



ESRC FESTIVAL OF SOCIAL SCIENCE 2021: UNDERWATER MILITARY HERITAGE

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Introduction: the Festival

The United Kingdom's principal public funder of research and innovation across academic and partner institutions is UK Research and Innovation (UKRI) which has a stated mission to '*convene, catalyse and invest in close collaboration with others to build a thriving, inclusive research and innovation system that connects discovery to prosperity and public good*'.³ Clustered within are seven research councils, of which the Economic and Social Research Council (ESRC) is tasked with funding research into economic, social, behavioural and human data science.⁴ Its remit encompasses law, given the impact of regulatory controls on all of these areas in one way or another. Alongside high-end, project-driven academic research the ESRC, along with the other research councils, has a public engagement objective which encompasses two principal aims: awareness raising and involvement in the social sciences.⁵

The Festival of Social Science is one of the ESRC's engagement vehicles, which offers an annual, free to access, opportunity for researchers at partnered higher education institutions to share and showcase their work across the whole spectrum of the social sciences to a broad constituency and via numerous media. On occasion there is a thematic focus: 2021's

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³ See, for example <https://www.ukri.org/about-us/what-we-do/> (accessed January 2022).

⁴ Full details on the ESRC can be found at <https://www.ukri.org/councils/esrc/> (accessed January 2022).

⁵ Fuller information is available at <https://esrc.ukri.org/public-engagement/> (accessed January 2022).

events, for example, sought to bring research involved principally with social sciences and the environment to the public attention as a corollary to COP26,⁶ the annual/biannual Conference of the Parties assembled pursuant to the United Nations Framework Convention on Climate Change.⁷ The University of Plymouth has a long standing association with the Festival as a partner institution and has delivered a number of successful engagement events over the years. This article reflects on one of the events included in the 2021 Festival and gives an overview of the issues central to the basic theme: the sustainability of military heritage located in the oceans. The School of Society and Culture hosted a half-day colloquium, with experts exploring a number of key topics important in the contemporary management of such assets.⁸ The delivery was hybrid with speakers and an audience 'live' at the event, as well as those able to join remotely, which attracted a global audience with attendees from Australia, Finland, South Africa, the USA and Uruguay. While the detail and complexity of the contributions obviously cannot be comprehensively reflected in a limited review of proceedings, it is hoped that the reader is able to get a feel for the topics discussed.

Underwater Cultural Heritage

By way of a general introduction to the subject matter, the term underwater cultural heritage (UCH) is broad spectrum and is applied to phenomena as diverse as flooded Palaeolithic landscapes and lost 20th century military aircraft. In 2001 UNESCO adopted the *Convention on the Protection of the Underwater Cultural Heritage*.⁹ Its definition of UCH in art 1(1)(a) encompasses '*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*'. It is inclusive in its application, but the temporal limit of 100 years does not, as yet offer comprehensive coverage of cultural and historical artefacts which exists as a result of some of the more contemporary and epoch defining conflicts such as the Second World War.¹⁰ In addition, as with all measures of international law, its reach is only as good

⁶ An explanation of the Festival is available at <https://esrc.ukri.org/public-engagement/festival-of-social-science/> (accessed January 2022).

⁷ 26th UN Climate Change Conference of the Parties (COP26) in Glasgow on 31 October – 13 November 2021, details of which may be found at <https://ukcop26.org/>; and the UNFCCC more generally at <https://unfccc.int/> (accessed January 2022).

⁸ Enhancing past sacrifices: Protecting our underwater military cultural environment for current and future generations, University of Plymouth, November 2021. Full details, including a recording of the proceedings, are available at <https://www.plymouth.ac.uk/research/esrcfestival/enhancing-past-sacrifices>.

⁹ Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009) 2562 UNTS 3.

¹⁰ The cultural significance of which is recognised by UL heritage agencies that have protected several underwater World War 2 heritage sites.

as the capacity and/or motivation of a state's enforcement machinery. Furthermore, should states not ratify the Convention, as is the case with the UK, domestic measures of law would have to necessarily fill the gap in respect of offering some sort of protection to sustain UCH assets to enable their appreciation and study by future generations. Given the focus of the event we were honoured to have Vice-Admiral Sir Anthony Dymock RN (rtd) open the event and contextualise the importance of appreciating and conserving military heritage.

