

# Towards Ratification: Papers from the 2013 AIMA Conference Workshop

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## Contents

Organiser's welcome, Graeme Henderson	1
Speaker profiles	2
The significance of world-wide ratification of the 2001 UNESCO <i>Convention on the Protection of the Underwater Cultural Heritage</i> , Lyndel Prott	7
The reasons for the Convention's drafting, Patrick O'Keefe	9
The reasons for the Convention's drafting: a museum-based maritime archaeologist's perspective, Graeme Henderson	11
Why Australia should ratify the Convention, Craig Forrest	14
Australia's consideration of the ratification process and current position, Andrew Viduka	17
Maritime and underwater cultural heritage developments in sub-Saharan Africa, Bill Jeffery, Shawn Berry, and Chris Ngivingivi	21
The Netherlands towards ratification: activities in the light of the Convention, Martijn Manders	24
Status and development of ratifications, Ulrike Guerin,	27
The processes and strategies employed in Spain, Mariano J. Aznar-Gómez	29
The processes and strategies employed in Belgium, Marnix Pieters	33
Panel discussion, Patrick O'Keefe (Convenor)	36
Editors' notes	39



## Opening address

### Graeme Henderson

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Technological developments during the 20th century extended human access to all parts of the seabed, and in the absence of effective protection, destruction of the underwater cultural heritage (UCH) reached an unprecedented scale.

No protection was afforded under the existing UNESCO framework or via the *United Nations Convention on the Law of the Sea (UNCLOS)*, so concerned NGOs drafted the 2001 *Convention on the Protection of the Underwater Cultural Heritage*, (the Convention) adopted by UNESCO in 2001. The Convention was developed with the intention of providing a global matrix of protection, with States Parties enacting consistent national legislation, and facilitating close cooperation between all ratified States Parties.

To date 45 States have ratified the Convention and the emerging matrix of protection is having a major positive impact. Sadly, ratification is not uniform across the globe and our region, rich in significant UCH, is one of the slowest to take up the Convention. Australian legal experts and maritime heritage practitioners played important roles in the initiation and development of the Convention but the Australian Government has not yet ratified it. The Australian Government, State and Northern Territory Governments have moved closer to ratification by agreeing to the *Australian Underwater Cultural Heritage Intergovernmental Agreement* in 2010.

Unfortunately, amendment of existing legislation to make it consistent with the Convention has not kept pace and the *Review of the Historic Shipwrecks Act 1976 and Consideration of Ratification of the Underwater Cultural Heritage Convention*, commenced in 2009, has not yet even produced a report with recommendations. Australia remains some considerable distance from developing consistent legislation despite broad public, State and Territory government support and the opportunity to fix existing policy gaps such as the protection for sunken aircraft.

The Australasian Institute for Maritime Archaeology (AIMA) has arranged this Workshop to review the progress made overseas and at home since 2001, and in the light of that progress, to develop a strategy for improving the management of Australia's UCH and for pursuing ratification domestically. It is also intended that delegates from other countries take home useful insights into the processes involved.

Speakers will address the reasons for the drafting of the Convention, and the heightening need for effective protection. Speakers from States currently examining ratification will outline any progress towards ratification and the strategies employed, while those from ratified States will explain how ratification was achieved.

The final part of the Workshop will be a round-table discussion about options for the future. The intent is that this discussion will provide AIMA with the necessary information to develop the most effective strategy to encourage Australia's ratification, thus enabling the protection of our overseas UCH through cooperative relations with other States Parties to the Convention.

I encourage all those attending to contribute. It is a Workshop rather than a debate, and we welcome your thoughts as to the best way for us to proceed.

Editors' note. It is intended that the Workshop proceedings will form a part of the toolkit for those advocating improved protection for the underwater cultural heritage with minimal delay, and that the target audience include non-academics. In line with this aim much of the informal flavour of the Workshop talks has been retained.

## Speaker profiles

### Lyndel Prott

Lyndel Prott holds the degrees of Bachelor of Arts and Bachelor of Laws of the University of Sydney, a Licence Spéciale en Droit international of the Free University of Brussels and of Dr Juris of the Eberhard-Karls University of Tübingen in Germany. Between the latter two degrees she was an officer of the Legal and Treaties Section of the Australian Department of Foreign Affairs. Before joining UNESCO as Chief of the International Standards Section in the Division of Cultural Heritage in 1990, she had a distinguished career as an academic, teaching and researching at the Faculty of Law at the University of Sydney. Her expertise in Comparative Law, International Law, Jurisprudence, and especially in Cultural Heritage Law, where she is regarded as one of the pioneers of the subject, led to her appointment to a personal Chair in Cultural Heritage Law at that University, from which she resigned after taking up her post in UNESCO. In 2001, Dr Prott was appointed Director of UNESCO's Division of Cultural Heritage. Dr Prott has lectured at many universities and institutes around the world and has authored, co-authored or edited over 200 books, reports and articles. She has written in English, French and German and been published in Arabic, Croat, Chinese, Italian, Magyar, Russian and Spanish. With her husband, Dr P. O'Keefe, she is co-authoring the fundamental research text in cultural heritage law, *Law and the Cultural Heritage*, of which two of the planned five volumes are already published. Her book on the International Court of Justice, *The Latent Power of Culture and the International Judge*, 1979, and her more recent Commentary on the *UNIDROIT Convention* 1995 are also well known among experts in international law. She is on the Editorial Board of three international specialist Journals. In 1991 she was honoured for her work in Cultural Heritage Law as a Member of the Order of Australia, and in 2000 the Government of Austria awarded her the 'Croix d'honneur autrichienne pour les Sciences et l'Art première classe'. Professor Prott taught International Heritage Law at the Australian National University from 2003 to 2006 and is currently engaged in similar programmes and in supervising PhD students in Museum Studies at the University of Queensland as a distinguished professor.

### Patrick O'Keefe

Patrick O'Keefe Graduated BA/LLB from the University of Queensland in 1968 and worked in the Departments of Trade and Industry, External Territories and Foreign Affairs. In 1972/73 he studied for a MA in Business Law at the City of London Polytechnic and completed an LLM at the Australian National University. On returning to Australia he was offered a lectureship in the Faculty of Law at the University of Sydney where he stayed until 1990, obtaining a

PhD and becoming Associate Professor in 1986. From 1990 to 2002 he lived in Paris and acted as consultant on the law and management of cultural heritage to UNESCO, Council of Europe, World Bank, Commonwealth Secretariat, ICOM, ICOMOS, as well as to various governments and private clients. He also wrote extensively; attended conferences and workshops around the world; lectured at various universities and was examiner for a number of PhD theses from European and Australian Universities. In 1994 he was elected a Fellow of the Society of Antiquaries of London. In 2002 he returned to Australia. The Research School of Pacific and Asian Studies at ANU invited him to teach an online unit on International Heritage Law in a Master's course in Sustainable Heritage Development and offered him the status of Adjunct Professor. He is currently Honorary Professor in the School of Law and the School of English, Media Studies and Art History at the University of Queensland. He has been awarded the Order of Australia and elected a member of the Australian Academy of the Humanities.

### Graeme Henderson

Graeme Henderson's interest in the underwater cultural heritage was sparked when, as a 16 year old, he found the wreck of the Dutch East India Company vessel *Vergulde Draeck* on the Western Australian coast. After studying history at the University of Western Australia he worked at the Western Australian Museum as a maritime archaeologist, conducting research on the east-coast wrecks of HMS *Sirius*, HMS *Pandora* and *Sydney Cove*, as well as colonial-period sites in his home State. He completed a history Master of Arts degree at the University of Western Australia and a Graduate Diploma in Public Sector Management at Curtin University. In 1992 he became the first Director of the Western Australian Maritime Museum and directed the fitout of the new Maritime Museum building opened on Victoria Quay in 2002. During his career he initiated the Museum's watercraft collection, pushed for initiation and improvement of the legislation to protect and promote the underwater cultural heritage, successfully lobbied for government funding to document the history of Australia's coastline and authored numerous books and journal publications. During the 1990s he brought together the 20-country International Council on Monuments and Sites (ICOMOS) committee, the International Committee on the Underwater Cultural Heritage (ICUCH), to develop the charter (the ICOMOS *International Charter on the Protection and Management of Underwater Cultural Heritage*) that was modified to become the *Annex* to the 2001 Convention. In 2002 he was named Western Australian Citizen of the Year in the category of Arts, Culture and Entertainment. In

2012 he became a Member of the Order of Australia for 'service to maritime archaeology in Western Australia through the documentation and preservation of Australia's underwater cultural heritage, to international professional associations, and to the community'.

#### **Craig Forrest**

Craig Forrest teaches and undertakes research in the areas of private international law, cultural heritage law and maritime law. His current research interest focuses on the international law applicable to wrecks, and he has published a number of articles on the subject, most recently in *Lloyd's Maritime and Commercial Law Quarterly*. He was a member of the South African delegation to the UNESCO meeting of experts to draft the international convention on the protection of UCH from 1998–2000, was a Research Fellow at the University of Cambridge in 2005, and was awarded a *Universitas 21* Fellowship to undertake collaborative research at the University of Nottingham in 2009. He is a member of the International Law Association's International Committee on Cultural Heritage Law, a co-editor of *LAWASIA Journal*, associate editor of the *Australian International Law Journal* and a member of the editorial board of the *World Maritime University Journal of Maritime Affairs*. Prior to joining the University of Queensland, he worked at Kings College, London and the Universities of Wolverhampton and Teesside. He has also taught courses in South Africa, Hong Kong and Republic of Korea. Before turning to the law, he served as a naval officer in the South African Navy.

#### **Andrew Viduka**

Andrew Viduka holds the degrees of Bachelor of Arts from the University of Tasmania, Bachelor of Applied Science (Conservation of Cultural Materials) from the University of Canberra, Master of Maritime Archaeology from Flinders University and postgraduate qualifications in Business Administration from University of New England. He has practical experience in Australia, Antarctica, Saudi Arabia, Sri Lanka, Thailand, Micronesia, Cyprus, Greece and Denmark and has worked extensively on HMS *Pandora* and HMAV *Bounty* artefacts. He was the Historic Shipwreck Officer for Queensland and site manager for the iconic SS *Yongala*. Andrew is a Churchill Fellow, member of Australia ICOMOS, an ICUCH Bureau member and Councillor of the Australasian Institute for Maritime Archaeology (AIMA). He is the author of numerous scientific papers and recently contributed three chapters to the *UNESCO Training Manual* for the UNESCO Foundation Course on the Protection and Management of Underwater Cultural Heritage in Asia and the Pacific. He is the Assistant Director Maritime Heritage in the Australian Government Department of the Environment and administers Australia's historic shipwreck program and development of the new Australian National Shipwreck Database. He is finalising the review of the Commonwealth *Historic Shipwrecks Act 1976* and consideration of ratification

of the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage*. Andrew led the successful development of Australia's National Research Project on *in-situ* preservation and reburial, and currently focuses on shared heritage management, national capacity building projects and linking community outcomes with the discovery and protection of Australia's underwater cultural heritage.

#### **Bill Jeffery**

Bill Jeffery has been working as a maritime archaeologist for over 30 years, beginning in 1981 when he formulated and coordinated a maritime heritage program for a state government agency, Heritage South Australia. He went on to work as a contract maritime archaeologist with Federated States of Micronesia National Historic Preservation Office and to complete a PhD in maritime archaeology at James Cook University. He is a consulting maritime archaeologist/research associate with the Micronesian Area Research Centre University of Guam, ERM Hong Kong, Hong Kong Maritime Museum, and the CIE-Centre for International Heritage Activities. He has implemented various types of archaeological and heritage research and management programs in Australia, Pacific Island nations, Hong Kong, Sri Lanka and various countries in Africa. Dr Jeffery has been involved in teaching maritime archaeology including field schools with the University of Guam, James Cook University and Flinders University (2013-2014 part time Lecturer) in addition to implementing avocational/paraprofessional training programs in nine different countries.

#### **Ulrike Guerin**

Ulrike Guerin is responsible for the Secretariate for the 2001 Convention at UNESCO in Paris. Before coming to UNESCO she worked as a lawyer in a major international law firm in Germany. She holds a graduate degree from Dresden Technical University and a *summa cum laude* PhD from the Ludwig-Maximilians-Universität/Max-Planck-Institute, Germany. She also obtained an LL.M. in International and Comparative Law in Chicago, USA, and studied cultural management in Vienna, Austria. Her publications include contributions to a recently published *Manual on Activities*, directed at underwater cultural heritage, a book on *Underwater Cultural Heritage in Oceania* and another one on intellectual property law, as well as many articles, in particular on the 2001 Convention and on the protection and return of cultural property.

#### **Martijn Manders**

Martijn Manders, a maritime archaeologist, is Head of the Maritime Program for the Ministry of Education, Culture and Science, The Netherlands. He teaches at the University of Leiden and Saxion (Applied Sciences), and is also involved with the UNESCO Foundation and advanced courses for UCH management in Thailand and Jamaica.

**Mariano Aznar-Gómez**

Mariano Aznar-Gómez is Professor of Public International Law at the Universitat Jaume I, Castellon, Spain, Chair of Public International Law at the University Jaume I, and Fellow of the Spanish National Scholarship Program of Research. He has been a visiting professor at the University of the Balearic Islands (1995), University of Naples 'Parthenope' (2004), the Université de Paris II—Pantheon Assas (2005) and at the University of Rome 'Tor Vergata' (2007). He has also been visiting scholar at the University of Cambridge's Lauterpacht Research Centre for International Law (2000). He has served as Secretary of the Scientific Advisory Board of the Bancaja Euromediterranean Courses of International Law (1997-2000, 2007-2011) and as a member of its Editorial board (2000-2009); he is a founder member of the European Society of International Law and a member of its Board (2004-2012). Prof. Aznar-Gomez's research focusses mainly on international responsibility of states, disarmament, maintenance of international peace and security and protection of underwater cultural heritage. His publications include *La verificación en el Derecho internacional del desarme* (1995), *Responsabilidad internacional y acción del Consejo de Seguridad de las Naciones Unidas* (2000), *La protección del patrimonio cultural subacuático* (2004) and *La administración internacionalizada del territorio* (2008). He is also the author of numerous scientific articles and contributed to the Commentary to the *UN Charter* (Cot & Pellet, eds. 2005), the Commentary to the *ICJ Statute* (Oellers-Frahm, Tomuschat & Zimmermann, eds. 2006 and 2012) and the Commentary to the *Vienna Convention on the Law of Treaties* (Corten and Klein, eds. 2006 and 2011). He is co-author of the *Green Book for the Protection of the Spanish Cultural Heritage* (2010) and is a legal expert on the protection of the UCH for the Spanish Government. He is advocate and counsel of the Kingdom of Spain before the International Tribunal for the Law of the Sea, and Representative of Spain before the Meeting of States Parties of the UNESCO *Convention on the Protection of the Underwater Cultural Heritage*.

**Marnix Pieters**

Marnix Pieters is the Senior Advisor, Maritime and Underwater Heritage, Flanders Heritage Agency, Belgium. He participated as an archaeologist and soil scientist in the Louvre excavations in Paris from 1989–1991, and afterwards directed the excavation and study of the deserted late medieval fishing settlement of Walraversijde, near Ostend, Belgium, from 1992–2005, which was the subject of his PhD dissertation in 2002. He was the driving force for the start-up of maritime archaeology in Flanders. From 2008-2012 Dr Pieters served on the board of directors of the Flanders Heritage Agency, and its forerunner, after which he became Senior Advisor on Maritime and Underwater Heritage at the Agency. An important part of his activities deal with advice, management and research of maritime heritage in the North Sea. Beginning

the Flanders Heritage Agency is participating in the multi-annual (2013-2016) Archaeology in the North Sea Project, which is devoted to the development of an efficient assessment methodology and approach towards a sustainable management policy and legal framework in Belgium.



## The significance of world-wide ratification of the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*

Lyndel Prott

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Very few international conventions are ratified by every single country – the UNESCO Constitution with its 195 Members and 8 Associate Members is probably the most successful, with the *Charter of the United Nations* with 193 States Parties close behind. The 20th century was a period of enormous development in multilateral agreements between States to adopt unifying principles over important areas of human activity: resolution of conflicts, control of dangerous weapons, prevention of inhuman activities such as slavery and exploitation of children, conservation of nature including species, protection of cultural diversity and so on, as well as setting basic standards for other activities such as sea and aerial travel, rules on immigration and asylum, standards for legal and electoral processes and human rights in general. Agreements, whether multilateral or bilateral, are registered with the United Nations which currently holds over 200,000 such treaties.

