

# **ENFORCING HERITAGE LAW IN DUTCH WATERS**

**The enforcement of the provisions of the Monuments and Historic  
Buildings Act on illegal excavation of underwater cultural heritage**

L.A.P. Ziengs BA/LL.M

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s9906541

Supervisors: drs. M.R. Manders/drs. A.D.C. Otte-Klomp

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## I. INTRODUCTION

### *I.1 The Netherlands and its underwater cultural heritage*

Although a country with a rich maritime history and a huge wealth of underwater cultural heritage, the Netherlands has been relatively late to recognize the importance of legally protecting its archaeological resources (Maarleveld 2006b, 31). This holds true for both terrestrial and underwater heritage. But while terrestrial sites of archaeological importance were legally protected from the 1960s onwards (Manders and Maarleveld 2006, 129), it took the Dutch government even three more decades, until the mid-1980s, to seriously take up its responsibilities for underwater cultural heritage on the sea bed – a rather inert response in the face of the rapid expansion of human activities underwater targeted at economic exploitation of underwater cultural heritage that were made possible by new inventions such as scuba equipment which became widely available for affordable prices in the 1960s (Maarleveld 2006b, 28). Steps toward legal protection took place in the form of an official extension of the application of the protective provisions in the 1988 revision of the Monuments and Historic Buildings Act (*Monumentenwet 1988*) to the Dutch territorial waters (Maarleveld 2006b, 32). Since 1988, the enforcement mechanism to ensure compliance of the Act's provisions applies equally to archaeological heritage on land as well as on the sea bed, charging governmental parties with enforcement of the rules in Dutch waters. Although underwater cultural heritage in the Netherlands is therefore formally protected against a phenomenon like illegal excavation, one might wonder whether the protective mechanism looks as good in practice as theory suggests. Arguments claiming the opposite are certainly defensible. For instance, one might argue that the existence of essential differences between the locations of terrestrial archaeological remains on the one hand, and underwater archaeological remains on the other, would make enforcement of the provisions of the Monuments and Historic Buildings Act at sea considerably more complicated than on land. After all, wet environments present unique challenges to governmental bodies charged with monitoring and safeguarding cultural heritage. Therefore, it remains questionable whether enforcement at the vastness of the sea takes place as originally intended: ensuring full compliance of the rules of the Monuments and Historic Buildings Act in order to

safeguard the vulnerable underwater cultural heritage against humans threats in the form of illegal excavation.

## *1.2 Research questions and research objective*

As a result of the situation described above, this thesis will focus on the enforcement of those provisions of the Monuments and Historic Buildings Act of 1988 intended to prevent and punish illegal excavation of underwater cultural heritage in Dutch marine waters. The main question to be addressed here will be: does the current enforcement mechanism, aimed at protecting the underwater cultural heritage against illegal excavation as mentioned in the Monuments and Historic Buildings Act of 1988, need to be improved and if so, in what ways? In order to answer this question, five sub-questions need to be addressed first:

- How do illegal excavations threaten underwater cultural heritage in the Netherlands today?
- How does the Monuments and Historic Buildings Act currently provide for protection of underwater cultural heritage against illegal excavation?
- What does the mechanism to enforce legal prohibition on illegal excavation of underwater cultural heritage look like?
- What weaknesses does the enforcement mechanism show in practice with regard to providing adequate protection against illegal excavation?
- What solutions to solve these weaknesses can be suggested to improve the protective system?

This study therefore has two main aims. First of all, this thesis intends to provide a summary of the enforcement practices currently in operation under the Act's provisions on illegal excavation. Secondly, by identifying foibles and providing some suggestions, where necessary, for improvement, it aims to contribute to a more efficient system of protection of the Dutch underwater archive.

### 1.3 *Scientific significance*

Laws are “only as good as their enforceability and the level of compliance which they attract” (Schadla Hall 1996 cited by Skeates 2000, 52). As a consequence, a properly functioning system of enforcement as foreseen in the Monuments and Historic Buildings Act is a crucial part of the framework of protection of underwater cultural heritage. Without such a properly functioning mechanism, the restrictions created by a prohibition reach only as far as every individual legal subject wants it to. For this reason, a critical assessment of the enforcement system of the Monuments and Historic Buildings Act is highly relevant in order to both identify its weaknesses and, in the light of current trends, to suggest improvements and adjustments where necessary, thereby contributing to conservation of the finite and fragile underwater archive. Time is ripe for such a critical appraisal of the enforcement mechanism provided by the Act since the field of underwater cultural heritage can be considered to be in motion, as it has recently been confronted with some important changes. Even leaving aside the rise in the number of new players in the underwater domain and the codification of principles with respect to the protection of the underwater cultural heritage in the 2001 UNESCO Convention, the 21<sup>st</sup> century *inter alia* brought with it a continuation of the long-term trend of growing popularity of amateur diving, a substantial extension of the maritime territory protected by the Monuments and Historic Buildings Act from 12 to 24 nautical sea miles in 2007 (Brouwers and Manders 2008, 19) and a different role for the central government and its agencies within the framework of heritage management as a direct consequence of the Archaeological Heritage Management Act (*Wet op de Archeologische Monumentenzorg*) in 2007 (Maarleveld 2006a, 162).

It may be clear that these developments, some of which have been qualified as ‘dramatic’ by Maarleveld (Maarleveld 2006b, 27) have severe consequences for the framework of protection. Ignoring these consequences is not an option as the underwater archive is too fragile to leave unprotected, especially now that leaving wrecks *in situ* can be considered the standard procedure (Manders 2006b, 72). The need to assess the working of the enforcement mechanism in relationship to the current state of affairs of contemporary heritage management is therefore now more urgent than ever.

#### *1.4 Scope of the research*

Underwater cultural heritage is a versatile and broad field of study. This is because underwater cultural heritage, or UCH as it is commonly referred to, entails significantly more than ship archaeology alone (Brouwers and Manders 2008, 18), although it remains a fact that shipwrecks and their cargoes form the greater part of the underwater archive. Inundated sites commonly fall within the reach of underwater cultural heritage as well, which brings a broad range of former terrestrial sites within its range as well. Because of these broad terms of reference, it is important to restrict the scope of the present study to keep focus. As the research questions already partially indicate, the scope has been restricted in several ways.

First of all, the scope of this research will be restricted to deliberate human threats in the form of illegal excavation. Focusing only on intended human threats implies that natural processes threatening archaeology underwater and unintended threats by human activities – such as collateral damage caused by civil engineering at sea – fall outside the scope of this document.

Secondly, the scope of the current research will be restricted to the territory of the Netherlands. The territorial waters of the Netherlands include the territorial sea and its internal waters, the latter being formally part of its land territory (Shaw 2003, 493). The territorial sea consists of a strip of water extending 12 nautical miles from the so called baseline, the boundary determined by the low-water line. The adjacent contiguous zone, another strip of 12 nautical miles extending to the international waters, is not formally a part of the Dutch territorial sea. However, since the validity of the Monuments and Historic Buildings Act of 1988 has partially been extended to this zone, creating a legal fiction of territory in line with international law, this study also refers to the contiguous zone. The Dutch internal waters include bodies of water on the landward side of the baseline, such as harbours, lakes and rivers (Shaw 2003, 493). Since this study will deal primarily with the challenges posed to heritage management due to the absence of human presence in wet environments, thus allowing illegal operations to go unnoticed, its focus will be confined primarily though not exclusively on the territorial seas and the contiguous zone instead of the internal waters: leaving some of the larger waters like the IJsselmeer or the Oosterschelde aside, in such a densely-populated country as the Netherlands the chances of illegal excavation or salvaging acts being successfully undertaken unnoticed in landlocked waters are much smaller when compared to the

vastness of the sea.