Challenges, enforcement and the PMRA

The substantive contributions were commenced by a presentation by the authors, setting the scene on the basic regulatory landscape in respect of UCH in UK territorial waters.¹¹ There are both generic and specific legal regimes which apply. In the case of the former, the emphasis is in respect of seabed operations and salvage, while in the latter, heritage-specific measures apply differential levels of protective designations on sites, artefacts or wrecks.

Seabed operations are controlled by virtue of the marine licensing regime established under Part 4 of the Marine and Coastal Access Act 2009 (MACCA). The relevant restriction is that no person may carry out a marine licensable activity without a marine licence granted by an appropriate authority.¹² Undertaking such an enterprise without a licence is an offence. Activities caught by this restriction and relevant to UCH include the placing of items on the seabed, the removal of objects from the seabed and excavating the seabed. Limited exceptions apply and include hand recoveries or use of small lifting bags – but otherwise, anything undertaken from a vessel or which would include use of machinery would require a licence. There is a significant reach to this legislation as it applies to the entirety of the UK Marine Area¹³ and, for UK nationals or registered vessels, anywhere in international waters.¹⁴ The licencing regime was applied to the illicit removal of £50,000 worth of tin ingots from a vessel, the *SS Cheerful*, sunk in 1855, by salvors. On conviction the ingots were confiscated and fines and community service orders were imposed on the convicted parties.¹⁵

¹¹ The focus was primarily on English legislation (with application in Wales and Northern Ireland) noting the Scotland has its own bespoke, but similar, legislation in force.

¹² Section 65, Marine and Coastal Access Act 2009. Appropriate authorities for the devolved nations of the UK are as follows: England, the Marine Management Organisation; Wales, Natural Resources Wales; Northern Ireland, the Department of Agriculture Environment & Rural Affairs; and in Scotland, Marine Scotland.

¹³ The UK Marine Area represents inshore waters to 12nm and offshore waters to the extent of the UK's EEZ/Continental Shelf. For illustration the UK (European) EEZ approximates to an area of 773,676 km².

¹⁴ Section.3 Protection of Military Remains Act 1986.

¹⁵ Additional details of the case are available at <https://www.gov.uk/government/news/man-found-guilty-of-marine-licensing-offences-relating-to-salvage-of-shipwreck> (accessed January 2022).

The law of salvage in UK waters is governed by the Merchant Shipping Act 1995.¹⁶ The regime is complex and not solely aimed at UCH protection although it offers ancillary protection. A person recovering or taking possession of wreck, the definition of which would include most items of UCH, must be reported to the Receiver of Wreck, an office located within the UK's Maritime and Coastguard Agency.¹⁷ The same duty applies to material recovered outside of UK territorial waters and brought within them. Whatever the circumstances, failure to comply with the notification requirement is a criminal offence attracting a fine and/or confiscation.¹⁸ The concept of Sovereign Immunity is linked to salvage. Basically it means that a wreck remains the property of the state which owned it, and it is immune from salvage services unless the state consents to recovery¹⁹. The UK views vessels that were state owned or operated, such as warships, are entitled to sovereign immunity from salvage, and the issue was explored in greater detail by subsequent speakers and is summarised more fully below.

Specific legal regimes for UCH are comprised in the Protection of Wrecks Act 1973 (POWA), the Ancient Monuments and Archaeological Areas Act 1979 (AMAAA) and the Protection of Military Remains Act 1986 (PMRA). Each of the legislative measures creates certain protective criteria and provides for offences should they not be conformed with. In brief, the POWA applies to designated sites of wrecked vessels in UK territorial waters that are of historical, archaeological or artistic importance.²⁰ The offences created include the removal of objects, damage, diving or salvage operations or deposit of items on the seabed.²¹ There are currently 54 protected wreck sites of the coast of England.²² The protection provided by the AMAAA is applied to 'monuments' on land or offshore in territorial waters.²³ Included within the definition of monuments are the remains of vessels, vehicles and aircraft.²⁴

¹⁶ Merchant Shipping Act 1995, Part IX.

¹⁷ Sections 236(1) and 237(1) Merchant Shipping Act 1995.

¹⁸ Sections 236(2) and 237(2) Merchant Shipping Act 1995: a contemporary example of the use of these powers in a UCH context is reported here <https://www.gov.uk/government/news/divers-guilty-of-raiding-shipwrecks-without-declaring-their-find> (accessed January 2022).