It is obvious that not every State will become party to all such treaties; it would simply be impossible for any State to properly examine each of them and become party to them. There are certain multilateral treaties which reach almost all the States in the world, such as the constitutions of the major international organizations like the United Nations and its specialised agencies (UNESCO, World Health Organisation, UN Development Program, Food and Agriculture Organisation and many others). Then there are some conventions which are designed to be universal and which have very substantial numbers of ratifications because it is felt politically damaging not to show support for their aims. These include, for example, human rights agreements such as the *Convention on the Rights of the Child*, 1989, which has 193 States Parties.

One hundred and ninety of UNESCO's 195 Member States have ratified the UNESCO *Convention concerning the Protection of the World Cultural and Natural Heritage*, 1972. It is, indeed, one of the most successful treaties in the world in terms of ratification. However, such success in *ratification* is not necessarily reflected in the *effectiveness* of a treaty. Conventions which deal with issues also the subject of other international conventions, or which have complex provisions requiring new legislation or revision of existing legislation, or those which require a change of public attitudes, or more stringent requirements of many nations, or those which reach across a series of different areas of law (such as criminal law, administrative Law, defence issues, contract or property law and so on), usually take much longer to attract a great many ratifications. These issues are often particularly difficult for federal states which have devolved certain aspects of the issues being dealt with to their sub-federal components (states, provinces, cantons, Länder, etc.).

Such difficulties are exemplified in UNESCO's 1970 *Convention Against Illicit Traffic*. For those reasons it has attained only 124 ratifications after 43 years, but this is hardly surprising since it requires far more of its Member States than the *World Heritage Convention*, 1972. The 2001 *Convention on the Underwater Cultural Heritage* is much closer to the 1970 Convention in its requirements of States Parties than to the less demanding requirements of the *World Heritage Convention*. Such conventions require a considerable effort of persuasion and explanation in order to get enough ratifications to make it clear that they are an effective and powerful instrument to achieve their purposes. For that reason it is important to get a substantial number of States to ratify.

However it is also important to have a reasonable representation from all the regional groups within UNESCO. So far there are 45 States which have ratified the *Convention on the Protection of the Underwater Cultural Heritage*. Fifteen of the 50 European/North American States have ratified the Convention, 2 of 48 Asian/Pacific States, 16 of 33 Latin American and Caribbean States, 6 of 46 sub-Saharan African States, and 6 of 21 Arab States). From these figures it is clear that a major effort should be made to persuade more countries in the Asian/Pacific group to ratify as early as possible.

### Flags of convenience

It is evident that States that promote flags of convenience (FOCs) are not likely to ratify the Convention, since they provide port facilities to ships which seek to evade international laws and responsibilities by operating their vessels under the flag of a country that currently either cannot or does not exert effective control over the operations of its flagged vessels. They thus avoid the costs of requirements for safety at sea, conditions of crew, controls for conservation of marine resources and other legal controls, whether national or international, by registering the vessel in a country which has minimal legislation or none, even though the ship may be owned by a corporation in a State which has stringent requirements for operating its ships. Shipping companies using these FOC registries save money by not taking the precautions and not conforming to the conditions which the majority of the world's countries have accepted.

FOC States make a lot of money from unscrupulous operators of ships, whether as to safety measures, crew conditions, illegal exploitation of maritime resources or evading controls on illicit trafficking of persons or of cultural heritage or, indeed, anything else. According to an Australian government website <<http://www.daff.gov.au/fisheries/iuu/high-seas>> illegal, unreported and

unregulated fishing (IUU) is facilitated by this practice. The most notorious FOC States appear to be Panama, Liberia and the Marshall Islands. The International Transport Workers' Union lists another 31 countries.

#### **Other evasive steps to avoid international regulation**

Illicit traffic of cultural heritage generally is facilitated by transit States such as the Autonomous regions of Hong Kong, Thailand and Singapore. These are countries which have not ratified the 1970 UNESCO *Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*. From this experience it is clear that there will not be 195 ratifications of the 2001 UNESCO Convention in the next decade. Nevertheless, there are now 124 States which have ratified the 1970 Convention and all regions are well represented in the List. Now that this is the case, the 1970 Convention has far more power because it represents roughly two-thirds of the international community. Furthermore, enough States feel strongly enough about the subject to donate substantial extra-budgetary funds to publicise that Convention and support regional training sessions to assist those implementing that Convention.

#### **Significance of ratification of the 2001 Convention for UNESCO**

Work on the 2001 Convention began as an initiative of the Council of Europe in 1977 beginning with a report in 1978. The International Law Association took it up on a universal scale in 1988 and UNESCO became involved in 1994. Four sessions of inter-governmental negotiation from 1998 to 2001 produced the present text. The cost and effort over 24 years to achieve such an international convention must not be wasted. It is therefore a high priority to get as many States as possible to ratify the Convention as early as possible.

It is particularly important that Australia, which played a key role in the negotiation of the Convention, should itself ratify the Convention. Many of its provisions are modelled on the Australian legislation (the *Historic Shipwrecks Act 1976*) and on the terms of its pioneering 1772 *Agreement of the Australia Netherlands Committee on Old Dutch Shipwrecks* (ANCODS Agreement) with the Netherlands government to share knowledge and artefacts. Australian underwater archaeologists have also done outstanding work in the Asian-Pacific region to train specialists for countries in this region and elsewhere. Australia should play a key role in encouraging more governments in the Asian-Pacific region to ratify the Convention.

## The reasons for the Convention's drafting

Patrick O'Keefe

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Underwater archaeological problems were mounting during the 1960s and 70s. People were saying that just about all the wrecks in the Mediterranean that could be reached by weekend divers on holidays had been looted. Around the United Kingdom there were the same sort of problems. Down in the Scilly Islands for example there were gunfights. The Caribbean was dominated by Mel Fisher pursuing Spanish wrecks. The Dutch wrecks off Western Australia had problems. In many parts of the world there was a feeling that the underwater resource created from centuries past was under severe threat. The legal and administrative background was very, very minimal. Countries did have legislation, but in many cases it was not specifically directed at underwater cultural heritage (UCH). It was legislation dealing with archaeology in general, and it just happened to extend to what was beneath the waters of the territorial seas.

In 1956 UNESCO passed its *Recommendation on International Principles Applicable to Archaeological Excavations*. That was a long time ago, and it was a very rudimentary recommendation. But it did extend to archaeological excavations 'on the bed or in the subsoil of inland or territorial waters of a State', and that itself at the time was quite revolutionary because it required States to consider the problem of what lay within the territorial sea, and how to deal with it. Many States never took any action. In 1956 most States had a territorial sea of three nautical miles. Why three nautical miles? Because that was the range of a cannon shot. And so it could be controlled from naval bases on the coast. But by 1956 of course that old idea had long disappeared. States were claiming much broader areas of competence.

In January 1977 the Council of Europe held a meeting to discuss what was going on in the United Nations in relation to the Law of the Sea Conference. They came to the conclusion that it was unlikely that any agreement would be reached quickly as regards detailed provisions on UCH at the law of the sea negotiations.

The United Nations had been negotiating law of the sea matters for a number of years. There had already been two conferences prior to the January 1977 meeting, and a number of conventions drawn up. So this was going to be the big one, the one where they were going to finally come to an agreement on virtually the total law of the sea, and UCH was a minute part of that. So the Council of Europe decided to investigate what it could do. If the United Nations was going to take years, then what could the Council of Europe do in the meantime?

In 1977 they passed a resolution that action should be taken within the Council to prepare a report on UCH within Europe. The end result was what is called the *Roper Report of 1978*. It is still good reading if you want

to go back to the early years. There were three other specialist reports attached. David Blackman did one on underwater archaeology, and then Lyndel Prott and I did two on the legal aspects. They were synthesised by the Education and Cultural Committee of the Council of Europe under John Roper, now Lord Roper, and they produced the *Roper Report*.

The *Roper Report* suggested that the Council of Europe prepare a European convention on UCH. They set up an *ad hoc* committee under the chairmanship of Carsten Lund of Denmark. They worked on this until 1985. They had a draft convention prepared, which would have been applicable throughout Europe, for those States who decided that they wanted to become party to it. However, it was never opened for signature 'due to Turkey's objection to its territorial scope of application'.

The objection had nothing to do with cultural heritage. It was a dispute between the Greeks and the Turks over certain Greek islands which lie very close to the Turkish coast, and to what sort of control those islands would have in relation to Turkey. Turkey objected and the whole program within the Council of Europe, in relation to a draft convention, came to a stop.

In the United Nations meanwhile, they had been moving closer to a draft convention. In 1982 that was finally enacted as the *United Nations Convention on the Law of the Sea*. It had two provisions on the UCH, Articles 149 and 303, dealing with 'objects of an archaeological and historical nature'. Many saw these two articles as deficient. Article 149 deals with what is called 'the Area', which is basically the deep seabed. It is very peculiarly worded, so much so that it is difficult to establish what exactly it does mean. Article 303 is a more general provision, but once again, many of us came to the conclusion that it was deficient.

The difficulty was that there were very few States within these negotiations who were at all interested in the UCH. Of the States who were interested, a maximum of about seven, the two major ones were Greece and Tunisia, and they were opposed to a large degree by the United States and United Kingdom. So much so that at one stage they were almost locked up in conflict and could not get out until they had come to an agreement. When they did come to an agreement we ended up with articles 149 and 303. Three matters in particular caused concern. One was jurisdiction. Two was the role of salvage, and three was the question of sovereign immunity of State warships. That was the law of the sea proceedings.

There were other attempts in the years after that. For example I went to a meeting in Nebraska of all places in 1983, held by the University of Nebraska to organise an international meeting to be held in the Bahamas to discuss

a possible new convention. It was an interesting meeting in the capital, Lincoln. One morning we went to breakfast with the local football team. Another morning we had breakfast with the Governor. We were given freedom of the City of Lincoln. But it came to an end because the main person involved was a Bahamian Senator and she died of cancer three months later. The connection with the Bahamas was severed and it came to an end.

Around 1986 I made a proposal to the local chairman of the national committee in Australia of the International Law Association (ILA), that the ILA set up a committee to deal with general matters of heritage law. He was very enthusiastic and put the proposal to headquarters in London. It was put up before the executive council at the biennial conference in Warsaw in 1988. I was coming down the lift in the hotel and the ILA Director of Studies said 'We have just discussed your proposal. It has been endorsed by the executive council and you are the new chairman'. If you put up a proposal that usually happens. He said 'Who do you want as your rapporteur', and I said 'Jim Nafziger'. He said 'What are you going to talk about' and I said 'Underwater heritage'.

So we took off on the issue of UCH. We had a couple of meetings, one in Jupiters Casino, in Queensland in 1990, one in Cairo in 1992, and the final one, in 1994, in Buenos Aires, where the ILA adopted the draft that had been proposed. The ILA has consultative status with UNESCO, so the draft was forwarded to UNESCO for consideration. In 1993 the Executive Board of UNESCO had invited the Director-General 'to consider the feasibility of drafting a new instrument for the protection of the underwater cultural heritage'.

The Secretariat's study was made and presented to the Executive Board of UNESCO in 1995. It made frequent reference to the ILA draft, and stated that the ILA draft was a useful basis for the development of a UNESCO instrument on the subject. The UNESCO General Conference of 12 November 1997 resolved that 'the protection of the underwater cultural heritage should be regulated at the international level and the method adopted should be an international convention'. UNESCO and the United Nations Division of Ocean Affairs and Law of the Sea used the ILA Draft to prepare an instrument taking into account State comments.

The *Annex*, or 'Rules concerning activities directed at underwater cultural heritage', we in the ILA saw as an integral part of the Convention. Lyndel and I had proposed that there should be a code of conduct attached to the Council of Europe instrument – you will see in the Roper Report that we suggested that there should be a code of conduct. That was not referred to by the Council of Europe committee, but when we looked at it in the ILA it was decided that we needed something by which States could judge whether what archaeologists had done had been acceptable. What was an appropriate standard – an objective standard to judge the conduct of archaeologists?

For that we went to Graeme Henderson's committee, the International Committee on the Underwater Cultural Heritage (ICUCH) – within ICOMOS. We were looking around in the ILA Committee for someone to do this for us, because we had no expertise in archaeology. I probably got a notice from ICOMOS saying that the ICUCH committee had just been set up. I then seized on that thinking this is the sort of body we need. Graeme very kindly agreed to proceed with this. From that you have the development of both the ICOMOS *International Charter on the Protection and Management of Underwater Cultural Heritage* and the *Annex* to the Convention. That in a nutshell is how the Convention came about – the history of it.

## The reasons for the Convention's drafting: a museum-based maritime archaeologist's perspective

Graeme Henderson

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Fifty years ago, in 1963, the author had just reached the age of 16 when he found, by chance, while diving with friends, a 17th century Dutch shipwreck, the *Vergulde Draeck*, off the Western Australian coast. At the time it was the oldest wreck found in Australian waters. Carrying 76,000 Spanish guilders, it was a sensation in the press, stimulating community interest in early Australian history and, for the first time, an awareness of the importance of the underwater cultural heritage (UCH). But there were no heritage protection laws, only salvage law. That became a problem when the first silver coins were found. Salvage law involves the concept of 'salvor in possession', and encourages destructive and violent activity on heritage sites.

Events following the discovery of the *Vergulde Draeck* showed the need for heritage laws, management programs and community support. This took time to develop because Australia was a pioneer in the field and there were no overseas models to look to.

Such laws must be consistent and interconnected - providing a web of protection covering the seabed locally, nationally and globally. The first small local step was taken in 1963 by the author and co-finders of the *Vergulde Draeck*. Dismayed by the violence on the *Vergulde Draeck* following its discovery, they signed a Deed of Assignment with the State's Crown Law Department, transferring what legal rights the finders had to the Western Australian Museum. In accepting these rights the Museum took responsibility for the protection and management of historic wrecks, even before any protective legislation. The State Government legislated in 1964, vesting in the Museum the sole right of working on historic wrecks. But that failed to stop the destruction.

When the author joined the Museum in 1969 his colleagues were mainly ex-Navy clearance divers, tough men with the experience to confront dangers, and dangerous people, on the high seas. During the first 6 months of his employment he saw detonation wires on the wrecks of the 1622 *Trial*, 1656 *Vergulde Draeck*, and 1712 *Zuytdorp*, and blast holes on the 1629 *Batavia*. However the Museum's active excavation program initiated by Jeremy Green in 1971 was welcomed by the community, and the looting decreased.

In 1976 a diver, Allan Robinson, successfully challenged the State legislation in the High Court of Australia, on the grounds that the State Government lacked authority to pass laws affecting offshore waters. This prompted the passing of Commonwealth legislation (the *Historic Shipwrecks Act 1976*) and the development of management programs covering all Australian States.

Ships engage in trade in foreign waters, so much of the UCH is shared heritage, multinational heritage, important to both the country of origin and the site's neighbouring State. Awareness of the need for a comprehensive international instrument of protection emerged in the 1970s. During the jurisdictional uncertainty in Australia, the Netherlands Government offered assistance in protecting the Dutch wrecks in Australian waters. In 1795 the Dutch East India Company (VOC), owner of the ships *Batavia*, *Vergulde Draeck*, and *Zuytdorp*, had been nationalised by the Dutch Government, who became heirs of the Company and the cargoes of the wrecks. In 1972 the *Agreement of the Australia Netherlands Committee on Old Dutch Shipwrecks* (ANCODS) was signed, vesting the right of recovery in Australia, who in turn delegated the authority to the WA Museum. Ironically, the Dutch Government that helped Australia to protect VOC wrecks, did little to protect them elsewhere. They were claimed by the Ministry of Finance, who required that objects found on the wrecks be auctioned and thus scattered.

ANCODS brought ongoing close cultural ties, the Dutch taking a strong pride in their traders and explorers - the first Europeans to visit Australia in 1606, and the first to visit Western Australia in 1616. The Agreement had an element of one-upmanship - Robinson had challenged laws at the State level, but would he have the courage to challenge an international treaty? ANCODS, described by Committee member Geoffrey Bolton as 'an unusually harmonious example of successful international cooperation', has been tested in court, and its symbolic importance, as a worthy model for other nations to pursue, is huge. A bilateral agreement, it can be seen also as the first step toward multilateral agreements providing a network of global protection through coordinated action.

Such aspirations developed rapidly. In 1976 the Council of Europe's Education and Culture Commission undertook a study of UCH and considered that a convention would be desirable. In 1977 Zuiderzee Museum Director Gerrit van der Heide argued that, with increasing accessibility, many wrecks could only be protected by international agreements.