Thirdly, due to the involvement of Dutch law, the intention of this study is to focus on legal protection of underwater cultural heritage against illegal excavation rather than on physical protection to shelter shipwrecks from natural or human threats, for example by using sandbags (Maarleveld 1993a, 9) or polypropylene nets (Manders and Maarleveld 2006, 134).

It should be noted that this document is not a legal study. It is the underwater cultural heritage which is at the core of this document. Hence, the primary point of view is founded in archaeology and heritage management. Jurisdictional issues or diverging judicial views on definitions of terms – f.e. of ‘shipwreck’ or ‘cultural heritage’ (see for example Boesten 2002) – will therefore not be discussed here. Nevertheless, to a certain extent laws and legal mechanisms are considered relevant to this study, as they are an essential management tool to protect the underwater cultural heritage.

### *1.5 Research method*

The answer to the main question will be based on two components. First of all, an important part of this study will be information generated from a desk-based survey of available literature in order to provide an overview of the theoretical framework of protection of underwater cultural heritage in the Netherlands. An important aspect of this literature study will consist of an analysis of the legal basis for enforcement as laid down in the Act. However, as the actual effectuation of theory in practice is just as important, the second part will consist of information provided by experts who are confronted with the enforcement of the Act in practice. For this reason, representatives of several (governmental) parties actively involved in protection of underwater cultural heritage have been interviewed. Their comments on the current enforcement mechanism have been included in the text. In this way, the conclusions put forward in this study aim to provide a balance based on both theory and practice.

### *1.6 Structure of the chapters*

This document is divided into eight chapters, which will deal with the research’s sub-

questions as described in paragraph I.2. Chapter III will focus on the phenomenon of illegal excavation. After providing a general overview of the threats to underwater cultural heritage in general, the document will deal with the threats posed by illegal excavation in particular and provide a short overview of the involvement of the government in the protection of underwater cultural heritage in the past. Chapter IV, addressing the Monuments and Historic Buildings Act of 1988, will discuss the legal basis for protection against illegal excavation to clarify the legal basis for protection against illegal excavation. In addition, chapter V will focus on the enforcement of the protective provisions against illegal excavation in the Act in order to provide an overview of the way compliance of protective provisions is ensured. Reviewing the enforcement mechanism critically, the next chapter will then discuss the weaknesses of the enforcement mechanism. These will primarily be inferred from practice. Before dealing in chapter VIII with the conclusions reached in this study, chapter VII will formulate some suggestions for improvement of the current enforcement mechanism. However, one cannot discuss the enforcement of regulations with regard to underwater cultural heritage without discussing the underwater heritage itself. Therefore, this document will start with providing a general introduction on the concept of underwater heritage and its characteristics in Dutch waters.

## II. UNDERWATER CULTURAL HERITAGE IN THE NETHERLANDS

### *II.1 The concept of underwater cultural heritage*

Underwater cultural heritage covers a broad range of material evidence of human activities. Article 1 of the UNESCO Convention on the Protection of the Underwater Cultural Heritage describes it 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 such as (...) sites, structures, buildings, artifacts and human remains, together with their archaeological and natural context, (...) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context, (...) and objects of prehistoric character.” Of course, this is just one of many legal definitions of underwater cultural heritage – the definition of underwater cultural heritage has been subject to fierce debate on more than one occasion (Boesten 2002, 137) – that will not be discussed here in depth, but it does provide an impression of the rich diversity of underwater finds. It is important to realize that underwater cultural heritage concerns more than just shipwrecks. Even though ships and their cargoes do form a substantial part of the underwater cultural archive, other elements such as infrastructure, settlements and sanctuaries in inundated areas also form part of the underwater cultural heritage, just as well as aircrafts crashed at sea, in lakes or rivers. In others words, underwater cultural heritage concerns both sunken and inundated archaeological remains. Although there is a serious absence of reliable data on the number of underwater sites (Flatman 2009, 6), estimations can be made based on historic data and analogy. Such an analogy generates substantial numbers.<sup>1</sup>

Considering underwater archaeology a component of mainstream archaeology taking place within (former) wet environments is not as obvious as it may seem. Although such a comparison is defensible, for example from a semantic point of view, this assumption overlooks the specific technical challenges posed by archaeological research of underwater cultural heritage and the specific characteristics of shipwrecks

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<sup>1</sup> For example, the United Nations Educational, Scientific and Cultural Organization (UNESCO) has estimated that a number of 3,000,000 shipwrecks are scattered around the globe. See <http://www.unesco.org/en/the-underwater-cultural-heritage/underwater-cultural-heritage/wrecks> (contents of 10/12/2011).

which are at the core of underwater cultural heritage, and do not have equivalents in terrestrial settings. Moreover, underwater cultural heritage requires a different kind of heritage management. Of course, this does not imply that the methodological framework of underwater archaeology may not be similar to its terrestrial counterpart.

Like cultural heritage on land, underwater cultural heritage can be valued in more than one way (Mason 2008, 104). For instance, for the professional salvors and the amateur divers selling their finds at the antiquities markets underwater cultural heritage merely has an economical value. “Commercial salvors commonly ignore all components of a site except the high-value precious metals and artifacts which do not lose their value” Hutchinson observed, referring to the salvage of the *Geldermalsen* in the South Chinese Seas in 1985 by a commercial party. Its gold and porcelain were sold for £10 million whereas all opportunities to gain new knowledge, for example about the cargo by paying attention to the inscriptions on the well-preserved lids of the tea chests on board, were ignored (Hutchinson 1996, 288). Commonly, it is this economical value of the underwater archive which will give rise to conflicts over jurisdiction, ownership and sale (Smith and Cooper 2003, 25). A more socio-political point of view on the value of underwater cultural heritage is often discernable in international law, where underwater cultural heritage is protected as ‘common heritage of mankind’: being frequently considered a manifestation of universal values, cultural heritage is included in legal instruments as a way to promote understanding among nations (Vadi 2009, 858), for example in the 1972 Convention concerning the Protection of the World Cultural and Natural Heritage. A similar urge to promote understanding and a sense of unity by means of cultural heritage was displayed in the past by the Council of Europe (Skeates 2000, 93). From a scientific standpoint however, the value of underwater cultural heritage lies primarily in its historical and archaeological significance. From this point of view, the remnants from the past in their archaeological context are first of all objects of study which materialize aspects of human civilizations and offer a unique opportunity to learn about the past. For example, undisturbed shipwrecks offer a potential gain of scientific knowledge about ancient trade routes and life on board in past times (Vadi 2009, 856). This is particularly true since the material remains of sunken ships may form a closed deposit – or ‘time capsule’ as they are often referred to – of a collection of contemporary objects which can often be dated accurately (Dromgoole 1999, ix). Moreover, these closed deposits are often well-preserved thanks to the low levels of oxygen under water, and less damaged by deformations than finds in terrestrial environments (Vadi 2009,

856). Furthermore, they provide valuable insights in fields of knowledge where written sources are commonly absent, such as historical shipbuilding, where ancient techniques were not documented until the 19<sup>th</sup> century (Vos 2005, 8). In the scientific view on value, the archaeological context in which objects are situated is considered as crucial as the objects themselves.