¹⁹ Originally a matter of customary international law, the principle is now codified in Article 14 Brussels Convention on Salvage 1910 and Article 4 International Salvage Convention 1989.

²⁰ Protection of Wrecks Act 1973, s1(1).

²¹ Protection of Wrecks Act 1973, s1(3).

²² For further information see for example, <https://historicengland.org.uk/listing/what-is-designation/protected-wreck-sites/> (accessed January 2021).

²³ Ancient Monuments and Archaeological Areas Act 1979, s53 in respect of monuments in UK territorial waters. For discussion of the mechanics and potential application of the legislation offshore see, Lowther J, Parham D, Williams, M, 'All at Sea: When Duty meets Austerity in Scheduling Monuments in English Waters', *Journal of Planning and Environmental Law* [2017] 3 pp2-21.

²⁴ See for example Historic England's list of monuments available at <https://historicengland.org.uk/listing/what-is-designation/scheduled-monuments/> (accessed January 2022).

Contemporary designation of a number of monuments offshore has included a series of military vehicles, including tanks and floating harbour sections, lost in D-Day preparations.²⁵ Prohibitions include the demolition, alteration, destruction or 'repair' of scheduled monuments other than in accordance with scheduled monument consent. The designation, though, basically permits access – offshore for example enabling diving on a site – but operates on a 'look don't touch' basis.

A slightly more nuanced legal regime applies specifically to military losses. While the POWA and AMAAA *may* include military losses as UCH, the PMRA is specifically focused on them. In popular culture military wrecks, ships or aircraft lost at sea, are often described as 'war graves'. This is not entirely legally accurate as 'war graves' in UK has a definite meaning, that of burials as defined by the Commonwealth War Graves Commission.²⁶ However, legal specificity apart, the fact remains that there is often a deep cultural attachment to sites where such losses have occurred. The PMRA creates two specific designations: *Controlled Sites* and *Protected Places*.²⁷ In UK territorial waters there is a universal application of the law – so that any person or vessel is subject to the PMRA's provisions. Beyond UK territorial waters only UK nationals and UK registered vessels are subject to the law.²⁸ This distinction is important and was the focus of subsequent papers. Controlled Sites represent the most stringent of controls and permit no access other than by express licence and imposes controls on known locations of military or vessels less than 200 years old. Section 2 of the PMRA creates offences including damaging, entering or excavating, as well as conducting diving or salvage operations. In respect of Protected Places, defined as the remains of crashed military aircraft or designated vessels sunk after 4th August 1914, access is permitted on a 'look don't touch' basis. Offences, again in section 2 of the PMRA, are similar to those in respect of Controlled Sites.²⁹

The conclusions drawn in respect of the legislative regimes available for the protection of UCH were that there is a high degree of fragmentation, with considerable legal complexity, and which in general are not well understood by the public, or even marine users. Culturally however there is extremely strong public empathy for protecting last known resting place of military personnel.

²⁵ See for example, <https://historicengland.org.uk/listing/the-list/list-entry/1459754> (accessed January 2022).

²⁶ See for example, <https://www.cwgc.org/> (accessed January 2022).

²⁷ Protection of Military Remains Act 1986, ss.1(2) and 1(6) respectively.

²⁸ Protection of Military Remains Act 1986, s 3.

²⁹ Protection of Military Remains Act 1986, s 2(1)(b) imposes a reasonable suspicion limitation for liability.

Military remains and shared heritage

As explained, territorial jurisdictional limits and the imposition of a 100 year requirement for losses to qualify as UCH both impact upon the efficacy of legislative protection of military remains the UNESCO Convention imposes. Taken together, this can pose existential threats to heritage assets located in a different nation's territorial waters, the high seas, or if beyond the reach of the UK legal regimes. A contemporary mitigation has been the development of the concept of shared heritage. Put simply, it relates to the fact that one country's military loss, which might have occurred in a distant theatre, might also be of cultural value to the country within which the wreck lies. In the context of losses in 20th century conflicts, the complexities of post-colonial issues should not be ignored, but engagement and partnership brings co-benefits in terms of the sustainable management of UCH.³⁰ Professor Dominic Tweddle, Director of the National Museum of the Royal Navy (NMRN), shared the basis, work and rationale of the NMRN.³¹ Material from (UK) Ministry of Defence wrecks is accepted by the NMRN and curated so as to engage the public in appreciating naval heritage. While this might be achieved through the retrieval and preservation of artefacts from, for example the warship *Mary Rose*,³² the investigation and interpretation of wreck sites is important and fascinating.