Robinson's death in 1983 ended the era of high profile destructive individual treasure hunters in Australian waters, but a new threat was emerging. Ronald Reagan and Margaret Thatcher argued persuasively that markets, not government, held the key to prosperity and freedom. But with the dissolution of the Soviet Union, some free-market entrepreneurs felt that everything,

including UCH, should be commercially exploited. In his book *What Money Can't Buy: The Moral Limits to Markets*, Michael Sandel argues that the developed world has drifted from having a market economy to having a market society. In Australia, beginning in the 1980s, investor funded commercial salvage schemes targeted the UCH. These schemes were led by sophisticated businessmen, with the charm to influence investors, public officials and politicians. But because the level of protection had so increased in Australia with the Commonwealth legislation these ventures were generally focused overseas, in the waters of nations lacking legislation.

On the positive side, by the mid-1980s Australian archaeologists were playing a lead role in educational initiatives in many parts of Asia, raising awareness of the importance of the UCH and developing local management expertise. The Council of Europe, UNESCO, the International Law Association (ILA), the Australasian Institute for Maritime Archaeology (AIMA), the International Congress of Maritime Museums (ICMM), and Australia ICOMOS (International Council on Monuments and Sites, a UNESCO affiliate), were progressing other fronts.

The Council of Europe's Committee of experts on the UCH reported in 1985 with a draft European convention on the UCH, but it did not progress.

The discovery in 1985 of the *Titanic* wreck in 3,700 metres, and its subsequent plunder, made the international community aware that sites in the deepest oceans were accessible to destructive activity. UNESCO immediately became involved. At a UNESCO Regional Seminar on the Protection of Movable Cultural Property, held in Australia in 1986, it was observed that: 'wrecks on the deep seabed are of particular importance, since for various chemical and biological reasons, ... many ... are likely to be in an exceptional state of preservation'. The Secretariat issued a statement that 'if positive steps are not taken immediately... the recent advances... made by treasure hunters... particularly in South-East Asia, will result in a tragic loss of... heritage'.

The ILA established its International Committee on Cultural Heritage Law in 1988. By 1990 that Committee had prepared a first draft convention on the UCH. A report by Chairman Patrick O'Keefe to the ILA in 1991 envisaged that 'for the convention to be effective, Nationals would be required to abide by specified criteria in excavating historic wreck sites [and that] appropriate criteria might be drawn from such documents as the 1956 UNESCO Recommendation on... Archaeological Excavations and the [1990] ICOMOS Charter for ... Archaeological Heritage'.

Australian archaeologists were concerned about the escalation of auctions, such as Christie's 15 million dollar auction of the porcelain salvaged by an Australian, Mike Hatcher, from the wreck of the VOC ship *Geldermalsen*. Australian archaeologists initially employed a different strategy from that of the ILA, developing non-

prescriptive codes of practice, within Australia, with the ICMM, and with ICOMOS.

In 1989 AIMA, at the invitation of the Commonwealth Government's Australian Cultural Development Office, commenced its code titled *Guidelines for the Management of Australia's Shipwrecks*, comprising the principles and practise adopted by Australia's professional maritime archaeologists and intended to serve heritage bodies, developers, teachers, the diving community and museum visitors.

In 1987 the ICMM, whose 284 members comprised most of the world's largest maritime museums, formed an underwater archaeology committee, chaired by the author, with a brief to survey existing museum acquisition policies for objects from underwater sites and set recommendations for ICMM's position. The author saw this as an opportunity to address the demand side of the international market in antiquities from the UCH. If museums stopped buying, salvors would lose that market. The survey led to the adoption in 1993 of standards, developed by the committee, for the exploration of underwater sites, including the policy to 'not knowingly acquire or exhibit artefacts... removed from commercially exploited... sites in recent times'.

Even as this code was published there was evidence that it would be ineffectual without legal force. The United Kingdom's National Maritime Museum (Greenwich) agreed to the ICMM standard about not exhibiting artefacts removed from commercially exploited sites, but immediately entered into a contract with RMS Titanic Inc. to exhibit the material that company were salvaging. RMS Titanic was selling pieces of coal from the wreck, asking the public to help preserve the *Titanic* by purchasing items. The ICMM committee produced a report about the exhibit contravening the policy, but purportedly the ICMM President, Richard Foster, was warned while *en route* to the organisation's annual general meeting that any criticism of Greenwich, a founding member of the ICMM, would result in their leaving the organisation. They were not censured and the exhibit went ahead.

Australia ICOMOS facilitated a more successful strategy, matchmaking archaeologists with legal experts and so providing the opportunity for amalgamating the non-prescriptive and prescriptive approaches. ICOMOS members from Mike Hatcher's home State of South Australia had been lobbying the Australian Government in 1987 with their concerns about commercial projects. In 1991 the author responded to a request by ICOMOS to develop a new vehicle - the International Committee on the Underwater Cultural Heritage (ICUCH). Its mission was: 'the establishment of a structure of international environmental cooperation in the field of underwater cultural heritage, in accord with the spirit of ICOMOS'.

The ILA envisaged that for the Convention to be effective, nationals would be required to abide by specified

criteria in excavating historic wreck sites. But there was little awareness within the maritime archaeological fraternity of the activities of the ILA in producing a draft UNESCO convention in 1990. So in August 1991 Patrick O’Keefe wrote to the author inviting ICUCH to prepare these criteria – standards by which deviant conduct could be measured. This was a much better plan than using the 1956 UNESCO Recommendation, or the 1990 Charter on Archaeological Heritage, documents that did not deal with the UCH.

ICUCH’s maritime archaeologists and heritage managers from 20 countries developed the *International Charter on the Protection and Management of the Underwater Cultural Heritage*, adopted by ICOMOS in 1996. UNESCO used the Charter, a statement of fundamental professional standards, to develop the *Annex*—rules concerning activities directed at underwater heritage—for the *International Convention on the Protection of the Underwater Cultural Heritage*, adopted by UNESCO in 2001.

This paper presents the author’s view of the reasons for, rather than the process of, the drafting of the 2001 Convention. In 1964 the Western Australian Government had passed legislation because two early Dutch shipwrecks had been discovered, were considered to be of importance, and were being looted. While that legislation paved the way for the Museum’s management programs, it failed to stop the looting. The 1972 ANCODS Agreement came from a recognition that the Dutch wrecks were shared heritage under threat. The concept of cooperation between States was a valuable pointer to the more ambitious 2001 Convention. The Commonwealth Government’s *Historic Shipwrecks Act 1976*, administered with management programs, was largely successful in stopping looting of shipwrecks in Australian waters, but some Australians involved themselves in looting sites overseas.

Summarising then, among the reasons the author saw for the Convention to be drafted were:

- The ever increasing access to the deep ocean, where favourable environmental conditions imply superior preservation and the potential to gather unique information.
- The destruction caused by investor funded commercial exploitation. Involvement by Australians in commercial exploitation abroad undermines Australia’s reputation.
- The realisation that if bilateral agreements such as ANCODS can work, then multilateral agreements should work, providing opportunities for global cooperation and promotion.
- The opportunity to update the Western Australian State legislation (partially declared invalid by the High Court in 1976), and the Commonwealth legislation to make it fully consistent with other legislation domestically and internationally.
- The opportunity to act on the observation made at the UNESCO Regional Seminar, that advances by treasure hunters particularly affect South-East Asian

States. Australian practitioners have good relations with the heritage managers there, and in partnership have potential to prevent destruction.

- Non-prescriptive guidelines were useful in most quarters, but in isolation failed to stop those intent on commercial exploitation.
  - The underwater cultural heritage is a finite resource.
- For all the above reasons, the invitation by Patrick O’Keefe, who together with Lyndel Prott is the great champion of the 2001 Convention, for ICUCH to cooperate in developing an international instrument of protection, was a most welcome opportunity for the archaeological fraternity.

## Why Australia should ratify the Convention

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This paper discusses the need for Australia to ratify the 2001 Convention and highlights the issues pertinent to that question. Some very broad issues are raised, and connected with the issues in the previous papers, particularly those of Patrick O'Keefe and Graeme Henderson.

In the 1960s and 70s Australia, and Australians, were at the cutting edge of the field of maritime archaeology and laws to protect this valuable resource. Not only did the discovery of the old Dutch shipwrecks yield significant gains in our knowledge of the past and in the manner in which underwater sites such as these should be investigated and excavated, but it also yielded important legal consequences. The 1972 ANCODS Agreement between Australia and the Dutch Government was ground-breaking at the time, and is still influential as an example of the way cooperation can be achieved between nations, and the kind of cooperation the 2001 Convention specifically envisages in article 19.

The *Historic Shipwrecks Act 1976* too was ground-breaking at the time. It was one of the first to protect historic wrecks in the way that it does, and some aspects of that protective regime, are also still very influential today. In regards to the developments in protection we should recognise the great efforts of the three previous speakers: Patrick O'Keefe as chairman of the International Law Association's Cultural Heritage Committee that drafted the very first draft of what became the 2001 Convention, Graeme Henderson who chaired the ICOMOS International Committee on the Underwater Cultural Heritage that drafted the Charter that was to become the *Annex* to the Convention, and Lyndel Prott who was Director of the Standards Section of UNESCO when the 2001 Convention was being negotiated and adopted. But for these three Australians I do not think the UNESCO Convention would have seen the light of day in the way that it has. So the world owes a great debt to Australians and Australia for the pivotal roles played in protecting UCH and providing the world with this protective regime. So what then?

Graeme Henderson has expressed his disappointment at the lack of momentum. What we need to do now is regain this momentum. Looking back at the history of the Convention itself Australia was engaged both in the first and second meetings, but in particular in that third meeting in 2000, when the Australian delegation was actively engaged in the negotiations, both formally and informally, supporting the draft Convention, and voting in favour of its adoption. In 2001 the then Minister for Environment, Senator Hill, indicated that there would be a review of the legislation, and as part of that review one of the considerations would be to widen the scope of the protective regime beyond shipwrecks. Yet we are

where we are today, discussing this issue. We do need to regain momentum, to move past the dead water between 2001 and 2013.

Why then should Australia become a Party to this Convention? Not merely because of the historical importance and role that Australia played in this development, but because it affects Australia's future. The most obvious reason why Australia should consider ratification is that we need a contemporary, internationally consistent national standard. One that will provide a basis for better protection and management for a wider range of heritage objects and sites found in a wider geographical area.

I will address several of the reasons why Australia's ratification is important and look at how that plays into reconsideration of the legislative regime in Australia, particularly the *Historic Shipwrecks Act 1976*. It is outdated today, in several respects. It is very narrow in its scope, and requires broadening. It does not include UCH of Aboriginal and Torres Strait Islander origin. This is particularly important because it is an issue that was championed by the Australian delegation throughout the negotiations. Having championed the issue through the negotiations and having enabled its inclusion in the definition of UCH it is disappointing to see that it has not trickled down to Australia's national standard. As a result, for example, Aboriginal fish traps do not fall within this protective regime. Nor do aircraft. So there is an issue in terms of the scope of this legislation and a need to update it in relation to the Convention.

It is also the case that this legislation does not match up with contemporary management practices in the way in which heritage is managed in Australia. Many heritage management practices rely on that legislation's application but also on a much broader set of standards that ought to be applied in a manner consistently applicable at the national level. It requires for example a move away from a relic or object approach to a much broader site management approach with greater consideration being given to practises such as *in-situ* protection.

Another reason why it is important for Australia to upgrade its legal regime so as to concur with the Convention is to bring it in line with not only Australia's international cultural heritage law obligations, but also with broader international obligations. One of those is the international law of the sea. The *Historic Shipwrecks Act 1976* defines the waters over which Australia has jurisdiction for purposes of protection as waters adjacent to the coast. That means the waters measured from the low water mark out to the edge of the continental shelf. At the time, in 1976, this was ground-breaking. It was prior to the 1982 *United Nations Convention on the Law*



of the Sea (UNCLOS), and was perhaps the first attempt to really extend coastal State jurisdiction over this valuable resource beyond the territorial sea. However, subsequent developments in both UNCLOS and in the 2001 Convention suggest that the extended jurisdiction is partly incompatible with existing international law. So this is an opportunity for Australia to reconsider, but in a way which gives effect to what was intended in 1976, and that is, extending coastal State protection over a greater geographical area but now consistent with other international standards.

It is also important that we think about this in the context of broader Australian engagement with international law. Australia is currently a Party to a dispute before the International Court of Justice, which involves law of the sea issues, and it is important that when engaged in such a dispute, Australia can show that it acts in a manner consistent with the international law as much as possible. Consideration ought to be given then to looking at the Convention and its application through legislation in a way that makes it consistent with the much broader international law of the sea.

There are many other issues regarding the legislation itself that will need to be changed for it to be consistent with the Convention itself. These include, for example, the issue of granting rewards for finds, the way in which material and sites are managed, etc.

Although, in 2001, Senator Hill suggested that there would be a review of this legislation, it took until 2009 for something to happen, and subsequent to that nothing has happened, and something ought to happen. Again, considering that review and the changes to the legislation in a much broader context, Australia has gone through a process of updating its maritime law significantly. After a century of application, including its application to shipwrecks, the *Navigation Act 1912* was updated in 2012. There are a small number of aspects of that legislation that address historic shipwrecks, and that newly drafted legislation highlights the fact that the *Historic Shipwrecks Act 1976*, is now rather old in relation to the much broader legislative scheme. Something else is important in the *Navigation Act*. In the 2012 rewrite there has been a very clear reconsideration about the relation between the States and the Commonwealth in terms of regulation of maritime places and ships. That can play into the way in which the *Historic Shipwrecks Act 1976* might be managed in the future. It gives a much broader context to the way we might consider adopting the Convention and implementing it in Australia.

There is also the question of consistency between the *Historic Shipwrecks Act 1976* and other pieces of legislation that protect cultural heritage in general but in particular forms of UCH. Ratification of the Convention and its implementation through national legislation is an opportunity to bring that legislation in line with the other pieces of legislation that apply, some having been updated much more recently than the *Historic Shipwrecks Act 1976*.

Most important is the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), which has a number of heritage lists, and includes a number of important UCH sites. The *Australian National Heritage List* for example includes the wrecks of the *Batavia*, *Sydney*, *Sirius*, *Cerberus*, *Kormoran*, and the Brewarrina Aboriginal fish traps. Whilst the latter is an inland site, it indicates the kind of sites you might get along the coastline. The EPBC Act protects these shipwrecks, as does the *Commonwealth Heritage List*, which also has some of these wrecks on it, illustrating the fact that there are a number of different legislative regimes applying to the same heritage, which seems rather odd. This is particularly so when the inconsistency means that the legalisation applying to heritage generally provides in some ways greater protection than the legislation designed to protect the specific subset of cultural heritage under discussion: UCH. A more updated, more contemporary regime is needed to protect UCH.

There is also need for consistency between the *Historic Shipwrecks Act 1976* or the act that will implement the Convention, and other pieces of legislation that we have in Australia, particularly that implementing other UNESCO cultural heritage conventions. For example, the 1970 *Convention on the Illicit Trafficking of Cultural Heritage* was implemented through the *Protection of Movable Cultural Heritage Act 1986*. That Act denies UCH coming into Australia without an export certificate from its state of origin. This, however, is somewhat problematic as illustrated in the case of the *Tek Sing* wreck, where the vast majority of the porcelain recovered was allowed to pass through Australia before the Commonwealth was able to take action and seize the material. This difficulty can be overcome through implementation of the 2001 Convention that requires, for example, the seizure of material that has been recovered in a manner inconsistent with the *Annex*.

Again, a problem we have with this legislation is that the *Protection of Movable Cultural Heritage Act 1986* and the *Historic Shipwrecks Act 1976* have both been under review recently but neither review necessarily considered the way in which these pieces of legislation interact. The best way to deal with that interaction is to consider them in the international context. And the best way to do that is if Australia ratifies the 2001 Convention.

Ratification of the Convention is also an opportunity to bring uniformity to the way in which the law deals with the cultural heritage. By uniformity I mean not just uniformity across jurisdictions in Australia – the States, Territories and Commonwealth – but also internationally. We have problems for example in the States and Territories where aircraft are protected under Western Australian State legislation but not under Commonwealth legislation, and internationally we have legislation protecting UCH in Australia but not in our neighbouring States. The Convention is designed as a mechanism by which States will cooperate in the protection of that heritage, so that heritage recovered in one State contrary to the

Convention cannot be brought into another State. That mechanism does not exist unless all those States are Parties to the Convention. And then, if States are Parties to the Convention the best way to deal with that is to have consistency across the legislation to implement the Convention. The only way we can do that is to all work with the same initial structure, that is, the Convention.