## II.2 *The Dutch underwater cultural heritage*

A maritime nation with an extensive history of seafaring, the Netherlands has left traces of travel and transportation connected to trading, military, religious and political activities all over the world. A wealth of archaeological remains from ships is present in its river and lakes, along its coast and beneath the seas around the globe. Being a country covering a geologically dynamic area which is used to taking from as well as giving to the sea because of a continuously rising sea level,<sup>2</sup> the Netherlands owns a huge richness of underwater cultural heritage that does not have a maritime character but used to be part of inhabitable land before the water came, such as sunken roman harbors and submerged prehistoric settlements. Almost no area within Dutch territorial waters has not been terrestrial at some point in the past. Because of a huge build-up of marine and estuarine sediments over time, the Dutch underwater domain provides great opportunities to conserve organic archaeological materials for a long time in anaerobic environments (Maarleveld 1993, 2). The Archis database already listed 1240 archaeological sites under water in 2006, for example 187 sites in the North Sea, several hundred in the rivers, approximately 45 in the lakes of the IJssel- and Markermeer, and 231 in the tidal basin of the Wadden Sea: an ever expanding wealth of cultural remnants which is on the whole in an excellent condition (Maarleveld and Manders 2006, 127). This list is, however, probably only a small percentage of the sites that still have to be discovered. The total number of underwater locations containing valuable archaeological sites in Dutch waters is estimated to amount to tens of thousands. However, in 2009 the Dutch Cultural Heritage Agency (*Rijksdienst voor het Cultureel Erfgoed*) observed that less than a hundred of these locations have been researched to date. Of this number, only a small number had been researched by the Agency itself – the rest of the evidence is based

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<sup>2</sup> See for example Van Gijssel and Van der Valk 2009 or Maarleveld 1998.

on information from diving companies and amateur archaeologists (Beukers 2009, 35). Hard numbers on the numerical relationship between maritime heritage and non-maritime heritage underwater, whether on a national or international level, are hard to give. The small number of analyses that are known are not always based on the same criteria, generating interesting differences in percentages. To give an impression: Vos claims 90% of known monuments underwater consist of shipwrecks (Vos 2005, 7). However, in the database of the Cultural Heritage Agency only 544 of the 1402 classifiable sites in 2006 are determined as related to ships, adding up to a percentage of only 39% (Beukers 2009, 35).<sup>3</sup> In 2009, six underwater sites were listed as an archaeological monument (Otte 2009b, 116).<sup>4</sup>

### *II.3 Government involvement with underwater cultural heritage*

The sea has always played a prominent role in Dutch history. Conserving the archaeological evidence of the maritime past has not. Although blessed with a rich maritime history and a huge wealth of underwater cultural heritage, the Netherlands was relatively late to recognize the importance of protecting its maritime archaeological resources (Maarleveld 2006b, 31). While the foundations of archaeological heritage management in the Netherlands were laid in the 1940s, when the Dutch government issued a decree forming a State Commission for Archaeology which would develop into the State Service for Archaeological Investigations (*Rijksdienst voor het Oudheidkundig Bodemonderzoek, ROB*), attention for archaeological remains remained limited to terrestrial environments for a long time (Maarleveld 2007, 52). The management of the Agency considered maritime matters “no core business” (Maarleveld 2007, 52). Hence, a tradition of underwater archaeology was completely lacking, both technically and theoretically (Maarleveld and Van Ginkel 1990, 33). Taken into account the fact that heritage management by the newly founded state institute in the post-war period took the

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<sup>3</sup> According to A. Otte-Klomp from the Cultural Heritage Agency, this striking difference in numbers can be explained by the fact that some databases still consider ship remains situated in former wet environments as maritime finds, whereas others consider them as terrestrial finds as a consequence of their current position on land.

<sup>4</sup> The total number of listed archaeological monuments in 2009 was 1800. Underwater cultural heritage is therefore clearly underrepresented on the list (Otte 2009b, 116).

form of rescue archaeology in areas of large-scale destruction, this is hardly surprising (Willems 1997). Moreover, technical possibilities to explore the sea bed – and therefore any potential threats to the historical remains on it – were limited. Therefore, maritime matters did receive almost no attention whatsoever in the first decade after the war. This slowly started to change in the 1970s and 1980s. The decision to research several underwater sites in the 1970s marked the starting point of this new development, although the auctioning of the rich cargo of the *Geldermalsen* in the mid-1980s must be considered the major boost that suddenly made underwater cultural heritage a serious subject of heritage management. Considering the auction of the gold and porcelain objects as a direct result of the failure of Dutch governmental policies to safeguard the underwater resources, a special committee set up for the purpose expressed its concerns about the lack of attention for underwater cultural heritage and concluded that immediate action was necessary (Manders and Maarleveld 2006, 129). As a result, the Department of Underwater Archaeology (*Afdeling Archeologie Onderwater, AAO*), a small unit for underwater archaeology, was founded in 1985 at the Ministry of Welfare, Health and Culture (Maarleveld 1997, 48). The Department instantly made considerable contributions to knowledge about underwater cultural heritage, for instance in the large-scale ‘Slufter-project’ in Rotterdam in 1986 and in research-led projects in the Wadden Sea. However, a move towards the centralization of government institutions led to an integration of the Department within the State Service for Archaeological Investigations in 1995 under the name of Netherlands Institute for Ship- and Underwater Archaeology (*Nederlands Instituut voor Scheeps- en onderwaterArcheologie, NISA*). Although this reorganization ended the undesirable isolation of underwater archaeology within the governmental organization, it brought along new problems such as the issue of maritime agenda setting in an organization traditionally focused on mainstream archaeology (Maarleveld 2007, 54). In the meantime, the working of the Monuments and Historic Buildings Act, which had become under revision in the 1980s, had been expanded from the land territory and inner waters of the Netherlands to maritime environments, resulting in legal protection of underwater cultural heritage against illegal excavation in a zone of 12 nautical miles in the waters around the Netherlands from 1988 onwards (Manders and Maarleveld 2006, 129). Protective measures against illegal excavation were further extended to 24 nautical miles in 2007 (Maarleveld 2006, 36). Although an important milestone in the management of maritime sites, the extension of protective legislation to maritime environments must also be considered a rather slow reaction compared to the

speed in which new technologies became available to enable exploration of the sea bed, for instance the development of scuba equipment in the 1960s (Maarleveld 2006b, 28). This apparent backwardness is further emphasized by the fact that, following a pragmatic post-war period that had been characterized by a lack of regulatory frameworks justified by the importance of rapid reconstruction, the terrestrial heritage had already been protected by national legislation in 1961 (Maarleveld 2007, 50).<sup>5</sup> Although changes in the organizational structure of the Agency – a fusion with the state service for built heritage and two changes of names – brought along adjustments in the organizational blueprint of the management of underwater cultural heritage as well, the current Cultural Heritage Agency is still formally charged with the management of underwater heritage, which is nowadays regarded as “an accepted public responsibility” (Manders and Maarleveld 2006, 131).<sup>6</sup>

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<sup>5</sup> Unfortunately, the inertia displayed by the Netherlands with respect to the creation of legislation for underwater cultural heritage is not an exception, as Dromgoole observes. Few states have shown signs of protecting archaeological heritage underwater as adequately as on land (Dromgoole 1999, ix). Grenier concludes that even states “renowned for the protection and proper management of their cultural heritage”, such as Canada, have entered the 21<sup>st</sup> century without any legislation protecting underwater cultural heritage (Grenier 2006, x).

<sup>6</sup> With regard to the internal waters this responsibility is shared with the relevant provinces and municipalities.