Interpretation of wreck sites provides insights into numerous aspects of life at the time of the loss. The NMRN has been involved in a number of projects, including HMS Invincible – lost in the Solent in 1758 – in partnership with the Maritime Archaeology Sea Trust.³³ The Invincible exhibition has, to date, engaged close to 260,000 visitors and provided educational and training opportunities for university students and apprentices. The enduring societal value of UCH as a sustainable resource is brought into sharp focus on the basis of such managed recovery and curation of threatened UCH³⁴.

Professor Tweddle shared the experience of recording the level of public impact through the recovery, conservation and curation of cultural objects in respect of the wreck of *HMS*

³⁰ For example agreement between the UK and Canada (HMS Terror and HMS Erebus), between the UK and Australia (HMS Pandora) and the UK and South Africa (HMT Birkenhead).

³¹ Details of the NMRN are available at <https://www.nmrn.org.uk/> (accessed January 2022).

³² The *Mary Rose*, flagship of Henry VIII's navy, was sunk in 1545 and artefacts as well as a portion of the ship raised in 1982 is exhibited in Portsmouth, UK. Additional information is available at <https://maryrose.org/> (accessed January 2022).

³³ Additional information on Invincible and the MAST project are available at <https://thisismast.org/projects/hms-Invincible.html> (Accessed January 2022).

³⁴ The site was threatened by natural seabed erosion, which is illustrative of the challenges climate change may pose to the conservation in situ of UCH in the future.

Invincible.³⁵ The wreck was excavated over three diving seasons with over 6,000 objects recovered and conserved. The items were then transferred by the Ministry of defence to NMRN to, which in turn curated a public exhibition attracting in excess of a quarter of a million visitors to the Portsmouth Dockyard site. Additionally, close work with school, and universities has been undertaken alongside a number of people being trained in aspects of cultural interpretation, curation and object conservation. The nexus between the project and the heritage and local communities prompted significant volunteer and outreach work, representing a successful engagement of the public and heritage. The exhibition will move to Chatham in 2022, creating further opportunities to share in the history of *HMS Invincible* and her discovery and conservation.

A more contemporary project has involved the NMRN with Uruguayan historians. *HMS Agamemnon*,³⁶ anecdotally Admiral Lord Nelson's favourite ship, sank in the River Plate in 1809. The project to research the vessel and curate exhibitions in both countries represents an exceptionally good example of international cooperation to secure and preserve the heritage for both Uruguay and the UK.

Sovereign immunity and practicalities of underwater heritage protection outside UK waters

Commander Caroline Tuckett, a serving Royal Navy (RN) officer and the RN lead on international law, presented an informative and engaging insight into the principles of Sovereign Immunity as it applies to military heritage. Commander Tuckett noted initially the example of *HMS Queen Mary*, lost in the North Sea battle of Jutland in 1916 and lying beyond UK territorial waters in international waters. The ship is designated under the PMRA, although a number of items have been removed from the wreck without permission of the UK authorities by foreign salvors and sold, both for scrap and cultural value. No prosecutions have to date been brought in respect of the non-permitted salvage, despite pictures posted online of the salvage operation and the individuals involved. It was noted, referring to MAST's compiled Royal Navy Loss List that there are in excess of 5,000 UK Naval and military wrecks worldwide, many of which representing the final resting place of the crew

³⁵ Details of the ship and the Deep Dive project are available at <https://www.nmrn.org.uk/exhibitions-projects/hms-Invincible>, with further insights from the partner organisations the Maritime Archaeology Sea Trust MAST) <https://maritimearchaeologytrust.org/projects-research/hms-Invincible-1758/> and Bournemouth University <https://www.bournemouth.ac.uk/news/2019-12-11/hms-Invincible-1744-excavated-bottom-solent> (all accessed January 2022).

³⁶ For details on the *Agamemnon* see for example, <https://www.wrecksite.eu/wreck.aspx?194630>.

and which carry an emotional connection to families, colleagues and the services.³⁷ In that connection the enforceability of the existing law, and the principle of sovereign immunity becomes central to understanding the current position and options available into the future.