There is also the need for leadership in the Asia-Pacific region. The only ratifications from the Asian region are Cambodia and Iran, and none from the Pacific. The opportunity for Australia to provide leadership in the Asia-Pacific region is quite significant. You can only do that if you become a Party to that Convention. And a part of that leadership then is the cooperative regime that you construct. Australia needs to construct a cooperative regime similar to that which it has had for many years in the Australia-Dutch Agreement, and facilitate that cooperation through a mechanism designed to enable States to coexist with one another. That cooperation exists in many ways between Australia and its neighbouring States. And it exists in particular through education.

Education is one of the methods by which the Convention itself tries to facilitate protection of cultural heritage across jurisdictions. It is a very important component of the Convention. Australian universities are an important educational facility in the Asia-Pacific region. It is important that Australian universities engage with the region. In my university where I teach cultural heritage law to Masters students and to students in Museum Studies, many of the students are from jurisdictions overseas and many of those jurisdictions are jurisdictions in the Asia-Pacific region. It is rather difficult to teach them best practice when Australia is not exactly the best example to point to within the region. Those who teach maritime archaeology will probably say the same thing.

It is unfortunate that Australia has stalled in playing an important role in that educational function. Look at UNESCO's training regime that has been run in Thailand over the last few years. Many in the audience here today have taught in that course. There have been trainees from a range of countries in our region, including Cambodia, Vietnam, Thailand, Malaysia, Sri Lanka and Indonesia. And we have graduates from some of those programs here today. Australia plays an important role in that function as well. Again I think it is difficult for Australia and Australians to play that educational role when they cannot point to their own jurisdiction as an example of the things that we ought to be doing and the way we ought to protect the UCH. Regional leadership and education will help us assist with those examples of practice that have not been ideal, some of which will be familiar to many of you. Ratification of the 2001 Convention will facilitate this educational function utilising Australia's rich knowledge base of maritime archaeology and international law and its protection of cultural heritage.

We really ought to be assisting our neighbouring States in how they manage their UCH. Some of these are

of historical importance and others quite contemporary examples of vessels that arrived in our region. The ratification of the 2001 Convention is important for the way in which Australia engages in a much broader protection of UCH. UNESCO has a suite of international conventions that protect cultural heritage and it is important that Australia be a Party to all of them, because all of these conventions overlay one another in a seamless protective mantle. If you are not party to one of those you expose that particular aspect of cultural heritage to some risk. Australia is a Party to at least four of those conventions, the 1954 *Hague Convention on the Protection of Cultural Heritage during Armed Conflicts*, the 1970 *Illicit Trafficking Convention*, the 1972 *World Heritage Convention*, and the 2005 *Cultural Diversity Convention*, but not yet a party to the 2003 *Convention on the Intangible Cultural Heritage*. Consideration should be given to not just the 2001 Convention but also to the 2003 Convention, in the sense that all of these conventions cover aspects of cultural heritage which, although they address specific subsets of cultural heritage or heritage in different contexts, their application works from an integrated and systemic, principled way.

Finally it is important to consider that we are discussing this on the eve of the Centenary of the Australian Navy, and the fact that what we are talking about is a section of this heritage that will very soon fall within the scope of the 2001 Convention – the UCH of the First World War. This is an exceptionally important heritage for Australia and for the Australian Navy that suffered losses in the sinking of the submarines HMAS *AE1* and HMAS *AE2*. The role that the 2001 Convention can play in the protection of conflict heritage, which includes other forms of UCH such as that lying in the waters of sites such as Gallipoli, that, importantly, lie within the jurisdiction of others States, is acute. The cooperative protective mechanism constructed within the 2001 Convention offers the very best form of protection in these circumstances. That brings us back to my first point, that Australia has a very rich and important resource of UCH, and the only way we can really protect that is to ratify the UNESCO Convention.

## **Australia's consideration of the ratification process and current position**

**Andrew Viduka**

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At the 7 September 2013 federal election the Australian people voted for a change of government, bringing in a Liberal Government led by the Prime Minister the Hon. Tony Abbott MP. In line with Australian Government policy, as a public servant speaking in a public forum shortly after an election, it is inappropriate to pre-empt a policy position of the new government. So I shall draw upon information previously communicated to the public in one form or another.

I will begin with some background to Australia's long progress towards ratification. The *Historic Shipwrecks Act 1976* (the Act) is a Commonwealth place-based Act that covers the entire country, as differing from a state or Northern Territory Act that would only be applicable to the specific jurisdiction. It protects both shipwrecks and relics, and works on a blanket-protection rolling-date system. So for example, a vessel sunk over 75 years ago, automatically becomes protected, as do all the associated relics. Isolated objects that are clearly thrown from a vessel 75 years ago, in jurisdictional waters, were also protected under the Act.

### **Jurisdictional waters under the Act**

The Act's jurisdictional waters are different to those used in other Australian Government pieces of legislation particularly the major piece of environmental legislation the *Environment, Protection and Biodiversity Conservation Act 1999* (EPBC Act). This is because the Act came in before the *Offshore Constitutional Settlement 1979* that defined where the offshore boundaries are for Australia today. The Act uniquely goes from the low water tidemark to the edge of the Continental shelf, or the EEZ, or whichever is further.

Australia is surrounded by three oceans and multiple seas. That gives you an idea of the immensity of the space we are charged to manage. There are over 8,000 shipwrecks in our jurisdictional waters - a large number! Perhaps it seems nothing compared to countries such as England or Spain, but in our waters all those sites are declared protected and must be managed accordingly.

### **The Act – Policy Issues**

We are at the stage where the Act protects every vessel sunk pre 1937. Over the next eight years the vast majority of shipwrecks in Australian waters will be protected. It is easier for us to tell people what shipwrecks are not covered by the blanket protection provision of the Act and where they are located. Very few vessels have sunk since WWII and the busy shipping years in the 1890's.

The Act is dated. It has some significant failures. I will give you an example that has not been mentioned so

far. Compliance and enforcement provisions under the Act are no longer meeting our standard. People might break the law but because of the way the legislation is currently drafted we are required to take every breach to the Public Prosecutor. This means that a breach of the Act is fighting for space and prioritisation against crimes related to drugs, guns, gang violence and other matters in a fixed pool of limited resources. This is at the same time that such a breach in a more modern Act would be dealt with by a fine. As such we can fail to effectively prosecute some individuals and this is lamentable when there is a clear breach. As heritage managers we work hard to protect heritage, and the mixed messaging that results from a failed prosecution can have significant detrimental results in the community. This is a significant weakness.

### **How did the UNESCO 2001 Convention on the Protection of the Underwater Cultural Heritage Convention (the Convention) come about?**

Australia has had an enormous ongoing involvement with the Convention's development process, from conception through to creation. Yet in 2001 the opportunity for Australia to ratify the Convention was lost. Australia did become a signatory to the Convention's text in 2001 but issues with language in the Convention's text were raised. Under the belief that the Convention would not come into force the Government's position was not reassessed. On 2 January 2009 the Convention did come into force with respect to the 20 States that had deposited their instruments prior to 2 October 2008. This precipitated increasingly strident calls, from a wide range of the community, for Australia to ratify the Convention.

In June 2009 the Australian Government began active consideration of the question of ratification by distributing a Discussion Paper asking questions about the existing Act and the Convention. Australian Government policy is to have enabling legislation in place prior to ratifying any convention. As such the review of the Act had to be done in consideration with aligning with the Convention's requirements.

### **Review of the Act and consideration of ratification**

The 2009 Discussion Paper was based around 29 questions. The aim was to seek comments from the public on those questions, or any other questions they wished to raise. The Paper had two parts, the first focussing on the review of the current Act, and the second asking questions about the Convention. All the information about the review is available on the Department's website and all the submissions, that are publically available, are also downloadable.

In the Discussion Paper, the largest number of questions posed on a single theme was seven and this was for the management of shipwrecks. That is what we are about, protecting sites and managing them. So it is a logical focus of the Discussion Papers questions. The next largest area for discussion was the management of relics, with five questions. There were four questions each on the scope of the Act, compliance and enforcement, and the Convention. Three questions were posed regarding the register for shipwrecks and relics, and two questions on the jurisdiction of the Act.

### Responses to Review

The Department only received 38 submissions to the Discussion Paper. This is the sum total of the public and government's response. However the 2009 review was done over a relatively short period of time. The largest body of respondents were government agencies. That is not unusual when a government Department is conducting a review. As a government body we have to engage effectively with Commonwealth, State and Territory colleagues to make sure everyone knows what's going on and how it is proceeding. It is necessary to be consultative. The next largest body of respondents was from the community, with NGO's, business and university respondents having an equal number. The smallest group of respondents came from the Museum sector, which focussed more on questions regarding relics.

### Summary of submissions

It is the Minister's decision to release a review report when it is finalised. As such, I can only speak in broad terms in this forum. Based on information already in the public domain, everybody is supportive of amending the Act. All respondents saw the Act as no longer meeting needs or international best practice. People did not feel that the Act needed to be thrown out. There was consensus that minor policy modifications to the Act would enable it to work to international best practice standards. There was also support for the Act to remain a separate piece of legislation.

In regards to ratification I use the term broad support, rather than universal support. For example one respondent felt that the English model of UCH management is better than the current Australian shipwrecks protection structure. There were also different opinions on how we should proceed. The critical point is that in general respondents felt we should proceed with change, not stay where we are. That was the community feeling from the Review.

### Issues raised in submissions

Submissions highlighted that we are not uniformly protecting all forms of UCH. While we are mentally stepping into the paradigm of managing all UCH we recognise that we do not have the necessary legislative framework to prevent destruction but that does not mean

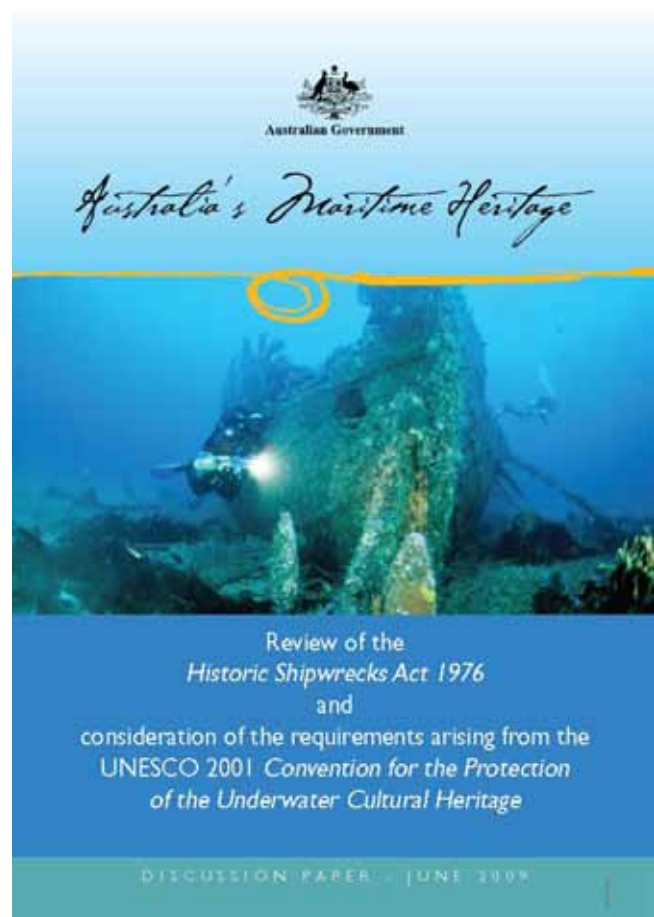


Figure 1. 2009 Discussion paper.

we are not aware of damage, to aircraft for example. Of course we are! And that is why in the Discussion Paper we posed those questions to the public. Should we be protecting aircraft? Should we be protecting indigenous UCH? How should we be doing this? What should be the jurisdiction? And we received that feedback in 2009.

Some submissions raised concern about protected zones. These respondents saw them as excluding people from access to their heritage. That is a messaging problem, because protected zones do not intrinsically exclude anybody. Access is by permit only. Of the 8,000 plus shipwreck sites in Australia we have only 22 protected zones, and of those there are only two - maritime military graves with unexploded ordnance - where we strongly limit permits. Protected zones enable the UCH manager to know who has been to a site and when, so that we can go back to a given person and ask them what the condition of a site was on a particular day. That assists us with investigating incidents.

A major concern of many respondents was to ensure the continuing rights of people to dive shipwrecks without applying for permits. This is partly tied up with the protected zone misconception that heritage is being locked away from the public. Everyone wants to maintain the right of the public to access sites. Our current Act is really a balance between the need for the

public to be involved with their heritage to understand it and appreciate it, and the need to balance that with compliance and enforcement provisions, so that when people do the wrong thing there is an appropriate level of response. Our goal is to always assist people to be involved with their heritage. As UCH site managers it is even more important to encourage community involvement, as the heritage we aim to protect is not visible to the vast majority of the population. Equally, it is important that when people break that contract to access a site without impact and actually interfere with a site or remove a relic, we must have the mechanisms in place to proceed with prosecution. People's ongoing association with a site is what maintains the value that is heritage and that is truly something we can all agree on and fight to keep.

Another issue raised in submissions as a major concern was the way we treat human remains, particularly within the context of military vessels and aircraft. The existing legislation does not treat human remains any differently from the way we treat a teacup, yet we are highly conscious of the existence of human remains in shipwrecks and aircraft.

#### **Finalisation of Commonwealth consultation**

In August 2013 the Department concluded consultation with other Australian Government agencies and departments. It has been a long consultative process because we have tried to go through the process in such a way that there was ample opportunity for anybody to raise their concerns and for those concerns to be appropriately voiced, aired and considered. Within the Department we now consider the first stage of consultation to be concluded and we are moving forward.

#### **Necessary amendments to enable ratification**

There are gaps in the existing legislation that prevent us from ratifying the Convention. None of those gaps go beyond what was considered through the review process, including a ban on the sale of unregistered relics, control of Australian's activities abroad in relation to UCH, broadening protection to include other historic heritage such as aircraft, and distinguishing human remains from the archaeological assemblage. The Australian Government needs to have enabling legislation in place prior to ratification. As nobody disagrees with the government amending the Act to a level of legislative control that would enable ratification, a good interim outcome would be where these enabling amendments have been made so that any government of the day could choose to ratify the Convention.

#### **Review of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*.**

Why have we not finished amending the Act and ratifying the Convention already? In 2009 the *Historic Shipwrecks Act 1976* review was overtaken by the independent review of the EPBC Act. The EPBC Act review recommended

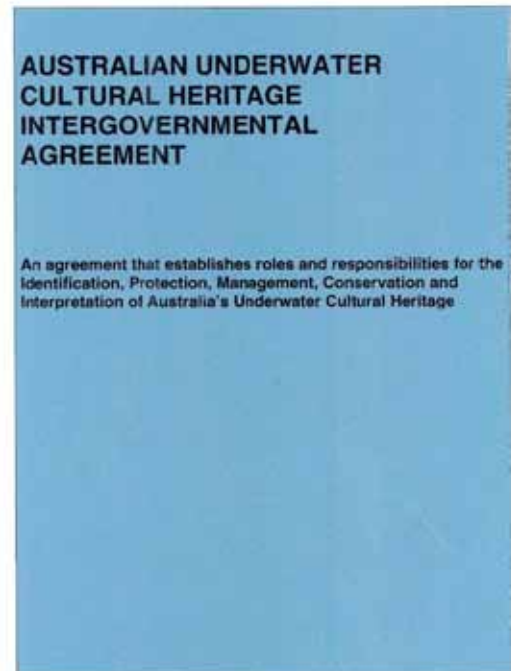


Figure 2. Australian Intergovernmental Agreement May 2010

that the *Historic Shipwrecks Act 1976*, amongst others, be consolidated into an amended and enlarged EPBC Act. This recommendation effectively stopped the *Historic Shipwrecks Act 1976* review being finalised. Once the EPBC review recommendations were made, the Australian Government had to consider and respond to these recommendations. In 2011 the Australian Government's response to the EPBC Act review was finalised and recommendation 64 stated that the *Historic Shipwrecks Act 1976* would remain a separate Act but cross-reference the EPBC Act with reference to impacts and authorised officer and enforcement powers of the EPBC Act. So two years later in 2011, the Review was back to where it was in 2009, as far as the policy position was concerned. Sadly, by 2011 heritage within the Australian Government was firmly caught up in the impact of the Global Financial Crisis. Significant resource staffing reductions and financial efficiency dividends were imposed on heritage as part of an all of Australian Government approach to the crises. Over the next two years heritage went from being a Division, made up of three or four Branches, to a single Branch today.