### III. ILLEGAL EXCAVATION AS A THREAT TO THE UNDERWATER CULTURAL HERITAGE

#### *III.1 Threats to the underwater cultural heritage*

Underwater cultural heritage and the context in which it is located are threatened by a broad range of destructive processes. These processes can be separated into two distinct groups which manifest themselves in Dutch waters: threats by nature and threats by man. Threats to underwater cultural heritage by nature are as omnipresent and omnitemporal as nature itself. They can be subdivided into three categories. Firstly, mechanical threats consist of threats that are caused by the actions of the elements (Bryant 2002, 112). A shipwreck is often well-preserved by the sea itself as soon as it becomes covered with thick layers of sediments. “Although the sea initially damages the ships, it then little by little becomes the protector of its prey” (Grenier 2006, xi). However, as soon as this protective blanket is removed by storms or currents, the wreck will become exposed to degrading processes such as abrasion and scouring. In such circumstances, the wreck may almost completely disappear in a relatively short period of time (Manders 2004b, 6), as divers observed for instance in case of the exposed wreck of the 17<sup>th</sup> century merchant ship *Burgzand 10*. In this particular case, the wicker and ropes from the ship were damaged while its cargo started to drift away within days after exposition (Vos 2005, 11). Although it is unclear whether this situation is illustrative of the speed of decay of exposed wrecks in general, it is clear that within decades nothing will remain but heavy non-organic remnants such as cannons and ballast stones (Beukers 2009, 82). The process of sediment erosion can destroy heritage underwater as relentlessly as on land. In an age when climate change has caused a dramatic increase in storm surges, the subsequent processes of erosion coming along with it create a major problem for underwater cultural heritage in coastal areas (Flatman 2009, 45). A second category of natural threats consist of biological threats which are for example manifested in the ongoing process of bacterial decay and the occurrence of woodborers such as the dreaded *Teredo navalis*, a shipworm which is able to eat away the internal structure of wooden remnants in a time span of months, leaving its irreparably affected timber at the mercy of the currents (Manders 2004b, 6). This problem occurs particularly in areas which are favorable for organisms attacking organic material, such as sites in the oxygen-rich environment of turbulent seas

or sites characterized by a high amount of organic waste (Manders 2006a, 58). Thirdly, a threat to underwater cultural heritage is posed by chemical degradation, for instance in the form of corrosion of metal objects (Manders 2006a, 58). Whilst potentially as destructive to cultural heritage as threats by humans, natural threats are less relevant to the current study, due to its focus on illegal excavation.

Threats caused by humans are relatively new. These can be divided into two separate categories: unintentional and intentional threats. First of all, a substantial part of the damage done to underwater cultural heritage takes place as a kind of collateral damage, incidentally affecting archaeological remains. Large-size industrial processes such as oil drilling (Bryant 2002, 111), the building of wind farms and the laying of cables on the seafloor (Maarleveld 2006b, 36) create major risks for underwater cultural heritage. It is estimated that 25.000.000 m<sup>3</sup> of sand are dredged from the North Sea annually (Beukers 2009, 166). This does not only affect shipwrecks, but the remains left by the prehistoric populations which inhabited this former dry land during glaciations as well, as was shown by Environmental Impact Assessment (EIA) studies in British waters. Finds of flint artifacts and *in situ* archaeological sites are assessed as seriously threatened by dredging, and there is no reason to assume that this would be different in the neighboring Dutch waters, where a substantial part of the Dutch Palaeolithic and Mesolithic archive is situated (Firth 2006, 8; Hijma *et al.* 2011, 32). Although on a scale with far-reaching consequences for archaeological sites underwater, the impact of dredging of the sea bed could be arguably be called negligible in comparison to fishing activities, another form of unintended damage. Fishing activities can have devastating effects on underwater sites. Fishing nets, for example, sweep the ocean floor and break off protrusive parts of wrecks (Manders 2004b, 6). In the Netherlands, fishing nets disturb an area of approximately 570.000.000.000 m<sup>2</sup> each year (Beukers 2009, 166). Another form of collateral damage is manifesting itself for instance in the Burgzand area at the north side of the Afsluitdijk, the 20<sup>th</sup> century dike that was constructed to close off the marine waters of the former Zuiderzee but as a result also forces the water of the North sea to find new ways, frequently over sea beds vulnerable to erosion (Manders 2006b, 70). As a result, the underwater cultural heritage present here – in particular 17<sup>th</sup> and 18<sup>th</sup>-century ships – are exposed and threatened after centuries of natural protection by sediments (Beukers 2009, 82). Damage to underwater cultural heritage due to changing sea currents can therefore be said to be a significant side-effect of this engineering project. Furthermore, the Directorate-General for Public Works and Water Management

(*Rijkswaterstaat*), part of the Ministry of Infrastructure and Environment (*Ministerie van Infrastructuur en Milieu*), may find it necessary to remove wrecks from shipping routes if they endanger traffic. These forms of unintended threats to underwater cultural heritage can take on extensive forms, since engineering projects under water almost by definition coincide with large-size scale (Maarleveld and Van Ginkel 1990).

Secondly, underwater cultural heritage can be threatened by human forms of destruction which are willfully directed at the archaeological remains. These are mainly connected to the economical values surrounding cultural heritage. For the major part of human history, underwater sites tended to be scarcely accessible. The possibility to reach them physically was limited by the sheer contents of one's lungs. This situation slowly started to change in modern times. In the 20<sup>th</sup> century salvage companies hesitantly started to conduct experiments to locate and salvage sunken ships. Technical developments then lead to the invention of sophisticated scanning equipment to search and exploit the seas, for example in the field of defense technology were the technique of sonar was developed (Hutchinson 1996, 287). When human threats take place in the form of unauthorized excavating activities, illegal excavation as defined under the Monuments and Historic Buildings Act may be involved.

### *III.2 Illegal excavation*

Illegal excavations can take place in a wide variety of forms, depending on the actors involved. Three categories of actors can be distinguished in this respect.

The first category consists of recreational divers. Recreational diving has formed a threat ever since scuba gear became widely available in the 1960s and '70s (Maarleveld 2006b, 28), bringing along a risk of vandalism and souvenir hunting at historic and non-historic shipwrecks (Bryant 2002, 111). The fate of the remains of two exposed shipwrecks, the *Sophia Albertina* near Den Helder and the so-called 'cannon-wreck' near Goeree, are illustrative of this: after having become exposed, the remnants of the wreck were reduced to their heavy materials only within several decades, not only due to the currents, but also by the activities of recreational divers (Beukers 2009, 83). Unlike Manders, who observes – with respect to wrecks in the Wadden Sea – that a growing public concern about underwater heritage has mitigated the threat of looting by divers (Manders 2004b, 6), Maarleveld endorses the destructive effects of recreational diving.

He claims that a constant feeding of the market from petty salvage in Dutch coastal waters is taking place containing a large proportion of illegally recovered artifacts, especially from the second half of the 20<sup>th</sup> century as divers have been aware that Dutch government has prioritized protection of maritime finds of an older age from the 1980s onward. As a result of the potentially harmful consequences of an expanding diving community, some have argued that the popularity of diving as a pastime is not to be applauded.<sup>7</sup> However, one should keep in mind that this diving community also provides the government with the eyes and ears essential to protect and preserve underwater sites. Furthermore, it is also the diving community that brings forward individual divers agitating against illegal excavation and other forms of destruction of underwater cultural heritage: some divers firmly resist against looting of underwater cultural heritage in private initiatives such as ‘*Stop de sloop*’, a recent protest action intending to end the illegal destruction of wrecks at the North Sea bed.<sup>8</sup>

The Janus-faced character of the recreational diving community as a whole clearly separates it from a second category of actors involved in illegal excavation, i.e. a group formed by more professional wreck divers. With the aim of gaining financial profit by selling illegally recovered objects from diving activities to collectors, these salvors can be held responsible for systematical destruction of cultural heritage executed on a much larger scale. Maarleveld states that the Netherlands boasts an active antiquities market where the legitimacy of the possession of antiquities offered is easily assumed and prosecutions are few. While the percentage of illegally excavated artifacts from terrestrial sites seems marginal compared to the total amount of goods offered, the situation is quite different when it comes to maritime sites. Auction sales of historical cargoes from Dutch shipwrecks, though mainly from foreign waters, have formed an important part of the Amsterdam antiquities market ever since new technologies made underwater cultural

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<sup>7</sup> The number of recreational divers is hard to assess. To give an impression: the Dutch Society for Underwater Sports (Nederlandse Onderwatersport Bond) represents 16,000 members and 280 diving clubs, see <http://www.onderwatersport.org/OverdeNOB/Organisatie.aspx> (contents of 01/12/2011).