The UN Convention of the Law of the Sea 1982 (LOSC) provides the basic framework in respect of Sovereign Immunity.³⁸ Article 32 ensures that nothing in LOSC affects the immunities of warships and government ships not operated commercially; and complete immunity from jurisdiction of any state, other than the state under which the vessel is flagged, is granted both to warships and non-commercially operated but government owned vessels on the high seas.³⁹ Cdr Tuckett helpfully described this as ‘a bubble of protection’, meaning that at international law, the vessel is protected by a shield of immunity that cannot be tampered with where ever that ship may be and, crucially for the basis of the colloquium, this would apply to wrecks too.⁴⁰ Interestingly, although not specifically concerned with heritage, the UK Government position is that Sovereign Immunity extends to all UK government used equipment, for example Autonomous Underwater Vehicles (UAVs) used for purposes such as mine hunting.

There is contemporary legal debate as to whether an otherwise sovereign immune ship that has been sunk retains that status. This is as a result of the definition of a warship which is defined in Article 29 of the LOSC as

‘...a ship belonging to the armed forces of a state bearing the external marks distinguishing such ships of its nationality...under the command of an officer duly commissioned by the government of the state...and manned by a crew which is under regular armed forces discipline...’⁴¹

Arguably, when a ship sinks it is no longer ‘manned’ and thus no longer capable of being defined as a state organ, it is not thereby subject to the rules relating to sovereign immunity. Commander Tuckett noted that a common sense approach had been adopted to such losses though States’ practice and noted that at the time of the negotiation of the LOSC the, then, Soviet Union had submitted that wrecks should be included within the definition of sovereign immunity within the Convention. Although it did not make the final draft of the Treaty, it has

³⁷ The Royal Navy Loss List, assembled by (MAST) containing information on HMS Queen Mary and all RN/military wrecks losses is available at <https://thisismast.org/research/royal-navy-loss-list.html> (accessed January 2022).

³⁸ UN Convention of the Law of the Sea 1982, 1833 U.N.T.S. 397, (in force November 1994).

³⁹ The LOSC, arts. 95 and 96 respectively. As noted above a position reinforced by Article 14 Brussels Convention on Salvage 1910 and Article 4 International Salvage Convention 1989.

⁴⁰ Subject to concepts such as the right to innocent passage etc. as provided for in the LOSC (art. 19).

⁴¹ Emphasis added

subsequently been accepted as a principle of customary international law. The UK view therefore is that any ship UK owned and operated 'lost'; ship remains sovereign immune and is there for subject to protection.

We learned that it is possible to give up, or relinquish sovereign immunity. This may happen in three principal ways. First, by capture in battle, such that a ship so captured, although not one sunk in battle, would have its immunity transferred over to the state which had effected the capture.⁴² A second way would be by international agreement, such as that of the Treaty of San Francisco in 1951 whereby Japan and the Allied powers re-established peaceful relations.⁴³ A gift or sale of the wreck would provide the third means. This might take place for example through the state sale of a ship to a foreign nation or, as in the case of *HMS Terror* and *HMS Erebus* lost in the nineteenth century, the gift to the Canadian authorities of the wrecks of these ships lost in the search for the elusive northwest passage.⁴⁴ By doing so the UK formally gives up its sovereign immune claim to those vessels.

In terms of enforcement, the LOSC does call on signatory states to protect objects of a historical and archaeological nature.⁴⁵ In addition the UNESCO 2001 Convention offers a degree of protection as noted above. The UK has not ratified the 2001 Convention and part of the reason for this is an objection to Article 7(3) which enables state in whose territorial seas a wreck lies to investigate it, provided that the state party is informed. The UK's view was that there was a potential breach of customary international law in that it enables too much for interference with what would otherwise be sovereign immune. Nevertheless, the UK attempts to enforce Sovereign Immunity where possible and has enshrined the principle in policy.⁴⁶ Where possible the UK has attempted to pursue diplomatic options with other navies and governments as a means to work towards ideas of shared heritage and to work towards situations where the principles underlying the 2001 UNESCO Convention can be applied. In addition, significant training is provided and planned in respect of the protection of cultural property within the UK armed forces, with the establishment of a Cultural Property

⁴² Examples given were that of the *ARA General Belgrano*, an Argentinian vessel sunk in the Falklands (Las Malvinas from an Argentinian perspective) conflict, and *HMS Coventry*, a Royal Navy vessel sunk in the same conflict. In both case sovereignty remained with Argentina and the UK respectively.