During this time not all was gloom. Concurrent to this process, in 2009 all the Commonwealth, State and Northern Territory heritage Ministers agreed to support Australia pursuing ratification of the Convention, subject to Australia's normal treaty making processes. They also agreed to sign an intergovernmental agreement on the management of UCH and to undertake all necessary legislative changes that would enable Australia to

ratify. On 5 July 2010 the *Australian Underwater Cultural Heritage Intergovernmental Agreement* was endorsed. This agreement clarified the rights and responsibilities of the Commonwealth, States and Northern Territory in respect to the management of Australia's UCH and agreed to utilise the *Annex* rules of the Convention to meet international best practice management standards.

This Intergovernmental Agreement is very important as it commits the States and Northern Territory to align their legislation with any amended Commonwealth legislation. This will form the basis for the future of the uniform national collaborative program to protect UCH and through the Act's delegated structure it aligns the protection of UCH with the Australian Government's major policy initiative of the one-stop shop for referral assessments. For proponents this will greatly assist industry with every jurisdiction having the same language and the same legislative requirements.

The Intergovernmental Agreement is probably the clearest step towards ratification that has been made to date. It commits us to use the *Annex* rules of the Convention as the basis of our management practice. But it is not about ratification, it is how we would operate should we ratify.

#### **Other support for amending the Act and or ratification of the Convention**

In 2011 the Australian *State of the Environment Report*, the nation's official report card, mentioned that the review of the Act and consideration of ratification was viewed as one of the best outcomes for heritage in the reporting cycle.

In the recent May 2013 Productivity Commission draft report on *Minerals and Energy Resource Exploration*, the Productivity Commission expressed the view that amending the Act would give business greater clarity. While this draft report is silent on ratification of the Convention, this statement about amending the Act to give business a consistent national legislative environment to operate in, is enormously valuable by reiterating the need for amendment and putting the business case for amendment before a government focussed on reducing green tape and improving the business-operating environment.

#### **Current position**

Where are we now? The current position is that we have a very new government. I am no longer in the Department of Sustainability, Environment, Water, Population and Communities, I am now in the Department of the Environment. I have a new Minister, the Hon. Greg Hunt MP. Through the process of the election the new government made no announcement about UCH, ratification or amending the Act. There is no stated government priority for UCH and no commitment of the government to reform. It is very early days for the Department in ascertaining the Government and the Minister's policy direction.

Now that consultation associated with the Review is concluded, the drafting of the report on the Review is

in the Department's work plan for 2013-2014. That does not mean that the Minister is obliged to accept or release such a report. However, it does mean that the Minister is likely to be asked the question in this financial year. Will you consider amending the *Historic Shipwrecks Act 1976* and ratifying the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage*?



## Maritime and underwater cultural heritage developments in sub-Saharan Africa

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Figure 1. Jiwe la Jahazi , the 'stone dhow' on Kilwa Kisiwani. Photograph by Bill Jeffery 2010.

In this paper colleagues Shawn Berry, Chris Ngivingivi and Bill Jeffery present an overview of the underwater cultural heritage (UCH) programs in Tanzania and South Africa, including the background, activities, issues and way forward with these programs in the context of the 2001 *Convention on the Protection of the Underwater Cultural Heritage* (the Convention).

Tanzania and South Africa have lengthy backgrounds in regard to human interactions with water bodies. Such interactions include the activities of approximately two million year-old hominids, subsistence living hunter-gatherers, the Iron Age, development of regional trade, and finally, the long period of traditional use and value of rivers, lakes and the sea, which carries on today.

### Foreign Contact: Tanzania

Foreign contact began with the Romans from at least the 1st century AD. There was trade from the 9th century with Persians, Arabs, African and Indian Ocean groups—a time that the Swahili culture and traditions commence. Around 1500 was a significant time because the Portuguese seized control of the trade that the Swahili merchants had in gold, ivory, silks and ceramics. The Omanis were trading slaves from Zanzibar in the late 17th century. The German period lasted from 1885–1918, followed by the British from 1918–1961.

Tanzania was born out of the union of Tanganyika and Zanzibar in 1964. Now it is an Independent Nation of 47 million people. Kiswahili is the official language and Islam the official religion, flourishing along with the arts and architecture.

### Foreign Contact: South Africa

Foreign contact commenced in 1488, when the Portuguese navigator Diaz rounded Africa from the Atlantic to the Indian Ocean and set foot in South Africa. In 1652 the



Figure 2. Tanzanian MUCH team members, Agnes Robert and Chris Ngivingivi interviewing a resident of the Mtanga area, Kilwa Masoko. Photograph by Bill Jeffery, 2010.

Dutch established a colony in Cape Town, and the British seized control from 1806.

Then there was the Union of South Africa commencing in 1909. While there had been a form of Apartheid for several hundred years, the official Apartheid Policy commenced in 1948. Apartheid ended in 1994 because with the election of Nelson Mandela, South Africa adopted Universal Suffrage.

### Underwater Cultural Heritage (UCH) background: Tanzania

Tanzania and South Africa have *different* backgrounds in their development of UCH programs.

Tanzania has a long history of preserving locally and nationally significant sites, and world heritage sites. Their heritage legislation pertaining to archaeological/historical sites dates back to 1964 (*Tanzania Antiquities Act*), when they protected, on a British legislative model, monuments and relics made before 1864, and protected objects made before 1940. Tanzania ratified the *World Heritage Convention* in 1977 and has seven sites on the World Heritage List. They ratified the *Intangible Heritage Convention* in 2011.

There is no known history of commercial operators, souvenir or treasure hunters involving themselves in the UCH in Tanzanian waters. They have a policy, promoted in 1997, of protecting the UCH, specifying shipwrecks, but no program or unique legislation was developed.



Figure 3. Tanzanian MUCH team members, Jumane Maburi, Shamoun Ali and Stephen Mndowla implementing the GPS survey of the building and well remains on the beach at Kisimani Mafia. Photograph by Ame Mshenga, 2012.

### **Tanzanian Centre for International Heritage Activities (CIE) implemented activities**

In conjunction with the CIE, from 2009, and using the 2001 Convention as a framework, a program using the Nautical Archaeology Society (NAS) training program commenced. An aim was to develop a Competent Tanzanian Authority, using terminology from the 2001 Convention, to implement a sustainable UCH program. A series of workshops to raise awareness among stakeholders was implemented, and a four-phased training program for 14 Tanzanians commenced to build their skills to implement UCH activities.

Projects were conducted in Zanzibar, Kilwa Kisiwani and Mafia Island. Prior to CIE's involvement, UNESCO, and a number of British maritime archaeologists had, and continue to, conduct research in Tanzania.

The Kilwa Kisiwani Project was a significant Tanzanian case study. Kilwa Kisiwani was a major Swahili city state from the 9th to the 18th century. It was declared a World Heritage Site in 1981, the first cultural site listed by Tanzania, but is now on the List of World Heritage in Danger. A project to further the skills of the Tanzanian UCH team, to engage with the local community and document significant sites, was implemented. UNESCO called for this investigation in context with a broader study in which the local community witness the benefits of living on a world heritage site, as this will serve to both improve living standards and ensure long-term sustainability of the site.

The skills of the Tanzanian MUCH team were further developed through community engagement, the collection of oral histories, the locating of a possible 1505 Portuguese shipwreck site, the investigating of *Jive la Jahazi*, the 'stone dhow' on Kilwa Kisiwani, and investigating of other significant sites in the maritime cultural landscape of Kilwa Kisiwani.

Mafia Island was another of our case studies. Similar activities were conducted on this Swahili site that was active from the 11th to the 18th century. Submerged and

shoreline building remains were recorded. A number of Kilwa Kisiwani minted coins from around the 14th century were recorded, and what could be Africa's oldest coin - a Tang Dynasty Chinese coin of 618-907. However such coins were sometimes used for some 300-400 years. A section of a keel structure reportedly from a 12th century dhow, and numerous ceramics were also recorded during this project.

### **Tanzania: current UCH program**

In 2009 the Tanzanian Department of Antiquities had no UCH staff or programs, but now has both. They have compiled a number of reports, brochures, and journal articles. Staff have attended additional training programs and conferences. They are developing an UCH strategic plan, as well as researching with key stakeholders and community the benefits of ratifying the 2001 Convention.

### **UCH background: South Africa**

South Africa's shipwrecks have been protected since 1979, but commercial exploitation is allowed, and still going on. Permits are required for any disturbance. The *National Heritage Resources Act* of 1999 established SAHRA (South African Heritage Resources Agency) and national, provincial and local levels of protection, with 60 year blanket protection. SAHRA has begun phasing out the commercial component, and in 2001, South Africa agreed to abide with the Rules of the 2001 Convention. In 2005 SAHRA updated its Shipwreck Policy in line with the 2001 Convention.

### **South Africa UCH program**

Since 1993 South Africa's UCH program has included academic courses and maritime museum involvement, and maritime archaeologists have been employed with SAHRA since 1996. SAHRA's Maritime and Underwater Cultural Heritage (MUCH) Unit have implemented a number of projects, particularly in developing a site database and engaging with the South African public. Through the permit system 106 permits have been issued for excavation, but 78% of these were for commercial exploitation. There has been limited outcomes from that, with material sold off and few publications—nine reports and 30 articles. SAHRA have implemented a number of NAS Parts 1 and 2 training programs, for over 300 participants. During the Apartheid regime the South Africans were on their own, having little professional contact with colleagues both in sub-Saharan Africa and further afield. That has now changed.

### **South African UCH program and CIE collaboration**

Beginning in 2009, CIE initiated a Maritime Archaeology Development Project (MADP) in conjunction with SAHRA, using Dutch funding. MADP developed important partnerships, at Robben Island, with NGOs, and with government agencies. Workshops and field schools conducted on Robben Island attracted 113 participants. South Africa now has three maritime



archaeologists, three students completing master topics and three graduates working with SAHRA. One outcome of MADP was the establishment of an NGO – the African Centre for Heritage Activities, to further training and regional coordination.

#### **Field school survey of ‘Barrel wreck’ possibly the French 64-gun warship *Severe* (1784)**

A site survey of the Barrel wreck was implemented by students. Research has revealed that a lead ingot belonged to Ronald Crawford & Co., who leased the mining grounds at Wanlockhead from 1755 to 1777. A hull planking timber sample sent for dendrochronology is from a north German tree felled after 1754.

#### **Still Bay fish weirs (*vis vywers*)**

This indigenous site, declared a National Monument, is promoted by SAHRA as a key ‘legacy’ site for the UCH program. It is cooperatively managed between the Department for Environment and SAHRA. Stone-walled fish weirs were used extensively on the south-eastern part of the South African coast and about 300 have been recorded in recent years, although many are not in use. The Still Bay fish weirs are by far the most extensive as they have been maintained. There is debate in some academic circles along the lines that they are only recent—since 1920s—and built by the farming community living along the coast. However, the general consensus is that they were originally built by Khoisan herders about 2,000 years ago. They are now incorporated into a marine park in this bay which manages their use by local farmers.

#### **South African issues: treasure hunters and inland rivers and lakes**

Sanctioning of commercial exploitation of shipwrecks has thwarted the development of the UCH Program. It has contributed to a general sense of apathy about the current UCH program—that it’s all about colonial heritage. The 2001 Convention is needed to address the unique challenges faced by former colonies who are protecting colonial wrecks. It is a politically sensitive issue. There is a need to expand the scope of the UCH program to make it relevant to indigenous communities. For that reason SAHRA are using Lake Fundudzi, to be declared a National Heritage Site, due to its intangible heritage significance related to water, and as a focal point to promote the program and the Convention to local communities.

#### **Sub-Saharan regional collaboration**

There has been regional collaboration between Tanzania, Kenya, Namibia and Mozambique, through the Robben Island workshops and field schools, through the development of a MUCH Regional Group Collaboration Statement between five countries, through the Barrel shipwreck survey, and the Kilwa Kisiwani survey. People from Tanzania, South Africa, Namibia, Kenya and Mozambique came together to compile a grant application



Figure 4. Fish weirs (*vis vywers*) at Noordkappershoek, Still Bay, South Africa. Photograph by Bill Jeffery 2011.

to the African World Heritage Fund. Through a UNESCO forum in Dar es Salaam in 2011, nine countries (Tanzania, Kenya, Uganda, Mozambique, South Africa, Mauritius, Seychelles, Comoros and Madagascar) developed a collaboration statement about the need to work on this program in line with the Convention.

#### **Conclusions and way forward**

Commercial exploitation of shipwrecks in South Africa brought about legislation for shipwrecks earlier than in Tanzania, but the Colonial approach in South Africa has stymied the growth of the UCH program. In Tanzania, where they have not had commercial exploitation they can learn from the South African experience. There is need to de-colonise UCH to make it relevant to all South Africans and Tanzanians. There is an 80% African population in South Africa, and 99% in Tanzania.

There is need to move beyond physical boundaries, to place greater importance on intangible heritage. Developing countries do not have the luxury of research for research’s sake, as in developed countries, so their heritage programs need to have more socially relevant outcomes and benefits. There is a need to redefine what a UCH program is trying to do and bring it into the real world that encompasses broad social, cultural, economic and political issues.

Education is a key issue, at primary, secondary and tertiary levels. An emphasis should be placed on the need to get local educators and local students to develop relevant UCH theoretical frameworks, strategies and activities. A clear vision of what UCH is trying to do is required, to develop a UCH vision, with aims, goals and activities, such as ‘Realising the extensive histories, cultural landscapes and cultural identities of Tanzanians and South Africans’. Bilateral or multi-lateral treaties with other countries in sub-Saharan Africa is a way forward, and researching the possibility of a regional UNESCO Category II Centre in South Africa (similar to the training centres operating in Chanthaburi, Thailand and Zadar, Croatia). It is noted with pleasure that the term ‘shipwrecks’ is not used in the 2001 Convention.

## The Netherlands towards ratification: activities in the light of the Convention

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This paper will outline the ways in which we at the Dutch Cultural Heritage Agency (RCE) are moving towards ratification of the 2001 *Convention on the Protection of the Underwater Cultural Heritage*. We are in the middle of our investigations as to whether we should and can ratify, and hope that this can be done by the end of 2014.

Now, a short history of our underwater archaeology. The Dutch government started seriously working on underwater cultural heritage (UCH) research in the early 1980s. A few years later there was a boost in attention due to an outcry from the public. We first focused on specialising scientific research in underwater archaeology, dealing with the specific (physical) circumstances while doing underwater archaeological research.

The Netherlands is closely connected to water – two thirds of it is water and if you take away the dikes, at least another 2/3 of its land will be submerged (again). In the early period of underwater archaeology in the Netherlands we chose two sites on which to develop our methodologies. The *Scheurrak* SO1 wreck is a 16th century grain trader. The other site is the *Aanloop Molengat*, a 17th century cargo ship. One was from the Wadden Sea, which has average bad visibility, between 0 metres and 1 metre, while the other was from the North Sea, with visibility between 1 metre and 5 metres.

At the same time, in many parts of the world, Dutch shipwrecks had been found, and their cargoes were being sold (e.g. the *Geldermalsen* collection). Salvaging contracts were arranged with the Dutch Government. This eventually brought a public outcry, demanding that this could not continue. The underwater archaeologists were - at that time - mainly trying to develop a methodology to work in murky Dutch waters, and although it was noticed, there was not a strong focus on what was happening in the rest of the world.

Laws had to be developed. There was a change in the legal system in 1988. For the first time, underwater archaeology was included in the Dutch *Monuments Law*. This law could only be applied within 12 nautical miles of the coast. Before the *Monuments Law* of 1961 there was no protection for underwater archaeology. It was a first step in the emancipation of UCH management in the Netherlands.

In 1998 our underwater shipwreck experts combined with our land archaeological shipwreck experts from the Dutch Flevopolders into the Dutch National Institute for Ship and Underwater Archaeology (NISA) in Lelystad. It is no longer called NISA. It is now also part of the RCE.

While at first all the experts for maritime cultural heritage research were put together in one organisation, they soon ended up in being part of much larger organisations, first combined with all the other

governmental archaeologists, then with all immovable cultural heritage experts, and finally, for the past two years, also with the organisation responsible for the Dutch art collection. It is all very complex, but important to understand that underwater archaeology has been incorporated each time in larger organisations. So we first had a big centre for underwater archaeology, which is now mixed into a larger organisation. This became a major problem. Policy, research, exchange of knowledge, etc. all became separated. There was a perception that underwater archaeology costs more than land archaeology, and its relevance was not obvious to many. So the involvement in UCH became less and less. To counter this we developed a maritime program <www.maritiemprogramma.nl> within the RCE.

