site must be reported to the Federal Government Service Mobility and Transport (FOD Mobiliteit en Vervoer) by making use of an electronic form.[2147] The royal decree further emphasises that no activities can take place on or near an *in situ* protected site that can potentially alter the UCH. For activities that take place in the vicinity of the site all efforts must be made to ensure that they do not damage the historical wrecks and the Receiver must authorise the removal of any objects linked to an UCH site.[2148] In any case, all activities directed at *in situ* preserved UCH must be executed in conformity with the Rules of the Annex to the UNESCO Convention.[2149] Finally, the royal decree alters one of the provisions set out in the UCH-Act. Originally, it was determined in the UCH-Act that both the regulatory and individual measures should be adopted by royal decree. Article 7 of the royal decree regulatory measures, however, determines that any individual protective measures for *in situ* protected UCH shall be adopted through ministerial decree rather than royal decree.[2150] At the

[2144] These individual measures will be set out below in this section.
[2145] Article 2 royal decree regulatory measures 2016.
[2146] Article 3 royal decree regulatory measures 2016.
[2147] Article 4 royal decree regulatory measures 2016.
[2148] Article 5 royal decree regulatory measures 2016.
[2149] Article 6 royal decree regulatory measures 2016.
[2150] Article 7 royal decree regulatory measures 2016.

moment such a ministerial decree has been adopted for nine out of the eleven recognised UCH sites (ministerial decree on individual measures).[2151]

Individual measures have been adopted for all recognised wrecks, except for the HMS Wakeful and UB-29. The reason for this is that both the Wakeful and UB-29 are located in a fairway where activities that might damage the sites are prohibited anyway. Therefore, it was felt that these wrecks were already sufficiently protected by their location and no additional measures were necessary. For the other nine wreck sites the ministerial decree on individual measures determines that it is prohibited to anchor or dredge in a specific radius as determined in the decree around the wreck site.[2152] This radius varies from 12,5 metres to 45 metres depending on the wreck. Additionally, for the West-Hinder, SS Kilmore, U-11 and HMS Brilliant it is prohibited to fish with a line in a radius around the wreck varying from 15 to 45 metres. Finally, the ministerial decree prohibits trawling in the vicinity of the West-Hinder, U-11, Branlebas and H.M. Motor Launch 561.[2153] These measures are applicable until the revision of the Belgian marine spatial plan in 2020 after which these UCH sites will be included in this plan.[2154]

## 6. Heritage protection in legislation for activities taking place at sea

### 6.1. Activities incidentally affecting underwater cultural heritage

The UNESCO Convention requires States to use the best practicable means at their disposal for preventing or mitigating adverse effects arising from activities incidentally affecting UCH.[2155] No provisions in this sense are included in the UCH-Act. After receiving the comment from the Council of State that no definition of 'activities incidentally affecting UCH' had been included in the UCH-Act, the explanatory memorandum explained that no such definition was necessary as these types

[2151] Ministerieel besluit van 4 oktober 2016 betreffende individuele maatregelen ter bescherming van het cultureel erfgoed onder water, *BS* 4 November 2016, 72767 (ministerial decree individual measures 2016) and Ministerieel besluit van 6 april 2018 tot wijziging van het ministerieel besluit van 4 oktober 2016 betreffende individuele maatregelen ter bescherming van het cultureel erfgoed onder water, *BS* 11 April 2018, 33154 (ministerial decree altering ministerial individual measures 2018). The fact that article 7 royal decree regulatory measures 2016 provides that the Minister can adopt individual measures for the protection of *in situ* preserved UCH and the Minister has adopted such measures for nine out of the eleven recognised wreck sites, strengthens the theory that these wrecks are in fact preserved *in situ*, even though no explicit decision was made in this sense through royal decree.

[2152] The prohibition to anchor does not apply when this is necessary in light of a dive reported in conformity with article 4 of the royal decree regulatory measures. Ministerieel besluit van 9 maart 2017 tot wijziging van het ministerieel besluit van 4 oktober 2016 betreffende individuele maatregelen ter bescherming van het cultureel erfgoed onder water, *BS* 3 april 2017, 47997.

[2153] Articles 1-7 ministerial decree individual measures 2016; ministerial decree altering ministerial individual measures 2018.

[2154] Article 8 ministerial decree individual measures 2016

[2155] Article 5 UNESCO Convention.

of activities are not addressed in the Act.[2156] In the 2016 royal and ministerial decrees respectively issuing regulatory and individual measures for the recognised and *in situ* protected UCH sites, a number of activities incidentally affecting these sites have been limited or prohibited in their vicinity. No provisions on this, however, exist preventing in a general way the damaging or destruction of finds that have not yet been recognised as UCH or that have even not yet been discovered. Question thus arises to what extent Belgium protects UCH from activities incidentally affecting it.