<sup>8</sup> See <http://www.beschermeenwrak.nl/stop-de-sloop> (contents of 10/12/2011), which *inter alia* contains a petition to the Dutch government to end the looting of the *Cressy*, *Hogue* and *Aboukir*, three WWI cruisers located within the Dutch contiguous zone which are considered war graves. The petition was offered to the Secretary of State of the Ministry of Education, Culture and Science in November 2011. During that occasion, the Secretary underlined the importance of the enforcement of regulations with regard to the underwater cultural heritage.

heritage accessible in the second half of the 20<sup>th</sup> century (Maarleveld 2006a, 178).<sup>9</sup> Hopefully, the recent ratification by the Netherlands of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property will make an end to this state of affairs, as an inactive approach towards illegal activities surrounding the antiquities market clearly hampers awareness in society of the objectionability of trade of illegally excavated objects.

There is also a third category which can be distinguished. Wrecks are not only of interest for the art objects they may contain or the historic value they represent. Raw metal materials on board and even the materials of the metal shipwrecks themselves may also represent a substantial economical value. Since prices of raw copper, lead and tin sky-rocketed in recent years because of the scarcity of these materials on the market, wrecks are increasingly targeted for their heavy metals. According to the Dutch Coastguard (*Kustwacht*), the professional salvors involved are mainly former fishermen who were struggling to keep their heads above water in tough economic times. Having transformed their fishing vessels into salvaging vessels equipped with cranes and grabber arms they are now trying their luck at the metal market.<sup>10</sup> Copper ingots from the *Kerwood*, which sunk in 1920 near Terschelling, are said to have brought up € 900,000.<sup>11</sup> Furthermore, at copper prices already as high as € 7 per kilogram in 2010, a 30,000 kilo steam boiler in the North Sea becomes a valuable treasure of more than € 200,000 that will tempt salvors to dismantle a historical wreck.<sup>12</sup> Even though the number of incidents of illegal salvage of underwater cultural heritage may still be relatively modest, professional salvors pose a significant threat to underwater heritage, in particular because of the impact their activities may have on the perception of shipwrecks in society:

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<sup>9</sup> Unfortunately, Maarleveld did not or could not reveal the sources upon which he based these claims.

<sup>10</sup> See <http://www.volkskrant.nl/vk/nl/2664/Nieuws/article/detail/2965666/2011/10/13/Ook-al-op-koperjacht-in-de-Noordzee.dhtml> (contents of 01/12/2011).

<sup>11</sup> The example was taken from an article on destruction of war graves at sea by metal thieves in a Dutch newspaper. See <http://www.stimon.org/site/images/stories/Telegraaf24-7-2010.pdf> (contents of 01/12/2011).

<sup>12</sup> The example was taken from an article on demolition of North Sea-wrecks in the October 2010 issue of '*Onderwatersport*', the magazine of the Society for Underwater Sports. See [www.duikdenoordzeeschoon.nl/wp-content/uploads/2011/01/Onderwatersport\\_StopDeSloop.pdf](http://www.duikdenoordzeeschoon.nl/wp-content/uploads/2011/01/Onderwatersport_StopDeSloop.pdf) (contents of 01/12/2011).

especially the more lucrative cases of illegal excavation may create an understanding of these historical remains as sources of income rather than as vulnerable cultural heritage. The threat posed by the salvors is enlarged by the fact that they tend to be much better funded than archaeologists (Bryant 2002, 109). Of course, illegal excavation and related phenomena such as illegal trade in antiquities are not confined to underwater cultural heritage. However, the characteristics of aquatic environments such as the sea both diminish and increase the risk of looting at the same time. A hostile environment to humans, the depths of the sea form a vast area which is generally inaccessible and therefore provides cultural heritage with a high level of natural protection from intended or unintended interference. Moreover, the sea keeps away underwater cultural heritage from greedy eyes, preventing underwater cultural heritage from being spotted in the first place. “As they become known they become vulnerable” Hutchinson noted; although referring primarily to shipwrecks this analysis is fully applicable to underwater sites in general (Hutchinson 1996, 289). However, it is the limited accessibility of the sea which also creates the most important problem with regard to protection: because of the availability of technical devices such as scuba gear, this inaccessibility has proved surmountable. Anybody equipped with these tools has the freedom to wander around the sea bed unnoticed and, if desired, to undertake illegal activities such as large-scale looting of cultural heritage while risking a less smaller chance of being observed and getting caught than on land – a situation that is just a logical consequence of the fact that “nobody lives where most maritime management matters crop up” (Maarleveld 2007, 55). In other words, the chances to reach the finite underwater cultural heritage are relatively small, but if reached the consequences may be enormous. Unfortunately, these chances grow with the ongoing development of new techniques. Sonar technology and sea bed mapping, for instance, are nowadays available to salvors as well (Smith and Couper 2003, 32) and are in fact used by the majority of them. Moreover, not only are these techniques to effectively search the sea bed becoming more readily available than ever before, they also become more affordable each year (Dromgoole 1999, ix). Taken from their context, the looted objects become virtually useless from a scientific point of view, and often end up as objects in private collections, separated from their true inheritor – whether a local community, a state or even mankind as a whole (Scarre and Scarre 2006, 5) – or as scrap metal in the hardware trade.

#### IV. THE MONUMENTS AND HISTORIC BUILDINGS ACT

##### *IV.1 The Monuments and Historic Buildings Act as a part of heritage law*

Legislation plays an essential role in the protection of cultural heritage, whether this is found on land or under water. Rules and regulations to protect underwater cultural heritage can be issued at both a national and an international level. Since this study focuses on the Netherlands, the international framework will be largely left aside, even though it is clear that national laws are never created within a legal vacuum: they are influenced by regulations on an international level focusing on protection, conservation and study of cultural heritage as part of the commons of mankind as a whole (Pearsall 2008, 1427). From the point of view of cultural heritage management, a striking example of such international input is formed by the 1992 Malta Treaty. Other examples include for instance the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property and the 2001 Convention on the Protection of the Underwater Cultural Heritage. Without such transboundary agreements, legislation on a national level would be less effective. A prohibition on the trade of stolen antiquities can only be effective if more than one state penalizes illegal trade. As Skeates observes, “international conventions have (...) been somewhat effective in terms of indirectly helping to protect the archaeological heritage, by stimulating parallel developments in national legislation and policy making and in professional practice” (Skeates 2000, 48). The measures which are commonly applied by states to protect their underwater cultural heritage are illustrative. Most countries use the same kind of tools to make sure their underwater cultural heritage is sufficiently protected. These measures mainly consist of the registration of cultural heritage, the creation of a national inventory, the delimitation of archaeological sites, the application of scientific standards in case of excavation, the prohibition of illegal excavation, the prevention of both illegal import and export of artifacts, a duty to report finds and the promotion of cooperation with other states (Strati 2006, 26). The Netherlands seems to apply all of these points within its legislation and procedures.