In 2007 the *Monuments Law* (of 1988) was revised, extending the requirement for reporting and excavation permits into the 24 miles of the contiguous zone. The 50 years minimum age for a site protected under the *Monuments Law* has been put aside. It is, as in the UK, only a matter of cultural significance. This means much more work for us, because it is not immediately clear what is, and what is not, protected by law. The Maritime Program has been developed to also counter this problem. Within it policy, science and management were put together again. The first stage of this Program will last until 2015, but the budgets will continue after this date. We try to connect all the relevant stakeholders, and by demonstrating the value of the UCH to place it high on the political agenda. We raise awareness by visualising UCH as a priority, and we improve the quality of the UCH management, research and protection. It is not only the Government that is active in underwater archaeology but also contract archaeological companies, and many more stakeholders.

There are two important developments that we are taking into account in this maritime program. Firstly, there is a decentralising of archaeology (politically) in the Netherlands. Federal States, like Australia and Germany, have a lot to say on arranging archaeology in their states. But provinces and municipalities in the Netherlands also have much more to say than 10 years ago, and, importantly, have a much bigger responsibility. Secondly, within society there is a big change going on. Things are more and more locally arranged. People take the quality of their living environment into their own hands. They want to be able to say more and have a voice in the decision making. This is also the case for culture. Culture enriches the environment and the living conditions. Local communities connect with each other. They do this nowadays easily on the digital highways. This way of organising our life has already got a name: 'Sustainability', the 'new-modernism'. So we have to

address all the stakeholders – not only the government, but many more, and on national as well as international levels. To do this we have to use our communications and listening skills.

We have four project lines in the Maritime Program: management of maritime heritage of the Netherlands, capacity building, knowledge infrastructure (usually digital), and management of shipwrecks outside Dutch territory.

#### **Management of maritime heritage of the Netherlands**

Within the Netherlands we try to improve the quality of archaeology. We have developed the Quality Standards for Dutch Archaeology (KNA) which has also a special section for underwater Waterbodems 3.1 (the Dutch quality norms for underwater archaeology): [www.sikb.nl](http://www.sikb.nl). Here the procedures on how to do assessments and excavations are described. The KNA needs constant improvement and extension with new insights and procedures.

We have 40,000 known resource locations marked in Dutch waters, including aircraft crashed during WWII, built on the knowledge of amateur archaeologists, the government hydrographic offices, and others. Very few have been fully assessed. There is also a large unknown resource, for example prehistoric landscapes and other shipwrecks. We develop indicative maps for archaeological values underwater: maps for areas where there is the possibility of finding shipwrecks and other types of sites from particular periods. These are being developed through a combination of erosion models, multibeam sonar, historic maps, etc. We combine the information in geographic information systems (GIS). Assessments, indicative mapping, diving: everything has to be standardized in formats. These (minimal) standards will be incorporated into a maritime and underwater archaeological research and management handbook, to be published in 2015. Another quality improvement in the programme is the National Research Agenda: important research questions that have not been answered yet. This can be an aid for significance assessment and to justify excavation or other intrusive research.

#### **Capacity building**

Cultural heritage managers specialized in UCH, as well as underwater and maritime archaeologists, are needed for cultural heritage management and protection. We have a capacity building field school each year - one for underwater archaeology and one for shipwreck archaeology on land (IFMAF, together with the University of Groningen and Province of Flevoland). The primary aim is to educate our Dutch students in the Netherlands, but we also have some Belgian students and professionals involved with us. We are also cooperating in UNESCO capacity building field schools, mainly in priority countries with mutual heritage, in Asia (the UNESCO field school in Thailand), Jamaica, and other Caribbean countries.

#### **Knowledge infrastructure (digital)**

We are building a GIS system and connecting maps of wrecks *in-situ* with those of our principal stakeholders as open platforms so that we can examine and exchange each other's databases. We also have a website telling stories of wrecks *in-situ* for a broader public. There is a GIS basis for all maritime archaeology, which has been developed within the European Union-financed MACHU project. We are working on an integration within the 'land system' ARCHIS 3. The maritime GIS will be used for overseas territories in the Dutch Caribbean (in combination with a land based GIS ARCHIS), as a platform for European Union projects, and for the integration of GIS systems from other ministries, amateur archaeologists and the Hydrographic Office. We are working on an integration of data within Europe (a possibility is the *European Atlas of the Seas*) and worldwide coverage through initiatives from UNESCO.

#### **Management of shipwrecks outside of the Netherlands with Dutch 'ownership' claims**

The Netherlands claim ownership of Dutch East India Company (VOC) shipwrecks, the Admiralty shipwrecks and those of the West India Company (WIC). We cooperate with the countries where such wrecks have been found, to get information and discuss how to preserve them together, in the light of the 2001 Convention. We try to get the countries involved to take the lead, and we have a budget for such projects. Relating to the ANCODS bilateral agreement, between the Netherlands and Australia, there is new research paid for by the Australian Government to evaluate Dutch shipwrecks. In 1972 the Netherlands, as successor to the property and assets of the VOC, transferred to Australia all its rights, title and interest in and to wrecked vessels of the VOC lying on or off the coast of the State of Western Australia and in and to any articles thereof, and Australia accepted that right, title, legal and financial interest. Of course, the Netherlands still have scientific and cultural interests in these wrecks, which are an important part of our history. Hence, the cooperation projects between the two countries. We can do bilateral cooperation agreements with other countries as well. We have just done it with Cuba, where many Dutch shipwrecks have been found. They are in the lead in doing the research, as in Brazil where the Dutch Admiralty ship *Utrecht* (1648) has been discovered. We are advising, but also working together in the field.

#### **Maritime Program**

We have a specific project for ratification of the 2001 Convention. The fact that we have a maritime program, and that ratification is currently on the political agenda, promises a lot. We are now working together with other departments of government, including Foreign Affairs, Culture, Defence and Finance to see how we can protect our shipwrecks both inside and outside of Dutch territorial waters. We are also working with private organisations.

They are very effective in putting things high on the political agenda. For example, they were able to comment publically on the destruction of three English battleships of WWI in Dutch coastal waters by scrap metal salvagers. Local organisations offended by the destruction put the matter high on the political agenda. Then the Minister of our Culture Department could say, 'we have to do something about it', because in the end cultural heritage is not just something for the elite or professional community, it is for all of us, so why not decide together how to treat it?

### **Why the UNESCO Convention?**

From the Department of Education, Culture and Science point of view, we think there is a need to ratify the UNESCO Convention soon, because there is continuing salvage. Legislation in the Netherlands is insufficient. If you steal a lobster in Dutch waters you lose everything, including your boat. But if you take something from a shipwreck it is likely that no one will take action, because it is a long process, proof of violation is difficult and punishment is low. So far nobody has been punished for it. This highly insufficient law only counts for wrecks within the 24 miles contiguous zone. Outside there is almost no protection. Most of these problems could be solved within National legislation even without us signing the 2001 Convention. But the importance of the Convention is that many States take these measures and work together in executing them. We see more possibilities to cooperate with other countries after ratification. In addition, it will be good to have one set of rules for all these countries to make cooperation easier.

For ratification to take place some parts of our legislation need to be changed. We need to be prepared to cover a larger area, extending outside 24 miles by regulated actions directed at UCH, sailing under the Dutch Flag. In practice salvaging contracts have stopped. The cultural department is now the lead manager of the historic wrecks outside of our territory as well, but the salvaging still needs to be officially stopped. More underwater archaeologists are needed, hence there is still a lot to do in capacity building. A platform for international exchange is needed, together with more international cooperation. The 'commercial archaeology', or 'contract market' is very small but needs to grow to function well.

### **The benefits of ratifying for the Netherlands**

Ratification offers protection from illegal salvage outside of territorial waters. It will benefit international cooperation. It will guarantee that we will be involved in the decision making and management of UCH with which we have a verifiable link. It strengthens the international position of Dutch organisations and professionals in the field of UCH management. Finally, we have been advising UNESCO on aspects of the Convention, and we are asked, 'but why are you not ratifying?'

## Status and development of ratifications

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The UNESCO *Convention on the Protection of the Underwater Cultural Heritage* has profiled itself over the last decade as a central instrument for the perception and treatment of underwater cultural heritage (UCH) worldwide.

The impact of the 2001 Convention is increasing, as well as the number of States Parties who have joined. Almost all States bordering the Mediterranean Sea have already adhered and many States in Latin-America and the Caribbean. In comparison, the Asia-Pacific region limps behind. Only Cambodia and Iran have ratified. However, the impact of the Convention is increasing in this region and beginning to influence and change ways of behavior and legal approaches.

### The Subject Matter

UCH is defined in the 2001 Convention as ‘... 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...’.

UCH includes all forms of underwater heritage, from wrecks, to sunken cities and ruin sites, to prehistoric landscapes. Already, this definition of the Convention has had a crucial impact on how UCH is treated, perceived, and protected. It goes way beyond the view that submerged heritage is a collection of artefacts or pirate treasure, which is often promoted in the public space. It is comprehensive and inclusive, including repetitious materials, the entire site, and its context. This definition is now already ruling law in 45 States and has been adopted by many States looking into, or preparing for, ratification. It is also actively taken into consideration by courts in their evaluation of the best standard in the law. It sets the way the world will view underwater heritage in the future by altering the perception of heritage from single-artefacts to entire sites and from treasures to ‘cultural treasures’. This is already a great achievement of the Convention and also of the highest significance and importance for the Asia-Pacific region.

### The Issues Dealt With in the Convention

The 2001 Convention deals in a comprehensive way with the protection and treatment of underwater heritage and contains clear legal, as well as practical, advantages for States. It is the international community’s response to the destruction of submerged archeological sites and, as such, it addresses a number of pressing issues that impact them.

Naturally, a major issue for the Convention is the protection of sites from pillaging and commercial exploitation. In order to combat these activities, the Convention offers a number of very concrete and practical improvements for the legal protection of sites, ranging from the possibility of closing ports and seizing materials,

to the sanctioning of offenses, to a cooperative scheme for States allowing them to participate in the protection and safeguarding of sites that are located outside of their territorial waters. The measures for site protection are very far reaching, much further beyond the range of national law or the provisions of UNCLOS, and constitute a major advantage that in of themselves should already convince States to ratify the Convention.

Another issue addressed by the Convention, and a no less important one, is the destruction of sites by industrial works, such as trawling, mineral extraction, or oil recovery. It offers mitigation rules and seeks to find a balance in this regard. The Convention’s Advisory Body has done much work on this problem by issuing a number of practical recommendations adopted by the States Parties to the Convention for national implementation.

Furthermore, the Convention enhances State cooperation in the research of sites and also focuses strongly on issues fostering the public interest in UCH. For instance, it expressly encourages responsible public site access. Due to the fact that it is a major hurdle that UCH is relatively invisible to the public eye, the Convention has singled out the need to involve and integrate the public in its protection and recognizes the right of the public to enjoy its heritage. It also fosters training and capacity-building, which is of major interest for many States.

Last, and certainly not least, the Convention contains the most widely recognized set of rules regarding how to intervene on UCH sites in the Rules of its *Annex*. These have initially been elaborated by the ICOMOS subcommittee ICUCH and have since acquired worldwide recognition. A manual is available from UNESCO to explain the details of these rules and facilitate their implementation.

### The Ethical Principles

The Convention is reined by a set of uniform ethical principles that include the appeal that submerged heritage shall be protected, that commercial exploitation is non-compatible with proper management, and that responsible public access is encouraged. The *in-situ* preservation of sites shall be the first option to be considered in the event that there is no justifiable reason for recovery, such as protection, enhancement, or the quest for scientific knowledge. Recovery, however, is not forbidden. The Convention’s regulation only expresses the concern for proper consideration to be given to conservation needs, as well as storage and site integrity that has so often been disregarded not only as regards underwater heritage, but also heritage on land. Heritage should only be altered or moved for a valid reason and after proper consideration of the consequences.

The Convention does not request a benchmark for the significance of sites in order to grant protection, but

rather uses a blanket approach giving consideration to all facets of submerged heritage.

These above ethical principles are of greatest importance for the correct management of UCH and illustrate the spirit of respect, cooperation, and protection underlying the Convention.

### **The Institutional Setting**

In what regards its legal context, the 2001 Convention is an official treaty between States. Therefore, a State must ratify the Convention in order for a country to be bound by its rules and regulations.

The 2001 Convention is administered by the United Nations Educational, Cultural and Scientific Organization, UNESCO. It is one of six UNESCO Conventions that in their entirety provide an all-inclusive protection scheme for heritage in all its forms. UNESCO provides the 2001 Convention's Secretariat and is the depositary for the ratification instruments, i.e. a simple letter signed by the Head of State or Minister of Foreign Affairs expressing the wish of a State to be bound by the Convention.

The choice of the States that asked UNESCO to assume this task was not accidental. UNESCO has extensive experience in the field of heritage and UCH preservation. Since the 1960s, when a UNESCO mission led by Honor Frost first documented the important UCH remains in Alexandria, from the Pharos lighthouse and the Ptolemaic palace, UNESCO has been actively cooperating with governments, national authorities, NGOs, scientists, and police forces to improve the protection of the UCH. UNESCO has organized over the years numerous intergovernmental meetings, training and university meetings in this regard.

UNESCO hence only naturally assumed the task to lead the establishment of the Convention and is now organizing the Meeting of States Parties every two years, as well as an annual meeting of the prestigious Scientific and Technical Advisory Body consisting of 12 expert members nominated by States.

These organs are supported by a strong force of international partnering institutions, universities, experts, museums, and the eleven leading NGOs working in the field of underwater archaeology, officially accredited to work with the Meeting of States Parties.

Moreover, a UNESCO/UNITWIN Network for Underwater Archaeology associates a number of leading universities with UNESCO. The foremost professional associations in archaeology and underwater archaeology have also officially endorsed and supported the 2001 Convention.

UNESCO's 2001 Convention, its Operational Guidelines, as well as its Scientific and Technical Advisory Body, can hence be expected to shape the discipline of underwater archaeology while raising the public awareness about the importance of submerged heritage.

### **The Advantages of Ratification**

Ratifying the 2001 Convention provides clear advantages to a State. It helps to protect UCH from pillaging and commercial exploitation, puts the importance of protection on the same level as the protection of land based sites, and enables States Parties to adopt a common approach to preservation and ethical scientific management. States Parties also benefit from cooperation with other States Parties in practical and legal terms. Moreover, the Convention provides effective professional guidelines on how to intervene on, and research, UCH sites.

Ratification of the 2001 Convention, however, means more than that. It is not only a firm proclamation towards other States and entities, but also to the public of a State and society as a whole in regards to the value given to UCH and its context. It is a statement against commercial heritage destruction to the extent of the influence of the participating States Parties and the expression of a will to protect submerged archaeological sites as part of an international community. This expression of the will to protect and of a defence offered to the fragile legacy that is submerged archaeological sites helps to establish an international ethical standard. It discourages not only pillaging, but also the trading in artefacts recovered in pillage operations and raises awareness in society in general that archaeological sites, even if submerged, do not represent exploitable treasures, but cultural treasures and an immeasurable inheritance.

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

Universal ratification will create cohesion amongst the scientific community, put underwater archaeology higher on the agenda, set universal standards aimed at ending commercial exploitation, increase public awareness, and thus encourage investment in underwater archaeology.

Increased awareness of UCH is essential to the Convention's, but also to underwater archaeology's, success. Therefore, one of the biggest tasks for the discipline, for UNESCO, and for all its partners, is to make this heritage more visible in the eyes of the public, youth, children and divers in the coming years. Only a heritage that serves the public will be loved and safeguarded by the public.

Over the years, UNESCO has increased its efforts to train professionals, create cooperative networks, and assist States in the ratification of the 2001 Convention. However, it has also put significant effort into the education of children and youth, such as by the creation of TV films and a children website. This work with the public and for the public is the way forward for the decade to come.

## The processes and strategies employed in Spain.

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The *UNESCO Convention on the Protection of the Underwater Cultural Heritage* (the Convention) was adopted in 2001. Spain ratified on 6 June 2005 and incorporated it in the domestic legal order soon after its entry into force. Unfortunately, there were no sound could be better-possibly 'detailed' discussions in Spain about the legal consequences in the domestic realm of that ratification and how it will affect the practical protection of underwater cultural heritage (UCH). However, the impact of the ratification on Spain's international legal policy was deeply assessed, as well as the political message Spain wished to send to other negotiating States, particularly Latin-American States, European partners and the United States.

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

### The road to the Convention

Spain viewed the Convention as,

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

#### *The Convention as a mechanism of cooperation*

Spain realised that the legal regime for the UCH in current international law of the sea was incomplete and ineffective. The *United Nations Convention of the Law of the Sea* (UNCLOS), in its Articles 149 and 303 (with relation to Article 33), does not establish an appropriate legal regime for the protection of UCH. On the contrary, Article 149 seems a simple and very general declaration under which 'archaeological and historical objects' found in the Area 'shall be preserved or disposed for the benefit of mankind as a whole', without clarifying the extent of the 'disposal', the identification of who must act on behalf of the mankind, and leaving the 'preferential rights' of the concerned and interested States without a clear legal meaning.