⁴³ Treaty 1 of Peace with Japan, 1951, 1952 U.N.T.S 1832, for example art. 14(2)

⁴⁴ The wrecks were discovered in 2014 and 2016 respectively.

⁴⁵ Arts. 149 and 303, LOSC.

⁴⁶ Department of Digital, Culture Media and Sport, *Protection and Management of Historic Military Wrecks outside UK Territorial Waters*, 2014, available at <https://www.gov.uk/government/publications/protection-and-management-of-historic-military-wrecks-outside-uk-territorial-waters> (accessed January 2022).

Protection Unit as being key to the delivery of such objectives.⁴⁷

Reflections on HMS Victory 1744

Elisabeth Bussey-Jones enlightened the audience further in respect of the concept of Sovereign Immunity, although the historical context of her case-study premised on the relatively recent, and controversial, series of events that surrounded the discovery of the wreck of *HMS Victory* (1744).⁴⁸ The ship was the flagship of the British Mediterranean Fleet, captained by Sir John Balchin) and was in transit from Portugal to the UK when she sank with 1,100 crew. A US company, Odyssey Marine Enterprises (Odyssey) claimed to have located the wreck in 2008 – some distance from where the original loss was believed to have occurred and outside of the 12nm territorial sea but within the UK marine area. Material began to be recovered from the vessel including cannon. At this point the controversy began. On the one hand, maritime archaeologists were of the view that attempts to remove items from the wreck was essentially treasure hunting in the guise of conservation. On the other side was the view that deterioration of the wreck site and the threats posed by, for example bottom trawling, put the wreck at the risk of considerable damage if the *in situ* approach to preservation was continued. Not unrelated was the fact that *HMS Victory* was anecdotally rumoured to have been carrying significant amounts of bullion and silver coins.

As noted, despite being a contributor to its drafting, the UK has not ratified the 2001 UNESCO Convention, preferring instead to implement adopt a purely policy approach by adopting the Convention's Rules of the Annex as best practice for managing UCH, despite not ratifying the Convention. The Annex however incorporates the concept of non-commercial exploitation of UCH, so that anything perceived to be 'treasure hunting' would be an antithesis to the preservation *in situ* approach, or the fall-back position of management via accepted archaeological principles, including non-commercial exploitation. Although first principles would not always be expected to be adhered to, selling-off recovered artefacts (in the case of *HMS Victory* the precious metals rumoured as the cargo) would be in breach of the Annex to the 2001 Convention.⁴⁹

In addition, the principle of Sovereign Immunity, as outlined above, also applies to the wreck. Odyssey had registered a claim to salvage in the US courts, although had to concede at a

⁴⁷ Presented in Royal Navy context here <https://www.royalnavy.mod.uk/news-and-latest-activity/news/2019/january/07/190107-monuments-men-unit-formed> (accessed January 2022).

⁴⁸ For a wealth of detail about *HMS Victory*, see <http://www.victory1744.org/history.html> (accessed January 2022).

⁴⁹ Rules 1 and 2 of the Annex to the 2001 Convention.

later point that it had no right to do so given the wreck's entitlement to Sovereign Immunity. Otherwise, as noted in the first presentation, any recoveries would be subject to the regimes established under the MACAA for marine licensing and the MSA for salvage. It was reflected amongst other things that issues of transparency, conflicts of interest and the importance of the realisation that collective history represents a non-renewable resource are all germane considerations.

In summer 2008, the Ministry of Defence through its Disposal Services Agency (DSA) granted Odyssey permission to continue exploration work to establish the identity of the vessel. A public consultation was launched in 2010 seek views on options for site management.⁵⁰ In the interim a number of claims and counter-claims as to the security of the site had been made by a number of experts. Monies were also due to be paid to Odyssey by the DSA for the recovery of cannons from the wreck, although there was some movement on the amount and Odyssey did not pursue a claim in the US courts as it was of the view that HMS Victory was entitled to Sovereign Immunity. Independent historical research had also concluded that there was unlikely to be a significant amount of valuable cargo on site. There was a number of exchanges between relevant stakeholders and the relevant UK government personnel on the fate of the wreck I.⁵¹ By the time of the consultation responses there had been a change of government which then adopted a policy of outsourcing to deliver public services.