At the national level, the Moments Act of 1988 is the most important law regarding cultural heritage. A *lex specialis* on monuments and built heritage, it *inter alia* deals with protection, grants, licenses and prohibitions. In 2007, the Act was revised as a

consequence of new views on the archaeological process as laid down in the Malta Treaty. Implementation of these new insights, concerning the role of government, financial responsibilities and commercial archaeology, was arranged through means of the Archaeological Heritage Management Act (*Wet op de Archeologische Monumentenzorg*) in 2007 (Maarleveld 2006a, 169).

Although legislation such as the Monuments and Historic Buildings Act must be considered to form a crucial aspect of heritage management, it should not be forgotten that legal protection of cultural heritage only comes into being because society considers cultural heritage as inherently important enough to protect. As Maarleveld observed with regard to cultural heritage, “regulation in law does not seem to be the starting point. It is not law that is the basis for behaviour. Quite to the contrary, regulation in law only seems to be possible after principles, values and resultant behaviour have become accepted in society” (Maarleveld 2006a, 185). Thus, heritage law is an expression of the importance of conserving heritage rather than a primary reason to do so.

#### *IV.2 Legal protection against illegal excavation*

The legal protection of underwater cultural heritage in Dutch waters is primarily founded upon two provisions of the Monuments and Historic Buildings Act, creating a legal basis for taking measures to protect the cultural heritage.

The first provision, Article 45, concerns the banning order of excavating underwater cultural heritage without a license. Its first paragraph provides: “Carrying out excavations without or contrary to a license to excavate provided by Our Minister is prohibited”.<sup>13</sup> Carrying out an excavation is defined in Article 1(h) as “performing activities with the purpose of tracing or investigating monuments” – i.e. all man-made objects of fifty years or older of public interest because of their esthetical, scientific or cultural-historical value, or the areas which are of public interest because they contain the aforementioned objects, as can be derived from Article 1(b) – “causing disturbance of the soil.”<sup>14</sup> The provision aims to provide for government control of the underwater cultural

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<sup>13</sup> Author’s translation.

<sup>14</sup> Author’s translation.

archive (Maarleveld 2006a). In order to constitute an illegal activity, the disturber of the soil must have the *intention* to find archaeological remnants. The license required to conduct a legal excavation can only be acquired by scientific institutions, governmental services and professional archaeological organizations (Otte 2009b, 116).

The second provision consists of the obligation to report. The first paragraph of Article 53 reads as follows: “Anyone who finds an object otherwise than while carrying out an excavation which he knows or reasonably suspects to be a monument, reports this object as soon as possible to Our Minister.”<sup>15</sup> In this respect ‘as soon as possible’ means within 48 hours (Otte 2009b, 116). Due to Article 54, a similar obligation exists for “(a)nyone who is making observations while tracing monuments without causing disturbance of the soil.” Like in Article 45, the role of “Our Minister” – i.e. the Minister of Education, Culture and Science – is in practice fulfilled by the Cultural Heritage Agency. As a consequence of a report, it is ensured that the presence of cultural heritage will become known to government, making it less susceptible for looting, damaging or (accidental) destruction than in the case of knowledge among a select group of people only. After all, “(t)he cornerstone of archaeological heritage protection is information” (Maarleveld 2008, 58). Since there are no indications that the government actively verifies whether finders live up to this rule and it therefore seems unlikely that offenders will be confronted with sanctions, the value of this provision seems merely symbolic. However, in case of a malevolent that chose not to report an underwater site in order to remain able to carry out excavating activities, it may provide the government a back-up basis to prosecute as an alternative to an indemonstrable violation of Article 45, since it may be demonstrated at least that the alleged offender did not fulfill his duty to report.

#### *IV.3 Reach of the Monuments and Historic Buildings Act*

Creating a body of law for underwater cultural heritage at sea implies that the Netherlands is able to exercise jurisdiction over the maritime waters surrounding its territory. This is not as self-evident as it appears. Historically, the ability of states to claim

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<sup>15</sup> Author’s translation.

parts of the seas as their own is one of the most debated topics in international law.<sup>16</sup> Since ownership of the sea traditionally been rejected, freedom of the use of the seas is the rule of thumb (Shaw 2003, 505). However, there is a major exception to this rule: a state can extend its jurisdiction to its coastal waters. This exception has formed the basis for the concept of the territorial sea, a state owned strip of water bordering a coastal state's territory. This strip of water originated as the strip covered by the range of shore based artillery deemed necessary to defend the territorial property of a sovereign state. Nowadays, it is generally acknowledged that a coastal state is entitled to exercise jurisdiction over its territorial sea (Shaw 2003, 505). According to the provisions of the 1982 Convention on the Law of the Sea (UNCLOS), the territorial sea may extend up to 12 nautical miles from the baseline. As a result of this recognized right under international law, a state has the possibility to apply laws issued for land to its marine territory as well. This is exactly what the Netherlands did in the mid-1980s when the Dutch government decided to extend the application of the Monuments and Historic Buildings Act to the underwater heritage. Although this decision could only take legal effect from 1988 onwards, the Minister of Culture, L.C. Brinkman, declared he would interpret the Act as applicable to both terrestrial and underwater heritage from 1985 on (Maarleveld 2006a, 169). As a result, both the obligation to report finds from underwater sites and the ban on excavation of underwater cultural heritage without a license have been applicable to the Dutch underwater domain from 1985 on (Manders 2004b, 7).

There is also another important limitation to the idea of the freedom of the use of the sea. Closely connected to the concept of the territorial sea, the doctrine of the contiguous zone has become generally accepted in international law from the 20<sup>th</sup> century onwards,<sup>17</sup> proclaiming the idea of an expansion of the rights of states to parts of the high

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<sup>16</sup> While it is generally acknowledged that states are entitled to possess land – in fact, territory is even a requirement for recognition of a state – the law of the sea is one of the most heavily debated areas of law. The legal framework on jurisdiction over the sea that was created between states in the last millennium has been greatly influenced by the Dutch scholar Hugo Grotius (1583-1645). Ever since he published his famous work *Mare Liberum* in 1609, it is widely acknowledged that parts of the sea cannot be claimed by states in a way similar to the appropriation of land. Grotius considered the seas and oceans a *res communis*, something that cannot be owned and that should be accessible to all (Kooijmans 2002, 49).

<sup>17</sup> Although the doctrine of the contiguous zone was not codified in international instruments until 1958, when the Convention on the Territorial Sea first mentioned it (Shaw 2003, 515), state practice has already shown that the doctrine has become generally accepted, for example to control smuggling in the zones adjacent to the territorial sea (Oxman 1988, 363).

seas by means of a strip of water bordering the territorial sea as a necessity to prevent violations of custom, health and immigration law on their terrestrial territory. Unlike jurisdictional rights in the territorial sea, which coastal states enjoy automatically, rights of jurisdiction in a contiguous zone – extending to 24 nautical miles from a state’s baseline – has to be claimed explicitly (Shaw 2003, 515). As a result of a claim to a contiguous zone, the 12 mile strip of water adjacent to the territorial sea is partially brought under jurisdiction of the claiming state, even though a claim to a contiguous zone has to be distinguished from a claim to full sovereignty (Shaw 2003, 516).<sup>18</sup> Since 2007, the Netherlands has been among a select group of coastal states that have claimed a contiguous zone, exercising jurisdiction on the North Sea from 24 nautical miles from the national baseline.<sup>19</sup> Hence, Article 45a and 54a of the Act provide that the prohibition to excavate without a license and the obligation to report applies to the contiguous zone as well, creating a substantial extension of the spatial reach of the Act (Brouwers and Manders 2008, 19).<sup>20</sup> This is in line with the state obligation to protect archaeology in the contiguous zone as provided by international regulations such as the 1982 Convention on the Law of the Sea (UNCLOS).<sup>21</sup> Like in the territorial sea, the establishment of a firm

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<sup>18</sup> This geographical extension of the reach of national laws will manifest itself for instance in the authority of the coastal state to arrest (foreign) ships within this zone which are suspected of having violated national law or intending to do so (Kooijmans 2002, 45).