Even worse is the regime foreseen in Article 303, applicable to all marine zones, beyond the general (and plausible) principle envisaged in its paragraph 1:

'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.' Paragraph 2 establishes a legal fiction upon which the legal regime envisaged for the contiguous zone also applies to archaeological and historical objects. But paragraph 3, a typical *sans préjudice* clause, incorporates *private* maritime rules in the *public* system of protection drawn by UNCLOS, particularly law of salvage rules. Finally, paragraph 4 simply establishes that all these provisos are 'without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.'

Against this highly problematic framework, the Convention tries to root the general principle of protection and cooperation through a system of information sharing, collaboration among interested States and respect of coastal State sovereignty and rights over its marine zones and of flag States' rights over their sunken State vessels. Perhaps the system may be simplified in the near future: practice of States Parties and the Operational Guidelines of the Convention, to be adopted in 2013, should provide guidance on how to ensure an efficient cooperative system among those States.

#### *The Convention as a scientific effort*

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

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

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

- a. is authorized by the competent authorities, and
- b. is in full conformity with this Convention, and
- c. ensures that any recovery of the underwater cultural heritage achieves its maximum protection.'



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

Spain is currently initiating the process to codify domestic legislation on navigational matters. The Government has almost finished a new draft Law on Maritime Navigation, to be submitted to the Parliament by the end of 2013. In this draft, there are significant changes with regard to the regulation of UCH: it makes express reference to the protection of UCH (preamble and arts. 20 and 38), extends the archaeological jurisdiction up to the outer limit of the Spanish contiguous zone (art. 23 and 362), makes inapplicable the rules on salvage to UCH (art. 338), limits decisively the law of finds to archaeological objects found in the territorial sea (art. 354) and makes an express reference to the Convention (art. 362). In a similar vein, new proposals have been submitted to include the protection of UCH in the penal code, thus implementing article 17 of the Convention.

#### *The Convention as a 'neutral' legal instrument*

Contrary to what was implied by the UK, France, Norway, Russia and the US, Spain considers that the Convention does not definitively affect sovereign rights over marine zones or sunken States' vessels. In this sense, Spain, after a long legal assessment of its legal terms and keeping in mind the history and the *procès verbaux* of the Convention, understood that Articles 2(8) and (11), 3, 7(3), 10 (2) and (7) and 12(7) draw a legal canvas that respects both jurisdiction and legal titles on sunken State vessels enshrined by international law (including UNCLOS), two of the main British and US concerns.

The main rule is Article 3, under which,

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

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

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

with its sovereign rights or jurisdiction as provided for by international law including the *United Nations Convention on the Law of the Sea*.'

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

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

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

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

The meaning of this article, read in connection with paragraph 7 of Articles 10 and 12, which prohibit any activity directed at State vessels without the agreement or consent of the flag State, explains Spain's acquiescence with this regime that does not affect its legal title to all Spanish sunken State vessels, irrespective of the place where they sank and the time elapsed from their wreckage.

#### *The Convention as a point of departure*

Finally, Spain sees the Convention as a first step to complete an array of scientific and cooperative agreements to protect UCH. In this sense, Spanish scientific institutions and cultural agencies, central and regional, have concluded Memoranda of Understanding (MoU), or carried out scientific projects with institutions abroad even before the negotiation and entry into force of the Convention.

Following Article 6, Spain is particularly eager to conclude bilateral, regional or particular international agreements with other countries, both parties or not to the Convention, where Spanish UCH is located. In 2010, a MoU was signed between the Spanish Ministry of Culture and US agencies, particularly the National Oceanic and Atmospheric Administration (NOAA), with regard to cooperation in management, research, protection, conservation and preservation of UCH resources and sites.



On the other hand, some informal conversations have taken place between Spain and Mexico, Japan, Chile and Philippines with regard to the status of Spanish sunken vessels in their territorial waters.

### The implementation of the Convention

With regard to implementation, the main problems derive from,

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

The *National Plan for the Protection of Underwater Cultural Heritage* tries to solve some of these problems and their consequences.

#### The problems

There were no discussions about the legal and political opportunity to ratify the Convention. No discussions at all took place among the members of the *Cortes Generales* (Parliament), and no official debates were held with the scientific or academic community to assess the impact of the Convention upon all and any activity regulated by the Spanish domestic order. Among all the obligations included in the Convention, the doctrine has barely studied the most important, included in Article 5, which tries to reduce the main negative impact on UCH: the activities (legal and legitimate) incidentally affecting UCH.

Article 5 imposes an obligation of behaviour to States Parties which irradiates all the domestic legal order of these States since they must include, when necessary, new controls and preventive measures on their laws and regulations on, for example, fishing, coastal urbanism, marine research, exploitation of non-living marine resources (from oil and gas to wind or wave energy), navigation, etc. These are human activities whose impact on fragile archaeological areas must be mitigated; and this may imply the amendment of domestic laws and regulations not completely foreseen by the ones who decided in Spain to ratify the Convention in 2005. A quick political message to other States that, ‘*Spain wants to be in and cooperate*’, was preferred to a sound domestic legal assessment of its impact.

This problem is exacerbated since Spain, formally speaking a regional State, is a quasi-federal State where constitutional competences are exercised (i) by the central government exclusively, (ii) by the regional governments exclusively, or (iii) shared by central and regional governments. Several regions have established their regional centres for underwater archaeology. Along with the National Museum of Underwater Archaeology (ARQUA), they form the State network of centres well covering the Mediterranean side but with important gaps

in the north-Atlantic coasts which are currently being solved with the creation of a new centre in Galicia.

Each region has further enacted their particular norms regarding the management and protection of UCH in waters adjacent to its coast. However, most of them share common patterns with the central one, establishing a more or less common regime all over Spain. It must be also affirmed that, generally speaking, the system has functioned properly. The declaration (or prospect of declaration) of numerous ‘archaeological preserved zones’ along Andalusia and some other regions, as a preventive tool, has clarified the legal status and threshold of protection of several threatened areas.

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

#### The solutions

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

As a result of the first decision, Spain filed a counterclaim with the full support of the US Government. The case, discussed before the US admiralty courts, was finally decided in favour of Spain’s sovereign rights applying the jurisdictional immunity principle.

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

Along with these ‘legal fights’, Spain decided to revisit its general framework on UCH from different perspectives: technical, legal, political and educative, among others.

Following a proposal by the Ministry of Culture, the Council of Cultural Heritage (*Instituto del Patrimonio Cultural de España*) endorsed on 10 October 2007 the project of a National Plan, adopted by the Council of Ministers on 30 November 2007 as the *National Plan for the Protection of Underwater Cultural Heritage*. One of the by-products of the National Plan was the drafting of its *Green Book*, adopted in May 2009, a rethink of the national efforts required in any specific level to better protect the UCH. Since then, different measures have been adopted, including,

- cooperative and coordination agreements concluded between central and regional governments;
- agreements signed (or close to signature) between the Ministries of Culture, Defence, Home Affairs and Foreign Affairs;

- legislative decisions taken regarding adaptation of laws to the Convention, and drafting of a new cultural heritage law;
- a Scientific Commission of the National Plan has been set up and projects coming from different regions evaluated and included in the Plan;
- a new curriculum for a university master degree on underwater archaeology within the European Higher Education Area (EHEA) system is under discussion;
- a proposal to the Ministry of Science to include the protection of UCH among the priority list of research and development projects is under evaluation; and
- last, but not least, educative projects are under evaluation, trying to foster dissemination among citizens of the need to protect UCH.

### **The Convention and beyond...**

The *Juno* and *La Galga* case, the Convention, the *Odyssey* affair and some other questions have changed the vision about the UCH. For the first time in its recent history, Spain has decided to adopt a proactive policy toward UCH. Unfortunately, the financial crisis has affected every decision with economic implications. However, a consolidated budget has been approved for the coming years.

Now Spain is implementing the Convention, but, at the same time, is going beyond it at different levels:

- at the legal level, confirming its legal policy with regard to its sunken State vessels irrespective of its actual location, and clarifying the constructive ambiguities in the Convention through an active role when drafting its *Operational Guidelines*;
- at the political level, negotiating and concluding, when necessary, bilateral or regional agreements, or MoUs, with other States to confirm that legal policy and to move beyond the current status of protection of common UCH; and
- at the social level, mobilising public opinion against destruction and looting of UCH, and rethinking the educative model to implement new measures regarding the training and formation of specialists in the protection, conservation and dissemination of UCH and its valorisation (*mise en valeur*).

These are difficult tasks. Spain, as any other State with a true interest in the protection of UCH, faces new challenges and from the demagogic uses of UCH by treasure hunters and other persons and entities around the world. A common effort of States, scientific institutions and NGOs defending UCH is needed. The Convention is a first step that can be improved if and when necessary.

## The processes and strategies employed in Belgium

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### Belgian State Structure and Underwater Archaeology

Belgium is a federal state consisting of three regions (Flanders, Wallonia and Brussels Capital Region) and three communities (Flemish, French and German speaking). The regions have responsibility for territorial issues, including spatial planning, nature preservation, and housing, within their territories. Communities have responsibility for personal issues, such as culture and education, also within their territories. Archaeology is mainly a territorial issue and thus the regions have the responsibility for archaeology, but only until the archaeological objects and the corresponding documentation of an archaeological excavation for instance, are transferred to a museum or an archive. After this transfer the communities become responsible for archaeology, as it has become a personal issue. Flanders is the only region in Belgium with a coastline.

Six parliaments (Flanders and the Flemish community have a common parliament) have to approve an international convention dealing with matters such as archaeology, devolved to the regions and communities. The Federal Government has territorial authority in the Belgian territorial waters and on the Belgian Continental Shelf (BCS) but has no responsibility for the matter of archaeology. In the North Sea however the federal state has what we call a residual competence on archaeology, as the North Sea as a territory belongs neither to a region nor to a community.

Advocates for ratification of the 2001 Convention employed a strategy of raising awareness of the Underwater Cultural Heritage (UCH) and at the same time of keeping the issue on the radar of the politicians responsible for archaeology. The Brussels Region approved ratification on 4th September 2008, the Flanders Region and Flemish Community on 16th July 2010, the German Speaking Community on 19th March 2012, the French Speaking Community on 19th April 2012, the Walloon Region on 26th April 2012, the Federal Senate on 13th December 2012 and the Federal Chamber of Deputies on 24th January 2013. Ratification was achieved on 5th August 2013, Belgium becoming the 45th Member State to ratify.

### Recent development of archaeological interest in the Belgian part of the North Sea, and awareness-raising strategies employed

While there has been important scientific underwater research in Belgium (for example in the Caves of Han-sur-Lesse in Wallonia) for several decades, the archaeological interest in the Belgian part of the North Sea is a recent development. The Flanders Heritage Agency started in 2003 with a small and modest scientific unit dealing with maritime archaeology. The unit is a spin off from a

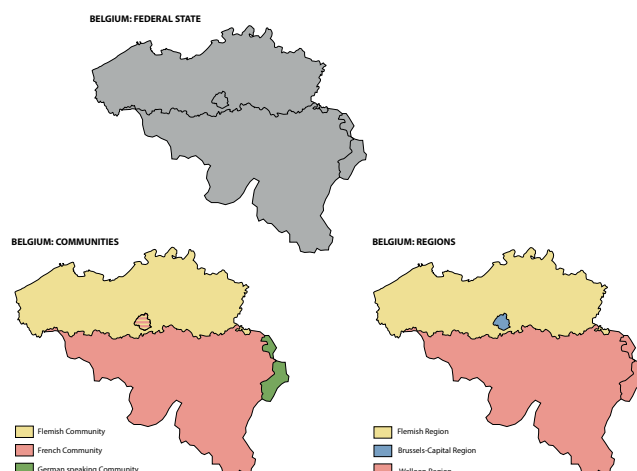


Figure 1. Belgian State Structure: regions and communities, copyright Flanders Heritage Agency.

research project devoted to the deserted medieval fishing village 'Walraversijde' situated on the Belgian coast next to Ostend.

From 2003 onwards the collaborators in this unit joined several European projects dealing with wetland and maritime archaeology such as PLANARCH (2003-2006), MACHU (2005-2009) and Atlas of the 2 Seas (2009-2012), to gain more experience. At the same time the maritime unit started to raise awareness of the UCH. A television programme on the research of a wrecksite on the Buiten Ratel sandbank was aired to raise awareness that this heritage was in danger. It was in danger because the Flanders Heritage Agency had only started in 2003 to devote attention to the underwater archaeological heritage, and Belgium did not then have the protection of the 2001 Convention.

In 2006 the Flanders Heritage Agency published a first archaeological inventory of the Belgian part of the North Sea, in four languages and with online access: <[www.maritieme-archeologie.be](http://www.maritieme-archeologie.be)>.

In 2007 the federal government passed a new law dealing with shipwrecks lying in the Belgian territorial waters and replacing the Emperor Charles the Fifth's 16th century law, which was abolished. This ancient law mainly dealt with finding the owners of goods washed ashore, and in the absence of the owners the goods went to the treasury of the emperor. This law was theoretically still in place in 2007. The new law of 2007 has not yet been implemented, but the federal government has the intention to implement it (see section 5 below) in 2013.

In 2009 the Flanders Heritage Agency started the Cog Project, related to the medieval Cog wrecks found near Antwerp during harbour construction works in 2000. In 2011 we co-organised in Brussels a UNESCO international



Figure 2. Aerial photograph of the beach of Raversijde in the late 1970s. At low tide several archaeological features related to medieval and possibly Roman peat extraction can be seen.

scientific meeting on factors impacting on the UCH. The Minister responsible for heritage in Flanders gave the welcoming speech at this conference. Now the Federal Government is preparing the implementation of the so-called 'Wreck Law' of 2007, and at the same time extending it so as to integrate maximally what UNESCO asks via the 2001 Convention. In addition, the Flanders Heritage Agency together with several partners is running a four year project (2013-2016) entitled 'Archaeological Heritage in the North Sea' or 'SEARCH' a contraction of 'Sea' and 'Archaeology'.

Last but not least, the Flanders Government provided in July 2013 the necessary funding to the secretariat of the 2001 Convention to organise a scientific conference and a commemorative event on the occasion of the Centenary of World War I in Bruges, 26-28 June 2014. This to demonstrate the commitment of Flanders to the recently ratified Convention. This initial conference aims to take stock of the available UCH related to WWI and to develop action plans and a work programme in terms of research, protection and management of this valuable heritage.

#### **Implementation of the 2001 Convention and future challenges**

One of the future challenges is that there are within Belgium many areas with different UCH regimes. There are the rivers and other inland waters for which a different archaeological regime exists according to the region where they are situated. Each region has its own heritage legislation, meaning three different regimes, in fact four as the Walloon region has devolved the responsibility for archaeology in the German speaking area to the German speaking community. When it comes to The North Sea, there is the intertidal (Flanders) part which abides by Flemish law, the territorial sea and the Belgian continental shelf/Exclusive Economic Zone (EEZ) beyond the territorial waters. The latter two will probably have two different regimes in relation to archaeological heritage due to the specific judicial regime of both zones. This amounts to a lot of complexity for



Figure 3. Aerial view on the site of the deserted and partly sunken 15th century medieval fishing village 'Walraversijde' on the Belgian coast next to Ostend. An evocation of four buildings of the village on the right lower corner of the picture. The start-up of scientific interest in the maritime archaeological heritage of the Belgian part of the North Sea can be considered as a spin-off from the research project devoted to this medieval fishing village.

a small sea territory of only 3,500 sq km, the so-called tenth province of Belgium.

We at the Flanders Heritage Agency see several possible answers to this complexity: the SEARCH project, the implementation of the 'Wreck-Law' and Marine Spatial Planning (MSP).

#### **The SEARCH project 2013–2016: strategy employed, 'do the thinking in advance'.**

In the summer of 2012 we had a project proposal on 'Archaeology in the North Sea' approved by the funding agency IWT, the Flemish Agency for Innovation by Science and Technology. In the project we pursue three major goals. Firstly, to develop a reliable survey methodology, based on geophysical and remote sensing techniques, that allows accurate and cost-effective evaluation of the archaeological potential of marine areas offshore, nearshore, and intertidal. This will avoid costly damage and the losing of valuable time during the preparatory and operational phase of the work.