Late in 2010 the 'Sir John Balchin Maritime Heritage Foundation' (later renamed the "Maritime Heritage Foundation (MHF)) was incorporated and registered as a UK charity, led by Lord Lingfield (formerly Sir Robert Balchin), a peer who claims direct descent from Sir John Balchin, a claim contested by other family descendants. . The Articles of Association state that the corporation is formed for the benefit of the public and involves education through "the location, excavation, recovery, raising, restoration and/or preservation of ship wrecks" including *HMS Victory 1744*.⁵² In 2012 it transpired that the wreck had been gifted by the Crown to the MHF, with a condition that nothing should be removed from the seabed or disturbed without permission from the Secretary of State, with an advisory group

⁵⁰ The consultation is available here, <https://www.gov.uk/government/consultations/hms-victory-1744-options-for-the-management-of-the-wreck-site> (accessed January 2022).

⁵¹ See for example redacted communications, such as https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/400648/2014-06466_Document_15.pdf (accessed January 2022).

⁵² Open access information from Companies House: <https://find-and-update.company-information.service.gov.uk/company/07419879> and registered with the Charity Commission in 2011 <https://register-of-charities.charitycommission.gov.uk/charity-search/-/charity-details/5016772/governance> (both accessed January 2022).

established to determine what would be acceptable archaeological management of the site. Since the wrecked vessel was no longer owned or operated by the UK it appears its entitlement to Sovereign Immunity was then lost.⁵³ Later it was established that Odyssey had entered an agreement with MHF with a project plan to excavate the site, which proved controversial, and, as was suggested by the speaker, was demonstrative of why openness and transparency are critical. The ‘fog’ surrounding the potential excavation prompted a threatened judicial review, particularly in respect of the process, which had proceeded on the basis that excavation of the site, rather than preservation *in situ* would be the primary approach. This approach also, it was presumed, was suggestive of a commercial exploitation of artefacts removed from the site, as were press releases by Odyssey. Further reports on the stability of the wreck again favoured *in situ* preservation.

Perhaps unsurprisingly MHF opposed this version of events and claimed that there was a legitimate expectation that the Secretary of State would not change their mind that the wreck was at risk and that the proposed recovery was in accordance with the Annex to the 2001 Convention. Ultimately, the Judicial Review did not proceed, the MOD withdrawing its permission for further recovery, and objects from the wreck were not recovered as per the MHF plan, although the wreck remains for the time being at least the property of MHF⁵⁴. The speaker concluded that the episode was a salutary lesson in the necessity of bringing law and policy together in a clearer way to provide a more holistic future means to manage underwater cultural assets.

Failures in the protection of underwater military heritage

Professor Dave Parham of Bournemouth University provided the final paper. In it, he reflected upon the significant heritage losses, as a result of unregulated salvage of military wrecks that had occurred within the Java Sea by way of an example where heritage protection has not worked.⁵⁵ He reflect that the Japanese attacks on Pearl Harbour were part of strategy to facilitate the acquisition of resources located primarily in maritime South East Asia. At the time, the UK and Netherlands had a strong colonial presence in the area

⁵³The deed of Gift is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27932/victory_1744_deed.pdf (accessed January 2022)

⁵⁴ Images of the site, taken by visiting recreational divers, using advanced diving techniques, can be found at <https://www.msn.com/en-gb/news/world/diver-captures-photos-from-wreck-of-the-original-hms-victory/ar-AALxrSj> (accessed January 2022).

⁵⁵ Detailed references to Professor Parham’s presentation are provided at the end of the recording of his presentation, although some key sources of interest are noted within the text.

and there was a large Royal Navy base in Singapore, a smaller Dutch presence in what is now Indonesia and the US had a strong colonial presence in the Philippines. In very brief summary, the plan was that in the event of conflict in the area fleets would be mobilised from the UK and from either mainland America or Pearl Harbour to support existing vessels in the theatre. The fact that the Royal Navy was otherwise engaged in the Atlantic and the US Navy had suffered significant losses at Pearl Harbour essentially undermined the effectiveness of that plan.

An Eastern task force was assembled under the combined command of US, UK, Netherlands and Australia. The force consisted of 16 ships, cruisers and destroyers, of which 11 were sunk. The principal focus of the presentation was *HMS Exeter*. The ship was damaged and while attempting to escape was lost in a secondary battle.⁵⁶ The wreck was discovered in 2007, and was intact when found. Other lost ships within the task force also discovered were found to contain human remains.⁵⁷ *HMS Exeter* was in fact scuttled, so that there were considerably less human remains on board the ship, probably within the engine rooms, and so were not disturbed until the wreck was interfered with at a later date as described below.