<sup>19</sup> See *Besluit grenzen aansluitende zone* (as in effect on 21/03/2011).

<sup>20</sup> Beyond 24 nautical miles the protection and management of underwater cultural heritage remains problematic. Smith and Cooper conclude that “(t)his outcome may be attributed in part to the reluctance of the major maritime states to upset the ‘delicate balance’ (...) between coastal state jurisdiction and freedom of the sea.” (Smith and Cooper 2003, 31).

<sup>21</sup> Two international instruments are of special importance when it comes to underwater heritage. The 1982 Convention on the Law of the Sea (UNCLOS) can be considered a global treaty on the use of the oceans (Boesten 2002, 3). It entered into force in November 1994, the Netherlands being one of the signatory states (Shaw 2003, 490). It provides a basis to regulate activities affecting the marine environment (Maarleveld 2006, 33). Article 149 states that “(a)ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole”. As such, the article lays down a state obligation to take measures to preserve underwater cultural heritage found in international waters. Article 303 provides in its first paragraph that “(s)tates have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.” Here, an unambiguous referral to a state duty to protect underwater cultural heritage is made that goes even further than mere preservation and is not limited to the high seas (Carducci 2006, i). In the second paragraph a removal of these objects from the sea bed in the contiguous zone is sanctioned as an infringement of laws and regulations applying to the territorial sea, i.e. customs, fiscal, immigration or sanitary law. While

legal framework of protection in the contiguous zone is crucial, as most objects of underwater cultural heritage are likely to be situated close to the coasts, since these areas were frequented the most during historical seafaring (Oxman 1988, 363).<sup>22</sup>

Thus, in spite of a traditional reluctance under international law, the legal protection of archaeological remains has been extended considerably in the coastal zone, making legal provisions such as the obligation to report or the requirement of a license for excavation applicable to a considerably larger area. This situation decreases the possibilities for divers to get away with illegal excavation and souvenir collecting, as Maarleveld predicted shortly before the new legislation entered into force: “The fact that the obligation to report and the prohibition on unauthorized excavation will be extended over the newly established contiguous zone will bring a much larger part of the relevant catchment area within the scope of control and enforcement. This will have some bearing on the marketing of UCH (*sic*) as it will be harder to argue that all material that is offered for sale has been raised beyond the zone of control” (Maarleveld 2006a, 180). Beyond the 24 miles zone, in the 200 mile exclusive economic zone and the international waters of the high seas, the Act does not apply. Since there is no real legal protection beyond 24 miles (Smith and Couper 2003, 32) the no-man’s land of the ‘Area’ – i.e. the deep sea bed below the high seas and the subsoil thereof – remains extremely vulnerable for excavation by salvors, despite the fact that it was declared common heritage of mankind by the

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its regime with respect to archaeology has been subject to fierce criticism and the convention has even been qualified as counterproductive, it must nonetheless be considered a milestone for introducing an obligation to safeguard underwater cultural heritage at the international level, constituting an internationally wrongful act in case of refusal to do so (Scovazzi 2003, 4). The second instrument, the 2001 Convention on the Protection of the Underwater Cultural Heritage (CPUCH) is aimed primarily at the protection of cultural heritage (Boesten 2002, 3). Moreover, it aims to provide a legal framework for the management of underwater heritage beyond the traditional territorial limitations (Dromgoole 2007, 33). It has guided policy development from the moment of its drafting (Maarleveld 2006, 34). The Netherlands did not ratify CPUCH. However, it has declared to live by its ‘operational rules’, a set of rules laid down in the so called Annex to the convention which has a more technical character. The Netherlands is for that reason bound by compliance to the articles of this Annex, be it politically rather than legally (Manders 2004b, 7). As a result, the Netherlands will *inter alia* have to take action against commercial exploitation of the underwater heritage.

<sup>22</sup> In case of the Netherlands, it should be realized though that underwater cultural heritage is less restricted to coastal areas than in case of many other countries. This is a consequence of the fact that the Netherlands have a long history of maritime trade and warfare with adjacent states such as England in the North Sea basin.

United Nations General Assembly in 1969 (Shaw 2003, 561). As a result, Dutch wrecks all over the world, for example those of ships of the Dutch East-India Company, are exposed to the risk of becoming the target of illicit excavations (Maarleveld 2006a, 163).

As maritime archaeology is by definition a cross-border discipline (Manders and Maarleveld 2006, 135), a demand for international regulation on archaeological remains underwater has been made for years. Recent decades have witnessed the development of a framework of rules and guidelines on underwater heritage. A growing number of both governmental and non-governmental organizations at the international level consider shipwrecks as cultural heritage of the world and are actively assisting states to create a protective framework of rules (Boesten 2002, 12). However, the effectiveness of a legal framework of protection such as the 2001 Convention on the Protection of the Underwater Cultural Heritage (CPUCH) is still limited since a substantial number of states, the Netherlands included, have not signed it.<sup>23</sup> Until an efficient international framework has been put into place, the Netherlands has to settle for legal protection against illegal excavation in the territorial waters and the contiguous zone only.<sup>24</sup>

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<sup>23</sup> See footnote 22 for more information on CPUCH.

<sup>24</sup> Under international law, state owned vessels form an exception. As the Dutch state is considered the legal heir of the Dutch East-India Company, for East-Indiamen complaints regarding theft can be filed.

## V. ENFORCEMENT OF THE PROTECTIVE PROVISIONS OF THE ACT

### V.1 *The legal concept of enforcement*

In a constitutional state, civilians need to adhere to democratically created laws and regulations. Compliance to these rules is essential for a society to function: without compliance, rules become utterly meaningless and, as a consequence, the people forming society will lose confidence in the alleged social contract between civilians and government. A lack of compliance can thus be said to strike at the roots of society itself. However, not all people are inclined to comply with the rules without external pressure. A government therefore needs to enforce compliance to the rules if they are neglected (Voermans 2005, 69). Enforcement is a broad and at times even vague concept that can be defined in very different ways. If it is understood in the broadest sense of the word as “every act aimed at stimulating compliance of rules of law or putting an end to an offence” (Michiels 2006, 8), it may entail monitoring, criminal investigation, prosecution and imposing sanctions. In other words, enforcement is generally interpreted as making people comply with the rules. However, the concept is often defined more specifically, for instance as taking and executing responsive measures. Interestingly, in this definition monitoring is clearly separated as a distinct notion from the concept of enforcement (Michiels 2006, 8). It seems the definition of enforcement commonly used in policy documents issued by the Dutch government – “the authority to exercise repressive action in the form of compulsion or restriction of freedom to make citizens, companies and governmental bodies comply with the rules posed”<sup>25</sup> – is in line with the latter definition. In this document, the concept of enforcement will therefore be used in accordance with this narrow definition, since it focuses on the enforcement by Dutch governmental bodies. Although in this view monitoring falls outside the scope of enforcement, the monitoring process is nevertheless considered an essential requirement for enforcement. After all, in order to identify non-adherence to any legal requirements in time, governments will need to oversee the compliance to these rules. Monitoring is understood here in accordance with a cabinet definition often used in governmental documents, in which monitoring is

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<sup>25</sup> See *Minder last, meer effect. Zes principes van goed toezicht. Kaderstellende visie op toezicht 2005*. Den Haag: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties, 11.

described as “collecting data to answer the question whether an act or an object meets the requirements demanded, forming an opinion on it and intervening in response if necessary”.<sup>26</sup> When monitoring establishes that rules are not adhered to and repressive action is deemed necessary, enforcement come into play (Beukers 2009, 212). The following procedure may then head in two alternative directions: when an administrative route to compliance is followed, reactions may consist of relatively modest responses like deliberation or a written warning only; however, if criminal law is deemed necessary to end the lack of compliance, enforcement may consist of criminal investigation by the police forces and prosecution by the Public Prosecution Office (Beukers 2009, 214). Criminal investigation of criminal offences and prosecution of these activities are therefore key aspects of enforcement. Adjudication, which may lead to imposing sanctions by a court of law, must be considered the crucial capstone of the enforcement mechanism. Enforcement can therefore be said to exist of investigation, prosecution and adjudication.