### 6.2. Marine Spatial Plan

The BPNS has a surface of about 3.457km$^2$ and a coastline that is about 66 km in length. While the BPNS might not be enormous in size, it is very intensively used.[2157] All types of activities coexist alongside each other in these waters such as shipping, fishing, dredging, sand and gravel extractions, energy generation and tourism. The objective of the MSP is to map all these activities and to give them a place both in space and time reconciling their impact with one another.[2158] On 20 March 2014 a new marine spatial plan and its annexes were adopted.[2159] This plan is legally binding and will be revised every six years.

The MSP in itself does not refer to the protection of UCH. In other words, no separate zones have been created in order to protect UCH or finds. The second annex to the MSP explains that the creation of separate heritage zones is not desirable. It is, however, important and recommended to assess where UCH can profit from protective measures already in place in a particular area in the framework of, for example, nature protection or energy generation. Combining the protection of UCH with another function for which a zone was originally designated, implements one of the basic options foreseen in the MSP namely the multiple use of space. The annex to the MSP indicates that when an activity forms a threat to UCH, mitigating measures can be taken.[2160] In the

[2156] Explanatory memorandum UCH-Act 2014, 7.
[2157] F. MAES, A. VANHULLE and A.K. LESCRAUWAET, "Mariene Ruimtelijke Planning" in A.K. LESCRAUWAET, H. PIRLET, T. VERLEYE, J. MEES and R. HERMAN (eds.), *Compendium voor Kust en Zee 2013: Een geïntegreerd kennisdocument over de socio-economische, ecologische en institutionele aspecten van de kust en zee in Vlaanderen en België*, Ostend, 2013, 271-285.
[2158] The MSP is aimed at achieving both economic and ecological objectives such as the development of windmill parks, the delimitation of marine protected areas, the creation of a policy plan for sustainable sand and gravel extraction, the mapping of marine habitats, the protection of shipwrecks that are of importance for biodiversity and the management of land-based activities having an effect on the marine environment. F. DOUVERE, F. MAES, A. VANHULLE and J. SCHRIJVERS (2007)," The role of marine spatial planning in sea use management: the Belgian case", *Mar. Policy* 2007*,* 182-191.
[2159] Koninklijk besluit 20 maart 2014 tot vaststelling van het marien ruimtelijk plan en bijlages, *BS* 28 March 2014, 26936. (royal decree for a marine spatial plan 2014)
[2160] Royal decree for a marine spatial plan 2014, Annex 1: ruimtelijke analyse van de zeegebieden (spatial analysis of the marine area), 38-40.

Compendium for Coast and Sea a similar view can be seen. The authors feel that it is difficult to designate a specific area at sea for the protection of UCH as this is scattered all over the seabed. They argue that use should be made of the existing protective measures in order to protect and preserve a representative part of the UCH *in situ*.[2161]

Currently, the first revision of the MSP in 2020 is being prepared.[2162] The idea is to indicate the recognised UCH sites in the MSP in order to ensure that activities will not damage or destroy these heritage sites. Additionally, in the SeArch project, the basis for a map indicating the archaeological potential of several zones in the BPNS was laid.[2163] This map could be included in the MSP to indicate the likelihood of heritage being discovered when activities take place in certain zones. In any case, this map should be taken into account when granting authorisations for activities that affect the seabed.

From 2020 on the MSP will probably include all recognised UCH sites and implement the measures that were taken for their protection by royal and ministerial decrees so far. This will, however, not result in the protection of all finds against the effects of activities incidentally affecting them, nor does this resolve the issue of what to do in case a find is discovered during an activity.

In order to assess whether provisions on activities incidentally affecting UCH should be included in the UCH-Act, a broader assessment of the Belgian legislation concerning these types of activities is necessary.

### 6.3. Heritage protection in specific legislation dealing with activities at sea

In the SeArch project an assessment was made of the extent to which archaeological or historical heritage is taken into account within the framework of activities taking place in the BPNS.[2164] Article 28 of the Act on the protection of the marine environment requires that each activity at sea for which prior authorisation or a permit must be obtained will be the object of an environmental

[2161] M. PIETERS, B. STRUBBE, M. VAN DIJCK and H. PIRLET (2013), "Maritiem & kustgebonden erfgoed" in H. PIRLET, T. VERLEYE, A.K. LESCRAUWAET, J. MEES (eds.), *Compendium voor Kust en Zee 2015: Een geïntegreerd kennisdocument over de socio-economische, ecologische en institutionele aspecten van de kust en zee in Vlaanderen en België*, Ostend, 2015, 179-192.

[2162] On 8 February 2017 a start event for the revision of the MSP took place in Bruges. FOD Volksgezondheid, Veiligheid van de voedselketen en leefmilieu, *Startevenement herziening marien ruimtelijk plan*, www.health.belgium.be/nl/agenda/startevenement-herziening-marien-ruimtelijk-plan (consulted 10 August 2010).

[2163] During the fourth Meeting of States Parties, the Meeting provided that its members should commit to elaborating predictive models that can assist in recognising areas with a potentially high heritage value. Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fourth Session, 28-29 May 2013, UCH/13/4.MSP/220/10, Resolution 4/MSP 4, recommendation 5.