In 2016 another diving expedition took place on *HMS Exeter* and on a series of the other accessible Java Sea wrecks as part of a 75th anniversary commemoration. It was discovered that the wreck was almost entirely missing, with only some scattered debris and a vacant depression in the seabed, providing a clue to her previous whereabouts. The same was true of other wrecks such as *HMAS Perth* and the Dutch vessels *HNLMS De Ruyter*, *HNLMS Java*, and *HNLMS Kortenaer*. The losses drew significant condemnation in the respective countries.⁵⁸ Dozens of military ships were lost in this area, as well as numerous merchant ships. In total, between 1942 and 1945, 61 military vessels from six navies were sunk. So far, of those located, 21 have been subject to unlawful salvage operations, most often for valuable non-ferrous metals. Many, if not all, of the wrecks are subject to Sovereign Immunity and therefore cannot be lawfully salvaged without authorisation from their Flag State, which has not been granted. Professor Parham noted that work that has taken place is often under state or regional government licence and often undertaken under the auspices of navigational clearance or of other, legitimate, salvage undertaken on another site. Trying to

⁵⁶ For details on *HMS Exeter* see, for example, <https://www.wrecksite.eu/wreck.aspx?14311> (accessed January 2022).

⁵⁷ See for example the report of the *HMAS Perth* Project, 2017, available at https://www.hmasperth.asn.au/drh0507/Perth_2017_Report.pdf (accessed January 2022).

⁵⁸ See for example Oliver Holmes and Luke Harding, 'British second world war shipwrecks in Java Sea destroyed by illegal scavenging', (the Guardian 16 November 2016), available at <https://www.theguardian.com/world/2016/nov/16/british-second-world-war-ships-illegal-scavenging-java-sea> (Accessed January 2022)

understand why this might happen offers a number of reasons. Post-war salvage for value of items has been identified as a reason, as has the lack of effective heritage management once wrecks had been discovered. Scrap metal values promote recoveries in times of high prices and the recovery of steel with low background radiation (anything sunk pre the nuclear age) is a factor.

It may be that certain recoveries are a means of removing colonial monuments from a territory keen to make an understandable break with certain aspects of its history. For now, in the Java Sea the salvage vessels seem to have moved on. Probably as a result of the fact that most of the accessible targets have already been removed. The issue remains though that this may play out again in another area, or that as technological advances push back the limits to recovery that other wrecks with a significant cultural value may also all victim to illicit interference. In terms of solutions, Australia, the US and Netherlands commenced high level diplomacy with Indonesia resulting in the signing of memoranda of association respect of the protection of certain wreck sites. The UK has not to date followed the same approach. On the basis of the previous presentations, it is clear that this remains an issue for the flag and coastal state management and resolution, but the willingness of states to be involved in shared heritage and 'cultural diplomacy' offers the greatest potential for solutions.

Final thoughts

The colloquium provided an excellent opportunity to articulate the many challenges, and opportunities, facing those involved in the sustainable conservation of cultural assets arising in their territorial seas and beyond. In a military context, the visceral attachment to the loss of life in conflict adds an additional layer of cultural value that cannot easily be ignored. The law can provide solutions, but, as with any law, the ultimate assessment of its effectiveness will depend upon the reality of its enforcement and the motivations and resources of those tasked to do so. Recognising the importance of heritage in a socio-economic sense, so that the communities in which heritage is located become beneficiaries of it, and ultimately its custodians, may offer a solution. Engaging stakeholders more fully in ensuring such assets endure might then be recognised as a more sustainable option.

Understandably, given the significant impacts of the pandemic, 2020 and 2021 are unlikely to feature on a list of most readers' favourite years. The many challenges brought for teaching, research and its dissemination, although important in their narrow context, rightly pale into insignificance when set against wider societal impacts, domestically and globally.

One very small positive, for those fortunate enough to have stable and affordable internet connection at least, has been the ability to remain connected and to participate more widely. In academic research the resultant pivot to online or hybrid events enabled attendance at conferences, colloquia and events that would be otherwise unavailable to many, due to temporal or budgetary constraint. This has opened access and the ability to participate, engage and exchange knowledge more broadly than ever before. This is perhaps a silver lining in what has otherwise been a dark period for so many.