

“Historic shipwrecks: An area which presents some challenges”

Sarah Dromgoole
Professor of Maritime Law
University of Nottingham

Sarah.Dromgoole@nottingham.ac.uk.

The subject of the underwater cultural heritage (hereafter UCH) has come to some prominence in recent years, particularly since the mid-1990s, because of advances in modern technologies. Treasure hunters using acoustic sonar imaging and submersibles are now able to undertake systematic search and location operations over very large areas of the seabed with the aim of identifying and, ultimately, recovering valuable cargoes from shipwrecks. Many of the shipwrecks being targeted are quite ancient in origin. Recovery operations can now be undertaken in virtually any depths, although the areas currently under investigation are usually on the continental shelf or within the 200-nm EEZ of a coastal State. It is also the case that discoveries of forms of UCH other than shipwrecks are also increasingly being made, either by commercial operators inadvertently coming across cultural remains in the course of their work, or by archaeologists making use of modern technology. For example, it was recently reported that archaeologists from Southampton University were planning to survey the remains of the submerged medieval city of Dunwich on the East Anglian coast.¹ There is also an interesting article in the June 2008 issue of *Hydro International* (in the IOSF delegates' pack) concerning archaeological finds made by the marine aggregates industry.

The purpose of this presentation is simply to raise the profile of shipwrecks and other forms of UCH, which form an important (and non-renewable) element of the marine environment. Human activities that threaten UCH can be divided into two categories. The first are activities including treasure- and souvenir-hunting, that are directed at UCH specifically; the second are activities that may have an inadvertent impact on UCH, which includes many ordinary commercial marine activities, such as fishing, dredging, land reclamation, and so on. Both threats are serious and growing, but this short paper will focus only on the former.

Treasure hunting is a particularly topical issue at present in light of the recent activities of an American marine exploration company which has been systematically searching for shipwrecks in various parts of the world, including both the Mediterranean and the English Channel. The search area in the English Channel is said to be approximately 5,000 square miles in size. There was considerable publicity in May 2007 when the company announced that it had recovered 17 tons of silver coins from a site somewhere in the Atlantic Ocean and had flown them into the United States. Since the company was known to have been searching in an area off Land's End, the British press speculated that the coins may have come from the fabled 17th century treasure ship the *Merchant Royale*, although it now seems that they probably came from a wreck lying in a different search area. Nonetheless, the company has applied to the US courts for the arrest of three sites in the English Channel, which suggests that it has found some shipwrecks in this area of potential commercial interest. Indeed, it was reported in June 2008 that one of these wrecks may be the French 17th century galleon *La Vierge du Bon Port*, which sank somewhere to the west of Guernsey, reputedly laden with valuable cargoes.²

In territorial waters, the coastal State has sovereignty and therefore the right to legislate to control these sorts of activities. However, the question that is exercising minds now is how can treasure hunting that takes place beyond the 12-nm territorial limit be regulated?

The UN Convention on the Law of the Sea 1982 (LOSC) was negotiated at a time when the scientific discipline of marine archaeology was in its infancy and long before the advent of modern systematic search operations. It therefore includes only very skeletal provision for what it refers to as “objects of an archaeological and historical nature”. Some specific, if inadequate, provision is made for such objects found in the Area (Art. 149) and also for

¹ “Off the coast of sleepy Suffolk, Britain's own Atlantis is about to yield its secrets”, *The Times*, 5 June 2008.

² “Pirates of the Channel Islands: A £200m treasure hunt”, *The Independent*, 13 June 2008.

objects in the contiguous zone (see Art. 303(2)). However, there is a recognised gap - a significant 'gap' - in the provision afforded by the Convention and that is for archaeological and historical objects located on the continental shelf beyond 24nm. This is the area that presents the immediate challenges.

The potential for technological advances to aid the discovery of, and recovery from, shipwrecks in deep waters first came to international attention with the discovery of the *Titanic* in 1985. The discovery of that wreck, and subsequent touring exhibition of artefacts recovered from the site, was the catalyst for an initiative to create a specific convention dealing with underwater cultural heritage, and – in particular – the question of the regulation of treasure hunting in international waters. That initiative eventually led to the adoption by UNESCO in 2001 of the Convention on the Protection of the Underwater Cultural Heritage. This new Convention to some extent builds on the skeletal provision of the LOSC, but there are questions about its compatibility with the LOSC, and for this reason it is hugely controversial. In particular, most of the big maritime States, including the USA, UK, France and the Netherlands, have indicated that they do not intend to ratify the new Convention.³ Nonetheless, the UNESCO Convention has achieved almost enough ratifications to come into force (17 out of 20, as at June 2008) and it looks set to do so in the near future.

The question that I have been mulling over for some time is what can the UK and the other maritime States who do *not* intend to ratify the UNESCO Convention do to regulate treasure hunting on their own doorsteps, in other words on their continental shelf or within their EEZs, but beyond the 24-nm contiguous zone. While the shipwrecks being targeted in the English Channel may or may not be British flag vessels, or have originated from the UK, nonetheless they may well have called at, or have intended to call at, British ports and would in that case have an historical connection with this country. In the language of the UNESCO Convention, there may be a 'verifiable link' with this country and they are therefore potentially part of this country's cultural heritage. Does the LOSC provide any means for enabling the British government to exercise some regulation of these activities when they are conducted by foreign flag vessels and nationals? It certainly does not do so explicitly, so perhaps we need to be imaginative. For example,

³ See, e.g., the response of Margaret Hodge, Minister for Culture, to the Parliamentary Question of Andrew Smith M.P. regarding the UNESCO Convention (Hansard, 21 July 2008, Col. 808W).

could the provision in LOSC Art. 81 be employed, which gives coastal States the exclusive right to regulate drilling on the continental shelf "for all purposes"? After all, the term "drilling" is not defined by the Convention, so could it not be interpreted to include excavation activities that disturb the seabed? Another possibility is to exploit the fact that fish and other living resources often congregate on and around shipwrecks. Interference with a shipwreck may well cause damage to these living resources and therefore to the sovereign rights of the coastal State, which it may act to protect.⁴ "Marine scientific research" is another term that is not defined by the Convention. It has been generally accepted that it does not include archaeological research, since such research is not directed at the natural environment. However, perhaps the activities of treasure hunters could be distinguished from traditional archaeological work and somehow drawn within the term "marine scientific research" so as to give the coastal State the right to regulate them? The coastal State's right to authorise and regulate the construction, operation and use of installations and structures under LOSC Arts. 60/80 might also occasionally be utilised.

To use any of these arguments may well be seen as clutching at straws. However, unless and until the major maritime States are prepared to ratify the UNESCO Convention, those straws are largely all that they have. So, a little creativity in the interpretation of the LOSC may be necessary.

Further reading

JNAPC, "The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House Seminar October 2005", (Nautical Archaeology Society, 2006) – available from the Nautical Archaeology Society (nas@nasportsmouth.org.uk)

S. Dromgoole, "The Marine Historic Environment: Two White Papers and a Black Swan" (2007) 22 *International Journal of Marine and Coastal Law* 621-631

S. Dromgoole, "Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins" (2004) 28 *Marine Policy* 189-198

⁴ In the EEZ a coastal State has sovereign rights over all living resources by virtue of LOSC Art. 56; where a State has not declared an EEZ, or beyond the 200-nm limit where it has, there would need to be disturbance of sedentary species (LOSC Art. 77).