[2164] H. LETTANY, M. PIETERS, S. VAN HAELST, T. DERUDDER and M. RABAUT, *Assessment of the actual legal situation in Belgium*, 2016, SeArch report WP 2.1.2. supplement.

impact assessment (EIA).[2165] The EIA allows for the effects of the activity on the marine environment to be evaluated.[2166] It must include a description and appreciation of the expected effects of the activity on *inter alia* cultural heritage.[2167] These effects include the direct, indirect, secondary, cumulative and synergetic, permanent and temporarily, positive and negative effects on short, middle and long term.[2168] The person wishing to conduct an activity at sea needs to submit an environmental impact report (EIR) to the Belgian Mathematical Model (BMM). This is a department of the Royal Institute for Natural Sciences, which is a federal scientific institution. The BMM will assess the compatibility of the activity with the protection of the marine environment based on this EIR and will assess the EIA. Based on this EIA the BMM will advise the federal Minister competent for the marine environment on the compatibility of the project with the protection of the marine environment and the conditions with which the project must comply to be authorised. The Minister will decide whether or not an environmental permit should be granted.[2169]

While the protection of cultural heritage is taken into account during the EIA process, it should be noted that within the BMM no heritage experts or archaeologists are employed. In order to ensure a proper assessment of the effects that an activity can potentially have in this regard, heritage experts need to be involved in this process. On the one hand, these experts could assist the applicant in determining which type of research should be conducted in certain areas to assess the likelihood of heritage being encountered during the activity. On the other hand, these experts can assist the BMM in assessing the effects that an activity can have on UCH or finds and suggest which measures should be taken by the applicant in order for him to obtain an environmental permit. Following the research conducted within the framework of the SeArch project, it was demonstrated that the BMM is willing to cooperate with heritage experts when the situation so warrants.

Unfortunately, the Act on the protection of the marine environment does not regulate all activities disturbing the seabed. For example, in case of sand and gravel extractions the duty to obtain an

[2165] Wet van 20 januari 1999 ter bescherming van het mariene milieu [en ter organisatie van de mariene ruimtelijke planning] in de zeegebieden onder de rechtsbevoegdheid van België, *BS* 12 March 1999, 8033 (Marine Environment Act 1999). An exception is made for permits that are issued following acts relating to fishing and concessions given in compliance with the Act of 13 June 1969 on the Belgian continental shelf of Belgium. Article 28§1 Marine Environment Act 1999.
[2166] Article 28§1 Marine Environment Act 1999.
[2167] As this royal decree predates the UCH-Act and no description of cultural heritage is given in it, it remains uncertain what is meant by 'cultural heritage'.
[2168] Koninklijk besluit van 9 september 2003 houdende de regels betreffende de milieu-effectenbeoordeling in toepassing van de wet van 20 januari 1999 ter bescherming van het mariene-milieu in de zeegebieden onder de rechtsbevoegdheid van België, *BS* 17 september 2003, 46111, article 10, 3°. (royal decree environmental impact assessment 2003)
[2169] Koninklijk Belgisch Instituut voor Natuurwetenschappen, *Beheer van het mariene milieu*, http://odnature.naturalsciences.be/mumm/nl/windfarms/ (consulted 10 August 2018).

EIA is regulated by other legislation, including the royal decree of 1 September 2004 on the rules for an EIA in application of the law of 13 June 1969 on the exploration and exploitation of non-living resources of the territorial sea and the continental shelf.[2170] This 2004 royal decree provides that an EIA for sand and gravel extractions needs to take into account the acceptability of the activity for the marine environment.[2171] Nowhere in this royal decree is the notion 'marine environment' defined. This entails that it is uncertain whether this notion includes cultural heritage. A second royal decree on the conditions and procedures for obtaining a concession for sand and gravel extraction foresees that without prejudice to regulations dealing with UCH, which includes the UCH-Act, the concession holder must report objects, traces and remains discovered during extractions that are of historical, ancient, scientific or military importance. When the concession holder incidentally recovered this heritage, he must keep it at the disposal of the competent authorities.[2172] While this provision demonstrates the wish to take account of UCH that might be present on site, it only imposes a duty to report and deliver a find after it has been discovered, which is similar to what is required by the UCH-Act. At this point considerable damage can already be done to a heritage site. No provisions are included requiring that prior to obtaining a concession for sand and gravel extraction, the applicant should conduct a preliminary investigation to determine whether or not UCH might be present on site.