Secondly, to prepare a correct implementation of the commitments imposed by international conventions with regard to UCH, to work out comprehensive proposals for a transparent and sustainable management policy, and to prepare for further development and implementation of a legal framework related to the Belgian UCH. This legislative framework should protect the marine historic environment but at the same time allow the necessary marine exploitation, including fishing, sand and gravel extraction, renewable energy activities, and dredging.

Thirdly, we wanted to offer guidance for the stakeholders, including marine industry, government agencies, fisheries, harbor authorities, and the public/social sector, on how to implement the new methodology and management approach, and to increase the general awareness of UCH.

### **Implementation of the 'Wreck-Law' of 2007**

In short this legislation of 2007 deals with wrecks and fragments of wrecks lying in the territorial sea of Belgium. Belgium will employ an official in some ways analogous to the UK's receiver of wrecks. There is an obligation to report wreck finds to the receiver and this official has a well-balanced system in place for rewarding the finder and, in some cases, the eventual owner when found. A permit from the receiver is needed to raise wrecks or fragments of wrecks from the sea. The law creates also the possibility to protect wrecks *in-situ*. The main limitation of this 'Wreck Law' is that it only deals with wrecks in the Belgian territorial waters and with activities directed at wrecks. None of the activities incidentally affecting wrecks are taken into consideration under this law, so from the heritage perspective additional legislation is needed.

At this moment the federal government is preparing the implementation of the 'Wreck-Law' of 2007 and at the same time extending it so as to integrate maximally the obligations of the 2001 Convention. The actual implementation proposal deals with UCH (and not only with wrecks) present in the territorial waters as well as on the Belgian Continental Shelf/EEZ, thus extending the law of 2007 territorially as well as content-wise. The problem of the law of 2007 - that it deals only with activities directed at UCH - stays in the new implementation proposal.

We are very pleased that immediately after ratification, implementation of the national law is proceeding, and we hope this so-called 'Wreck Law' will be in effect by the end of 2013 or the beginning of 2014.

The federal government is also developing a law on Maritime Spatial Planning in the Belgian part of the North Sea: strategy employed, try to be present at every level/ on every occasion and keep UCH on the radar

The Flanders Heritage Agency is involved in the preparation and consultation phases and UCH is taken into consideration in the documents related to the law on Maritime Spatial Planning. At this moment the European Commission is working on a Directive for a framework for Maritime Spatial Planning and Coastal Management. Also in relation to this initiative we have to be sure that UCH is taken into consideration.

The main issue/problem is to spatially integrate UCH into this process, as there are so many economically-speaking valuable activities going on at sea, such as gravel and sand extraction, wind-farming, fishing, and nature protection. Licensing procedures for these activities would allow taking into account heritage incidentally affected. This means that we hope that activities directed at UCH are covered by the implementation of the 'Wreck-Law' of 2007 and that activities incidentally affecting UCH can be covered through licensing procedures linked to these activities.

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## Panel discussion

### Patrick O’Keefe Convenor

Patrick O’Keefe: This is to be a round-table discussion, examining possibilities for furthering Australia’s progress to ratification. Speakers today have introduced a number of issues relevant to Australia. Let’s start with the issue of public awareness. What can be done in Australia to raise the level of public participation and public interest in this Convention, considering the fact that we have already had a review conducted by the Department of the Environment, which is in the process of being finalised? It may or may not go further up the hierarchy. Everything is in a state of flux after the election and the senior officers are very busy with the new Departmental arrangements.

Ulrike Guerin: Next year we have the Anzac Cove Centenary. That is an opportunity to promote public awareness of the Australian UCH.

Patrick: How can we tie the Convention in with projects dealing with Anzac Cove UCH?

Andy Viduka: Tim Smith is involved with the ‘Beneath Gallipoli’ project, and the Australian submarine *AE2*. These projects have diversity, and show the broader scope that would be required under the Convention.

Patrick: Can a TV producer be interested?

Michael Gregg: Media projects relating to Anzac Cove are already underway, but how is the focus to be placed on ratification?

Andy: The *Environment Protection and Biodiversity Conservation Act* has a section related to the List of Overseas Places of Importance to Australia – for example the Kokoda Trail in Papua New Guinea, Howard Florey’s Laboratory in London, and Gallipoli are included on that list. Should that list be expanded or is there a more appropriate way to recognise sites of significance to Australia?

Patrick: Can we point out the added benefits of protection and cooperation through the Convention, to promote public awareness of the Convention rather than just the sites?

Ulrike: UNESCO has a conference next year on the UCH at Bruges – another opportunity for promoting the Australian UCH.

Marnix Pieters: In Flanders there was virtually no public awareness of the UCH before our TV Programme, designed to stimulate that interest. The official channel asked us to make a program about UCH, and it had an enormous impact in Belgium. I gave on-site talks and newspaper interviews but they didn’t have the same impact. Ten years after the program people still approach me about it. A well organised film project in Australia might move public awareness.

Martijn Manders: Many people, when they hear about the Convention, only hear about restrictions – about fighting against the treasure hunters. Emphasise the positive aspects, the cultural value of UCH, and show why it is important to protect, manage and research UCH.

Deb Shefi: Can we use the news about destruction of the Great Barrier Reef, and discuss sustainability in Convention terms? Look at cultural resources and natural resources as equally finite.

Ulrike: People talking about the natural environment have, so far, done a better job. Talk about how important UCH is, and just add a little point on how it should be better protected. Children’s education is important. Use every angle to promote the UCH.

Graeme Henderson: We should hook on to the 2016 Dirk Hartog 400 years celebrations to increase public awareness. There is a clear Dutch shipwrecks connection. An ARC Grant is linked to the celebrations.

Patrick: Who is going to do this?

Andy: The Cape Inscription site is on the National Heritage list, as is the *Batavia* wreck – both sites of shared Dutch-Australia heritage. It is heritage without borders – the Convention helps in forming an international web of cooperation, with standards behind it. We at the Department are already delivering the Convention’s ‘standard’ of cooperative protection for shared heritage shipwrecks in our waters. We have included the *Sirius*, a British wreck, and the *Kormoran*, a German wreck, on the *National Heritage List*. We are recognising the heritage values of other nations already and include countries when planning activities on sovereign vessels lost in our waters.

Patrick: There needs to be a broader (than just the Department) means for delivering the concepts to the general public. Does AIMA have any role in this?

Graeme: It is essential that AIMA have a role. This is an AIMA conference, not a Department conference. AIMA has been doing worthwhile things on these lines. I think AIMA is the place for a strategy to be developed. AIMA people should be putting up their hands to do things.

Andy: Not just AIMA. ICOMOS, through ICUCH, has a role that needs to be teased out more so that they are not overlapping, but complementary. There is also ICOM.

Lyndel: I suggest the various maritime museums. We have quite a few around Australia. If each one made some special contribution – exhibition, TV show or whatever, there would be a number of things at the same time. We need to be doing this between now and 2016, which is an obvious time to bring it to a conclusion and get the ratification done.

John Day: I am with the Great Barrier Reef Authority. We did a thing called Reef Live, an 8 or 10 hour continuous filming on the web – using researchers, people on the reef and people asking questions of the researchers. It went around the world with 6 million hits. It would not be impossible if we got the agencies together to take the best of the heritage to the internet, u-tube etc. TV is a bit dated compared with the web – people can interact and ask questions. The web is available for people to look at as archives.

- It is probably less cost, with more immediacy. It was coordinated by us and Google. We have film on the *Yongala* as part of the natural environment, directed at kids. We also have the Reef Guardian Schools Programme. It has snowballed – we have 265 schools Australia wide signed up to this program. The teachers do the work and we provide the curriculum. It has now got to 111,000 kids – 10% of the entire population of the Great Barrier Reef catchment area. The kids are growing up learning about how to protect the reef. We should also be putting the heritage message into our schools program.
- Patrick: Who is going to start the ball rolling?
- Ulrike: UNESCO can offer a web page for children.
- Patrick: Any ideas on how the system could be started?
- Enrique Aragon: We propose digital film support and cooperation to AIMA.
- Anon: There is one person who needs to be convinced, and that is the responsible Commonwealth Minister. AIMA has also written to the Prime Minister, and with the new Government that needs to be looked at again. We can get kids looking at videos, and eventually they will get political representation, but we need the Minister, hopefully during the next year or so.
- Lyndel: The important thing is for the UCH to have a high profile, before you work on the politicians. Because they will take notice if it has a high public profile. They are influenced by the public. You have to start with the outreach and then go to the Minister or do the two in parallel. But they will not be interested in signing the Convention if they think the public don't give a hoot. If they start to see it in every newspaper and magazine every now and then, and the subject is popping up again and again, they will listen.
- Anon: There has always been a catalyst, a trigger issue. You can see that in the international issues – Spain for example. In our case we must keep the momentum going so that when the catalyst emerges, the groundswell is there in place. In the absence of a catalyst it will be difficult. At polling day people don't vote on heritage.
- Cassandra Philippou: Some issues that might become catalysts should be coming soon with the amount of money the Australian Research Council has granted to UCH. The people involved in those projects should be putting protection of the UCH in the public eye.
- Anon: Maintain heritage trails to keep communities involved in their UCH. They require little maintenance and involve large groups of people.
- Andy: Indigenous cultural heritage and intangible cultural heritage need further work and are an opportunity – maritime landscape, use of seascape, etc. It is a motif that will appeal to a large part of the public. Broaden it from the shipwrecks to include maritime landscapes.
- Bill Jeffery: It opens up a whole new field, making UCH much more relevant to many more people. Also, tie the indigenous UCH in with natural heritage.
- Bob Yorke: Picking up on WWI and WWII, events we would use in the UK include the battle of Jutland, when some Australian ships were sunk. 8645 men were killed in 24 hours. The only way these ships can be protected is by a North Sea cluster of countries ratifying the Convention. WWI is an obvious catalyst – Gallipoli, *AE2*, etc.
- Mariano Aznar Gomez: Who knows what is important. Not everyone shares an interest in UCH. Some educated people say the gold on shipwrecks could solve Spain's economic crisis – so we need arguments to address an emotional reaction.
- Ulrike: UCH contributes to economic development. A trail or a museum is more lasting than destructive exploitation. UNESCO is working to make the UCH more accessible. Use special days to talk about UCH. The public love special days, for example next year's 8th June Ocean Day.
- Patrick: Do we know of any politician in either house who is very sympathetic to UCH?
- Bill: Can we get a champion with a high profile – a sportsman or an actor who can approach a Minister.
- Patrick: Whitlam was a strong supporter in heritage matters.
- Andy: It was a Liberal Government that brought in the 1976 *Historic Shipwrecks Act 1976*. We have a new Minister, and historically the Liberal Party has been more supportive of the heritage than Labor. We would like to see bipartisan support for ratification.
- Lyndel: It would be useful to go through the profiles of those politicians just elected to see who might be interested. Who has been an enthusiastic scuba diver for instance? Or who has spent time on ships?
- Andy: Ask what is the direct benefit to Australia? Where is it? It is how we protect our heritage overseas. But that is the most invisible to us.
- Michael: We have been a victim of our own success – the ANCODS bilateral agreement was too easy, and the *AE2* was also. It hasn't been a fighting point. But *HMAS Perth*, a war grave, is being dived on, and material is being removed, and it could be a catalyst.
- Andy: We need a positive focus on what we are doing domestically and internationally – a comprehensive listing of the benefits. Constant repetition is necessary. That should be an outcome of this Workshop.
- Craig Forrest: There is no single enabling catalyst. We need a variety of catalysts involving many different communities. To have a snowballing effect. No one individual will have control.
- Bill: Ulrike, does UNESCO have a goodwill ambassador for the UCH?
- Ulrike: For outside of Australia, it is James Cameron [Director of the movie *Titanic*]. We have been in contact with him, but he was busy with other targets. It is difficult to say who is the most famous person for UCH.
- Bill: Johnny Depp.



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- Marnix: Politicians like a doable project. Find a politician who wants to realise the ratification/or this project within his or her term and goes for it.
- Graeme: I don't know of a current Federal politician who is a fanatical diver, but Deputy Prime Minister Julie Bishop has been a member of the WA Museum's Museum Foundation.
- Cassandra: Environment Minister Greg Hunt's electorate is Sorrento, and he had involvement in the letter writing regarding the *Cerberus* wreck.
- Anon: University students are the future politicians, and should be good at letter writing – get committees of students in various states involved in letter writing.
- Patrick: Are there any archaeologists who would be opposed to Australia's ratification, who would come out with public opposition?
- Andy: Nothing of that kind came out in the review. There was consistent support for ratification.
- Patrick: What about the public in general?
- Andy: There was a limited pool of submissions from the general public, but nothing against ratification. It was broad support.
- Bill: I support the Convention but even more important is a proactive programme in UCH. If the government says to people, 'don't sell that item, we can all benefit from using it in museums etc', we will bring people around. The Convention on its own cannot do that. It must be done in combination with a proactive program.
- Vicky Richards: The challenge is to get the funding for those programs.
- Patrick: Graeme, where to now. Was the idea of this discussion to produce a resolution, because there is none drafted. Do we put a report in to AIMA?
- Graeme: Part of the idea of the afternoon discussion was to look at whether AIMA can come up with a strategy for the future. AIMA has done well over the past several years in working towards the Convention. Having a good strategy doesn't necessarily mean that things happen immediately. Perseverance is absolutely essential. Yes, it has been a long time waiting, but it is a worthwhile cause, so AIMA must continue with it, and must have an up to date strategy. The discussions we have had this afternoon are good material for that strategy. Someone needs to run through these ideas and compare them with the strategy currently employed. Are there some useful new directions – a modification or totally new strategy? I think a modification is appropriate. And the group should look at producing a resolution, or declaration.
- Lyndel: In regard to a declaration, I am sure we could run up something short and punchy by the end of this Conference. Something that can go to a politician or whoever we go to – saying, 'this is what this group decided'.
- Cassandra: The working group can be discussed at the AGM. Create a working group so that it does not land on the executive, emphasising people who will not be compromised in what they say by their employment position.
- Patrick: I hereby close the meeting.



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## **Editors' notes**

### **1. Conference Declaration**

The participants in the Conference of the Australasian Institute for Maritime Archaeology (AIMA) at Canberra, 4–5 October 2013 make the following declaration:

Recognizing the pioneering legislation, at Commonwealth and state level, on the protection of underwater cultural heritage, and the leadership role at negotiations for the UNESCO Convention for the Protection of the Underwater Cultural Heritage 2001,

Emphasizing the Commonwealth review of possible ratification of the Convention, responses from experts and the public in 2009 and the Agreement of all Australian states and the Northern Territory to undertake all necessary activities to enable the Commonwealth to determine whether it could ratify the Convention in 2010,

Now urge the Commonwealth to ratify that Convention at the earliest possible date.'

### **2. Further information**

On 11 December 2013 Professor Geoffrey Bolton received correspondence from the Hon. Greg Hunt MP, Minister for the Environment, via Mr Don Randall MP Member for Canning. In that letter Mr Hunt advises that he has asked the Department of the Environment to provide him with a detailed briefing on the Convention, including steps and any risks associated with moving to full ratification. Mr Hunt expressly states that he regards the protection of our underwater cultural heritage as a significant issue and assured Mr Randall that he will be carefully considering this issue over the coming months.

## DECLARATION




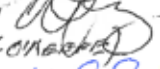
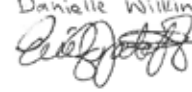

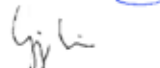

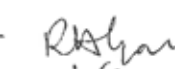

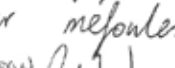


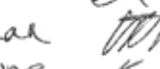

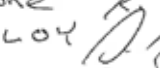
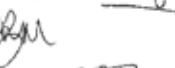

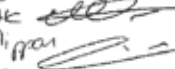


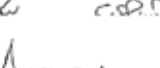

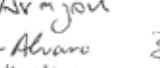

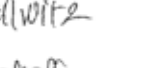

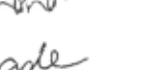








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Signed by:

WILLIAM JEFFERY 	 Danielle Wilkinson 
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Lyndal V. Pratt 	I. Walsh
LEANA LACINA 	J. Nauman
Celeste Jordan 	ROBERT YORKE 
Chelsea Colwell-Pasch 	Maddy Fowler 
Rela Stratton 	BRIDGET HENDERSON 
Vicki Richards 	Martin Braden 
JIM STEDMAN 	JENNIFER RODRIGUES 
Kim Browne 	Rebecca Ryan 
SAM MALLOY 	CHRIS LEWIS 
MARNIX PIETERS 	Cassandra Phillipps 
MIKE NASH 	<del>TONY MASSEY</del> RICK BULLER 
DAVID NUTLEY 	JAMES HUNTER 
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Rebecca Dallwitz 	
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