The legislator should reconsider these pieces of legislation to ensure that an assessment is made on the effects that activities at sea might have on cultural heritage prior to their commencement. During the SeArch project the possibility of creating a separate heritage impact assessment (HIA) alongside the EIA was discussed.[2173] In this HIA it would be required that a number of surveys and investigations are conducted on site to determine whether heritage is present. The main issue with introducing the obligation to conduct a HIA is that it would be very time and cost consuming for developers at sea, especially when there is little chance of discovering any heritage on the chosen site. Such an additional procedure might discourage developers from conducting projects in the BPNS. Therefore, the experts of the SeArch project felt that it is preferable to keep the assessment of whether an activity might affect UCH in the procedure for the EIA rather than to create a new

[2170] Wet van 13 juni 1969 inzake de exploratie en de exploitatie van niet-levende rijkdommen van de territoriale zee en het continentaal plat, *BS* 8 oktober 1969, 9479 (laatst gewijzigd op 22 december 2008) and koninklijk besluit van 1 september 2004 besluit houdende de regels betreffende de milieu-effectenbeoordeling in toepassing van de wet van 13 juni 1969 inzake de exploratie en exploitatie van niet-levende rijkdommen van de territoriale zee en het continentaal plat, *BS* 7 oktober 2004, 70525 (royal decree environmental impact assessment).
[2171] Article 17 royal decree environmental impact assessment. The provision listing the elements that need to be contained in the EIR does not even mention the marine environment, nor cultural heritage specifically. Article 3 royal decree environmental impact assessment 2004.
[2172] Koninklijk besluit van 1 september 2004 betreffende de voorwaarden en de toekenningsprocedure van concessies voor de exploratie en de exploitatie van de minerale en andere niet-levende rijkdommen in de territoriale zee en op het continentaal plat, *BS* 7 oktober 2004, 70529, article 41.
[2173] The introduction of such a heritage impact assessment is also recommended by the UNESCO Model Act. Article 16(2) UNESCO Model Act.

additional instrument. It was believed that it is best left to heritage experts to decide on what type of research is necessary depending on the nature of the activity and the area where it will be conducted in a case-by-case basis.

The Meeting of States Parties to the UNESCO Convention addressed the issue of activities incidentally affecting UCH during its fourth session. A number of suggestions were given on how to protect UCH from activities incidentally affecting it. As a starting point it was stated that for development and resource extraction projects account needs to be given to the presence of UCH on site. Thereto, the Meeting of States Parties provided that the project design submitted in order to obtain authorisation must contain a mandatory assessment of the area identifying any UCH present in it. The project developers, both public and private, are responsible for providing sufficient funds for this assessment. They are also financially responsible for, in as far as possible, preventing an impact on UCH by the project and for mitigating any negative effects caused by it. Furthermore, they must provide the means for the conservation of affected UCH, its promotion and dissemination. Alternatively, States Parties could impose a levy on all relevant infrastructure and resource extraction projects. The revenues of this levy would be placed in a fund for financing the preliminary assessment of development areas, the identification and prediction of UCH sites and all measures cited above for which the developer is responsible. These are two ways in which the polluter- or disturber-pays principle can be implemented in national legalisation. This principle can for example be found in the Valletta Convention.

Asides from financial obligations, the Meeting stressed that during the authorisation phase, the authorities competent for UCH should be mandatorily consulted or alternatively, when this is not possible, UCH experts should be present in the authority responsible for authorising such projects. In Belgium this would entail that external experts, for example from the FHA, need to be consulted during the authorisation process or that experts in the field of UCH need to be a member of *inter alia* the BMM. As a full assessment of the impact of a project on potential UCH might not be necessary in zones known to have little heritage value, the first option seems preferable from a cost perspective. Finally, the Meeting of States Parties also found that sanctions should be imposed on developers of infrastructure and resource extraction projects that do not respect the provisions relating to the protection of UCH.[2174]

### 6.4. Provisions on activities incidentally affecting cultural heritage in the heritage act

Another option to ensure that activities at sea take into account the presence of UCH is by including a number of provisions in the UCH-Act itself as is suggested by the UNESCO Model Act.

[2174] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fourth Session, Paris, 28-29 May 2013, UCH/13/4.MSP/220/10, Resolution 4/MSP 4 recommendation 5.

These provisions guarantee that for all activities taking place at sea an assessment is made of their effect on known and unknown finds and UCH. In the German Draft Act for the EEZ, for example, a permit must be obtained for activities when these endanger or might endanger UCH. In the resolutions from the third Meeting of States Parties, the members were encouraged to adopt clear national rules for the authorisation of interventions on UCH sites, which include rules on activities incidentally affecting such sites or areas where UCH could possibly be located.[2175]

A provision that should in any case be included in the UCH-Act is that after reporting the incidental recovery of a find, the finder should deposit it with the Receiver or hold it at his disposal under conditions that ensure its preservation.[2176] As was stated above, article 41 of the 2004 royal decree for concessions for sand and gravel extractions already provides for such a requirement. However, this obligation should apply to all finds regardless during which type of activity they were incidentally recovered.

The UNESCO Model Act provides that anyone intending to undertake an activity in an area of which it is known or can be reasonably suspected that finds or UCH are present, must notify the competent authority of this prior to commencing this activity. The activity should be prohibited if it endangers or damages the heritage to a larger extent than appears to be reasonable compared to the public benefit of the activity. The competent authority needs to be involved in this assessment.[2177]

As was explained, the project developer is responsible for bearing all costs relating to the fact that UCH is present on site. Article 4 of the Act for the protection of the marine environment already implements this principle in general terms as it provides that users of the sea must take into account the polluter-pays principle when operating at sea. This article specifies that the costs to be borne are those for preventing, mitigating and combating pollution and, when possible, restoring any damage. This provisions does not ensure that the project developer pays for, *inter alia*, the conservation, promotion and dissemination of knowledge on UCH. Therefore, a provision needs to be created specifying which costs are to be borne by the project developer or initiator of the project. This provision can be inserted in the UCH-Act as it would then apply to all activities incidentally affecting UCH without the need of amending all legislation applicable to such activities.

[2175] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, third session, Paris, 13-14 April 2011, UCH/11/3.MSP/220/11REV2, Resolution 6/MSP 3.
[2176] Article 6(3) UNESCO Model Act.
[2177] Article 16(1) UNESCO Model Act.

## 7. Conclusion

Since 2014 Belgium has had a framework for the protection of UCH in place which serves to implement the UNESCO Convention. Since the entry into force of this UCH-Act a number of further steps have already been taken. The most noteworthy of which is the fact that eleven sites have been formally recognised as UCH and that measures were adopted for their protection. This is huge step forward considering that prior to 2014 Belgium did not have any legislation in place which was able to adequately protect UCH, nor did the federal government, being the competent authority for UCH protection in the BPNS, have any experience or agencies in this field. Furthermore the mere fact that Belgium was the 45th State to ratify the Convention demonstrates the willingness of the Belgian government to actively protect UCH not only in its own territorial sea but worldwide. While there has thus been a lot of progress over the last years in this field, it is demonstrated throughout this chapter that a number of issues still exist relating to the UCH-Act that prevent it from functioning to its full extent. Furthermore, even though the Belgian legislator already made a valid attempt at implementing the UNESCO Convention in national legislation, a number of its provisions and mechanisms still need to introduced. In line with the 2015 resolution in which the Meeting of States Parties invited all its members to fully harmonise their national legislation with the UNESCO Convention and encouraged them to actively take measures to implement its provisions, it is time to reconsider and reform the Belgian UCH-Act.[2178]

Two key issues were identified in this chapter which form a fundamental part of the UNESCO Convention but have not yet been adequately implemented in the Belgian legislation.

Firstly, the application of the UCH-Act needs to be extended to include finds worldwide implementing the cooperation and consultation mechanism set out in the UNESCO Convention. This mechanism, which is based on the reporting of finds and activities regardless of their location followed by consultations, needs to be implemented both for the Belgian EEZ or on the Belgian continental shelf, as well as for the EEZ or on the continental shelf of a third State and in the Area. In light of providing for a global protection of UCH, the Belgian legislator needs to further implement article 14 UNESCO Convention prohibiting the entry into the Belgian territory, the dealing in or the possession of UCH that was unlawfully exported and/or recovered from another State or that was recovered in a manner that was not in conformity with the UNESCO Convention.

The second key issue is that the UCH-Act must provide for a wider protection of all types of finds regardless of how they were discovered or when they were submerged. To this end a shift from the mainly site-based approach to an activity-based approach should be considered. The legislator

[2178] Meeting of States Parties to the Convention on the Protection of the Underwater Cultural Heritage, Fifth Session, 28-29 April 2015, UCH/15/5.MSP/11, Resolution 5/MSP 5.

must also clarify how finds that were discovered prior to the entry into force of the UCH-Act should be dealt with. Furthermore, a binding provision needs to be adopted ensuring that finds that were incidentally recovered are preserved and, when so desired, handed to the Receiver. In light of offering a wider protection for finds, the Belgian legislator needs to consider safeguarding finds that have not yet been submerged for 100 years located in its EEZ or on its continental shelf in order to guarantee that these can be protected as UCH in the future. In order to ensure compliance with these protective and reporting measures, Belgium should attempt to conclude agreements with other (North Sea) States.

In addition to these two key points, a number of other suggestions can be given to the Belgian legislator as well which one the one hand assist in fully implementing the UNESCO Convention and on the other hand ensure the further development and better functioning of the UCH-Act as such.

Firstly, Belgium should correct the definition of State vessels and aircraft in the UCH-Act to ensure that the provisions dealing with such craft apply to all of it and not only to the small section that was recognised as UCH. Additionally, in order to create a rule of international customary law, it would potentially be interesting for Belgium to clearly express its views on sovereign immunity and ownership rights over sunken State craft at the international level.

Secondly, in order for the UCH-Act to function properly, sufficient means need to be made available to the national authorities. In addition, full advantage needs to be taken of all expertise that already exists in this field today, a large part of which is located within the FHA. A formal cooperation agreement could be concluded in this regard. Further cooperation with all actors at sea is crucial to ensure the full enforcement of the UCH-Act. Special consideration should also be given to maintaining a close relationship with the diving community as divers are the eyes and ears of the national authorities on site. Giving information on the UCH-Act and raising awareness about the importance of UCH protection is crucial in this regard. Finally, consideration can potentially be given to introducing a reward system as an incentive for the reporting and preservation of finds.

Thirdly, with a view to creating a transparent regime and offering potential applicants clear information on how and under which conditions to obtain authorisation for activities directed at finds and/or UCH, a number of provisions must be introduced in the UCH-Act addressing the formalities and conditions attached to obtaining authorisation from the competent authority.

Finally, the Belgian legislator needs to ensure that all activities that might incidentally affect finds or UCH are subjected to an assessment of the effects that they might have on such heritage. This can be done either by furthering the provisions that already exist on EIAs and ensuring that

heritage experts are involved in the process, by creating some sort of HIA parallel to the EIA or by adding a new set of provisions relating to activities incidentally affecting UCH in the UCH-Act.

It must be noted that at the moment the Belgian legislator is amending the UCH-Act following the suggestions given in the framework of the SeArch project, which are for the most part similar to the ones provided in this conclusion. By altering the UCH-Act in the sense as is recommended in this dissertation, not only would the Belgian legislator ensure that this Act functions optimally, but it would allow Belgium to further act as a forerunner in implementing the UNESCO Convention. Full implementation of this Convention could potentially serve as an example and inspiration for other North Sea States to do the same and guide them towards not merely ratifying, but fully adhering to the provisions set out in this Convention. In this regard, Belgium can also take the initiative to conclude an agreement with other North Sea States in order to ensure that UCH is adequately protected in this sea area. Such a regional agreement could once again serve as an example for other regions to do the same.

# General Conclusion

## Underwater cultural heritage in the spotlight

Internationally, the protection of UCH has taken a huge leap forward since the adoption of the UNESCO Convention in 2001. While anno 2018 we are still a far end away from worldwide ratification of this Convention, it is clear that it continues to gain importance. A number of States that originally abstained from voting for this Convention have since ratified it or are planning to do so. While the concerns that these States have with the UNESCO Convention, which mainly revolve around sunken State craft and creeping coastal State jurisdiction, are as valid today as they were in 2001, in depth studies on the practical application and effects of the Convention have indicated that it can be implemented fully in conformity with UNCLOS. These studies explain that the concerns expressed by certain States should not be used as a reason for them not to ratify the UNESCO Convention. On the contrary, in fact, those studies recommend ratification in order to allow States to have influence on the practical implementation of the Convention worldwide and to ensure that its provisions are interpreted in conformity with their views and opinions. The best way for States to be heard in this regard is within the framework of the UNESCO Meeting of States Parties and the Scientific and Technical Advisory Body. States are thus feeling the pressure to ratify the Convention, which is also evidenced by the recommendations given by the UN General Assembly in its resolutions urging its member States to become a party to the UNESCO Convention.

In order to assist States in implementing the Convention and to further elaborate its provisions, a number of tools have been created by the organs of the Convention and by experts in the field. These include the operational guidelines, the manual for activities directed at UCH and the model for a national act for the protection of UCH. These instruments, while very useful for the practical implementation of the UNESCO Convention, do not resolve the uncertainties and ambiguities still surrounding it. These uncertainties, *inter alia*, relate to the competences of coastal States following articles 9 and 10 UNESCO Convention and the regime for sunken State vessels. That the issue of how to treat the wrecks of State craft remains a sensitive topic is evidenced by the San José case in which Colombia and Spain maintain opposite viewpoints on the matter of title to and sovereign immunity of sunken State craft. In order to fully resolve such issues more State practice is necessary allowing a uniform interpretation to be given to the provisions of the Convention and international law as a whole. A practical application that might offer some additional insights on the functioning of the Convention is the case of the Skerki Banks, which is the first heritage site to be the object of consultations in accordance with articles 9 and 10 UNESCO Convention.

Not only at the international level, but at the European regional level as well, attention is paid to the protection of UCH. This is done mostly within a more general framework applicable to cultural heritage both on land and in the marine area. While the EU only has very limited competences in the field of heritage management, it still fulfils an important role in terms of awareness raising and offering funds for programmes and initiatives taking place within or across its member States. In this regard, the EU has declared 2018 to be the year of cultural heritage. In their legal instruments the EU institutions have considered cultural heritage as an important part of the European identity and recognise its value for economic welfare and social cohesion. Furthermore, the EU offers a platform for communication and cross-State cooperation in matters such as training of heritage experts, education and awareness raising across Europe, the digitisation of heritage records and the promotion of long-term heritage policy models. Member States, including Belgium and other North Sea States, should take full advantage of the platform and funding offered by the EU in order to take initiatives and cooperate in the field of UCH protection in accordance with the UNESCO Convention.

At the regional level, account should also be taken of the legal instruments adopted in the framework of the Council of Europe, especially the Valletta Convention. While this Convention does not specifically focus on UCH, it does offer a set of rules for heritage protection and even addresses aspects that were not included in the UNESCO Convention such as the disturber-pays-principle and heritage in relation to development projects. Therefore, this Convention should be considered when adopting or adjusting national legislation applicable to UCH. Furthermore, since 45 European States ratified the Valletta Convention, it offers a baseline for regional cooperation even with States that have not yet ratified the UNESCO Convention.

Underwater cultural heritage protection in the North Sea region

In this dissertation the national legislation on UCH of a number of North Sea States was assessed with the objective to determine how and to what extent UCH is protected in this region. Unlike in Belgium, all the assessed States, namely France, the Netherlands, the UK and Germany, have had legislation for the protection and management of UCH in place for many years accompanied by a strong and experienced national authority responsible for its practical implementation. Even though legislation in this field has been in place for a long time, however, the tendency to further and alter the framework for UCH protection as described above is visible in most of these States. In this regard especially the Netherlands should be mentioned which completely renewed its national legislation for UCH protection in 2016 and Germany which is creating new legislation for the protection of UCH located in its EEZ. The main incentive for these changes is the increasing importance of the UNESCO Convention. This is evidenced by the ratification of this Convention by France and Belgium in 2013 and the fact that Germany and the Netherlands have indicated that

they wish to do the same in the very near future. The UK has not yet expressed the intention to become a party any time soon, but committed itself to comply with the Rules of the Annex to the Convention for activities directed at UCH.[2179] The fact that the assessed States, at least for the most part, wish to comply with the provisions and Rules of the Convention creates opportunities for further regional cooperation in the North Sea area. This could be especially useful for controlling and enforcing national legislation for the protection of UCH. As it is often difficult for States to supervise their entire sea area to ensure compliance with their national UCH legislation, especially considering the fact that looters can access land in other States, cooperation in this field is necessary. In this regard reference can be made to article 15 UNESCO Convention addressing the non-use of areas under the jurisdiction of States which can only function properly if all States in a particular region implement it in their national legislation. A second aspect for which cooperation could be useful relates to maritime war graves. Considering the maritime history of the assessed North Sea States and the important role they played during WWI and WWII, the notion 'proper respect' that needs to be given to human remains located in the marine area could be further developed through regional cooperation. Furthermore, linked to this, the importance of cooperation for offering protection to shipwrecks that sank less than 100 years ago, such as WWII wrecks, and are located in the EEZ or on the continental shelf of one of the North Sea States, cannot be underestimated. In other words, while national legislation is very important, an added value can be seen in strong regional cooperation. This can potentially be effectuated via a regional agreement, in addition of course to the global cooperation scheme as set out in the UNESCO Convention.

As was discussed throughout this dissertation, the national pieces of legislation of the assessed North Sea States are to a larger or lesser extent in conformity with the UNESCO Convention. What is particularly noteworthy, especially in light of further cooperation, is the fact that the extraterritorial application of all national legislation is fairly limited. Germany is creating a new act applicable in the German EEZ and France has made provision in its 2016 Act for the application of the Heritage Code to the French continental shelf and EEZ via ordinances. Asides from this, and the UK PMRA which applies to a selective number of wreck sites worldwide, none of the assessed States has a comprehensive system in place for the reporting and protection of UCH located beyond its territorial sea (or in some cases contiguous zone). This demonstrates that there is still a lot of room for States to expand their national legislation and cooperate in this regard.

[2179] As was explained in this dissertation, it seems that one of the main reasons why the UK abstains from ratifying the UNESCO Convention is the fact that its national legal framework is based largely on a site-based approach rather than an activity-based approach. Furthermore, unlike the other assessed States, the UK has a very fragmentised legislation addressing mainly wreck sites which up till today remains partly influenced by two common law instruments being the law of salvage and finds.

The future of the Belgian legislation for underwater cultural heritage protection

The Belgian UCH-Act aims to implement the provisions and principles of the UNESCO Convention. Many of them have already been successfully inscribed in the Belgian legal framework, such as the preference for *in situ* protection, the respect for human remains, the long term preservation of UCH, the duty to inform (and following the UCH-Act, even consult with) the flag State of sunken State craft and the application of the Rules of the Annex to the Convention for activities directed at UCH. Other provisions have been included in the UCH-Act indirectly, such as the very limited application of the law of salvage and finds and the prohibition to commercially exploit UCH. Nevertheless, as a whole, the UCH-Act does not yet provide the level of protection required by the UNESCO Convention. One of the main reasons for this is the distinction that was created between 'finds' and 'UCH' resulting in only a very limited number of sites, eleven at the moment, to be fully protected. The Belgian legislator therefore needs to expand the protection offered by the UCH-Act. The best way to do this would be to step away from the site-based approach used today and to move towards an activity-based approach as can be seen in France, the Netherlands and Germany. In other words, rather than formally recognising all finds as UCH, provisions need to be made requiring that authorisation is obtained for all activities directed at finds in general so that these are conducted in conformity with the Rules of the Annex to the UNESCO Convention. If so desired, the choice can still be made to protect a number of sites at a higher level by, for example, even prohibiting non-intrusive access to them. This could potentially be necessary in light of protecting maritime (war) graves or highly sensitive sites.
In terms of the practical application of the UCH-Act the distinction created by the Belgian legislator between 'finds' and 'UCH' causes some difficulties due to fact that a number of definitions were copied literally from the UNESCO Convention without taking these newly created categories into account. This results in a number of unwanted consequences such as the provisions specifically created for State vessels only to apply to a very limited number of them and divers to be given a too wide discretion in determining what qualifies as 'a find' within the meaning of the UCH-Act.

One of the main challenges for the Belgian legislator in the near future is to fully implement the reporting and consultation mechanism for UCH located in areas beyond national jurisdiction. For the Belgian EEZ and continental shelf, the UCH-Act provides a set of rules *quasi*-identical to the ones for finds and UCH located in the Belgian territorial sea.[2180] This does not reflect the provisions of the UNESCO Convention determining that all measures taken for the protection of UCH located in the EEZ or on the continental shelf must be adopted following consultations with all States that have declared to have an interest in the heritage. Except for measures taken to prevent immediate

[2180] The UCH-Act provides in article 8§1 that the Receiver must consult with all States that made a declaration following article 9(5) UNESCO Convention. In chapter four of this dissertation it is explained, however, why the author is uncertain that this suffices to fully implement the consultation duty foreseen by the UNESCO Convention.

danger or to protect its sovereign rights, Belgium cannot unilaterally adopt measures for the protection of UCH in its EEZ or on its continental shelf. This should be reflected in national legislation and State practice. As for heritage located in the EEZ or on the continental shelf of a third State or in the Area, Belgium needs to impose a duty on its nationals and flagged vessels to report the discovery of UCH or the intention to engage in activities directed at UCH to the Belgian national authorities and, when applicable, the third coastal State.[2181] The Belgian authorities have the responsibility to declare that Belgium wishes to be consulted on the management of a particular UCH site, to participate in such consultations or, when applicable, to ensure that Belgium fulfils its role as Coordinating State.

Consideration must be given to protecting 'younger' heritage, especially shipwrecks, beyond the Belgian territorial sea. This is especially true for WWII wrecks as they are witnesses of a major historic event and often merit protection. The Belgian legislator would, therefore, do well to insert a number of provisions addressing these younger sites to ensure that they are not damaged or recovered without prior authorisation. Additionally, a reporting duty for the discovery of younger sites should be imposed on Belgian nationals. This would ensure that the Belgian authorities are informed about the sites located in the BPNS. As was already touched upon above, regional cooperation can be very beneficial in this regard as measures to protect sites that have not been submerged for over 100 years and are located in the Belgian EEZ or on the Belgian continental shelf cannot be enforced vis-à-vis third State nationals. However, taking into account the fact that many of these 'younger' wrecks are State vessels that sank during WWII and belong to neighbouring States such as the UK and Germany, it seems likely that they would be willing to cooperate. Belgium must seek to conclude agreements in this regard.

The Belgian legislator should revise the protection offered to finds against activities incidentally affecting them. The most important point in this regard is that the competent heritage authorities need to be involved to determine which surveys and other types of research are necessary in a particular area, to examine the effects that an activity might have on UCH and to decide on the best way to avoid or mitigate potential negative effects on such heritage. Linked to this, a set of rules should be created to ensure that finds that were incidentally recovered are preserved and either held at the disposal of the Receiver or are handed to him. Compliance with these rules could potentially be linked to the granting of a reward. Additionally, the disturber-pays-principle included in the Valletta Convention must be inscribed in Belgian legislation to ensure that the disturber pays for the preservation and dissemination of the affected heritage. This can either be done directly entailing that the disturber is responsible for the financial burden of preserving the

[2181] UCH needs to be understood here in the sense of the UNESCO Convention and not in the sense of the Belgian UCH-Act.

heritage affected by his project or activity or via contributions in a general fund used for all affected sites.

In conclusion, it can be said that while being fairly late in adopting legislation for the protection of UCH, Belgium over the last six years has made some serious efforts in this field. During that period Belgium ratified the UNESCO Convention, for a large part implemented its provisions in national legislation, recognised eleven sites as UCH and adopted specific measures for their protection. While these are huge steps in the right direction, we are not quite there yet. In order to further protect UCH, not only in the Belgian sea area but worldwide, and to be in full compliance with the provisions of the UNESCO Convention, Belgium needs to further reform its national legislation in conformity with the suggestions given in this dissertation. Furthermore, especially in light of expanding the application of the UCH-Act, sufficient financial resources must be made available to ensure that the competent national authorities have sufficient means and expertise to manage the UCH in the best possible way. To this end account should be taken of how the expertise that already exists at the Flemish level can be used at the federal level. Such changes would allow Belgium not only to have a national legislation in place in full conformity with the UNESCO Convention, but to become an example in this regard for other North Sea States and even States worldwide.

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