## V.2 *Enforcement of provisions on illegal excavation*

As is the case for rules in general, regulations laid down in the Monuments and Historic Buildings Act are only of value if compliance can be ensured by enforcement. This may become necessary when all other means to convince potential offenders that underwater cultural heritage is worth preserving have failed: as Maarleveld observes, “(i)t is only for the negatively inclined that strict law enforcement is the only remedy” (Maarleveld 1993, 9). The Minister of Education, Culture and Science is therefore responsible for the enforcement of the provisions of the Act; in practice this responsibility is delegated to the Cultural Heritage Agency. However, although the Agency may be responsible, a broad variety of other stakeholders are also involved in enforcement.

The enforcement of the Monuments and Historic Buildings Act will be analyzed here in terms of the triad of investigation, prosecution and adjudication. Although the definition of enforcement used in this document does not include monitoring, the

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<sup>26</sup> See *Kaderstellende visie op toezicht*, Tweede Kamer der Staten-Generaal, vergaderjaar 2000-2001, 27 831, nr. 1, 1 (author’s translation).

monitoring process must be considered an essential requirement for enforcement. Therefore, a few observations about monitoring will be made first.

Although paragraph 7.5 of the current organizational decree of the Ministry of Education, Culture and Science states that it is the Cultural Heritage Agency that is responsible for developing and implementing heritage policies and executing the Monuments and Historic Buildings Act,<sup>27</sup> it is the Cultural Heritage Inspectorate (*Erfgoedinspectie*) which monitors compliance of the provisions of the Act and other regulations regarding archaeological monuments, excavations and finds and reports to the Secretary-general of the Ministry due to paragraph 9.1.<sup>28</sup> In other words, while it is the Cultural Heritage Agency which is authorized to exercise enforcement after having been notified that a disturber fails to comply with the rules posed, it is the Inspectorate that monitors activities which may have negative effects on cultural heritage. However, within this allocation of responsibilities an important exception was made during the first decade of the 21<sup>st</sup> century with respect to the underwater domain. In this decade, monitoring of violations of rules with respect to underwater cultural heritage was not carried out by the Inspectorate, but was exercised by the Agency (Beukers 2009, 212), bringing both monitoring and the enforcement responsibility regarding cultural heritage underwater to the latter (Maarleveld 2006a, 171).<sup>29</sup> This division of responsibilities was considered a temporary solution, originating from the fact that the Inspectorate was not only short of manpower but also lacked the necessary level of expertise on underwater cultural heritage to exercise monitoring tasks properly with regard to the underwater area at the time of its foundation in 2005.<sup>30</sup> The Dutch government may therefore have realized that – due to the specific characteristics of underwater archaeology – the requirements for taking up

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<sup>27</sup> Although the phrasing of the organizational decree might suggest otherwise, the *development* of heritage policies is primarily the responsibility of the Ministry's Directorate of Cultural Heritage (Directie Cultureel Erfgoed).

<sup>28</sup> Organisatie- en mandaatbesluit Ministerie van Onderwijs, Cultuur en Wetenschappen 2008, paragraph 7.5 (as in effect on 16/03/2011).

<sup>29</sup> Although the Inspectorate did not monitor violations the Act, it did see to fair competition in the upcoming market for commercial archaeology in the underwater domain, as well as to implementations of regulations with regard to the quality of permitted excavations (Maarleveld 2006a, 186).

<sup>30</sup> In 2005, four inspectorates in the field of cultural heritage, including the National Inspectorate for Archaeology (*Rijksinspectie voor de Archeologie*) merged into the Cultural Heritage Inspectorate.

the responsibilities of monitoring at sea were too elaborate for a relatively small inspectorate traditionally aimed at dry land. The Cultural Heritage Agency, on the other hand, had acquired a high level of maritime specialization among personnel within its organizational structure – an inheritance from the more autonomous Department of Underwater Archaeology that had integrated with the Agency in the late 1990's – and had some costly diving equipment necessary for supervision at sea at its disposal. In practice, for a number of years the Agency and the Inspectorate tended to operate in close cooperation. In 2010, however, the parties involved have ended this temporary arrangement. As a consequence, the primary responsibility for monitoring of compliance regarding underwater cultural heritage was brought back to where it formally belongs, i.e. at the Cultural Heritage Inspectorate.<sup>31</sup> Although the exact form of the current division of responsibilities has not yet been completely crystallized, it does seem that the Agency's future role will be brought back to an advisory one.<sup>32</sup>

Lacking the eyes and ears to oversee the vastness of the Dutch waters, the government is dependent on cooperation with other governmental stakeholders active at sea to detect illegal excavations or other violations.<sup>33</sup> The Directorate-General for Public Works and Water Management (*Rijkswaterstaat*), the Coastguard (*Kustwacht*), Customs (*Douane*) and the Navy (*Marine*) are examples of these parties (Beukers 2009, 219; Brouwers and Manders 2008, 20). These stakeholders discuss the destruction of wrecks in the North Sea on a regular basis. These meetings have already created more knowledge and awareness about protection of cultural heritage. Since 2010, these stakeholders in maritime matters cooperate through the Maritime Information Centre (*Maritiem*

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<sup>31</sup> In 2010 the case of the salvage of the cannons of an 18<sup>th</sup>-century British warship seems to mark this shift in policy. As the case centered on import of cultural heritage, the leading role seems to have shifted in practice from the Agency to the Inspectorate, due to the latter's connections and expertise in this field.

<sup>32</sup> Such a division of tasks, in which the Cultural Heritage Agency acts as an advisor to the primarily responsible Cultural Heritage Inspectorate, has been confirmed by both Mrs. A.D.C. Otte-Klomp and Mr. J. Opdebeeck from the Agency and Mr. N. Aten from the Inspectorate.

<sup>33</sup> Traditionally, cooperation between government bodies and other stakeholders regarding the protection of underwater heritage manifested itself on an *ad hoc* basis. To guarantee a more structural protection, the Netherlands and six other European countries started the three-year project MACHU (Managing Cultural Heritage Underwater) in 2006, an initiative which aimed *inter alia* to provide a better exchange of available knowledge between scientists, policy makers and the public (Brouwers and Manders 2008, 20).

*Informatie Knooppunt, MIK*) in Den Helder. The Cultural Heritage Inspectorate is in close contact with the Centre.

The Directorate-General for Public Works and Water Management of the Ministry of Infrastructure and Environment is one of the most important partners with regard to underwater cultural heritage. The Directorate-General is responsible for the management of Dutch state waters and the sea bed from the point of view of keeping waterways open. Underwater cultural heritage identified during its activities will be managed in cooperation with the Cultural Heritage Agency (Otte 2009, 118).

The Dutch Coastguard is responsible for coordinating surveillance at sea. The enforcement instruction for the Coastguard contains a chapter on heritage legislation and archaeology, and provides instructions about what to ask for, what equipment related to illegal excavation to look for, and when to inform the Agency (Maarleveld 2006a, 186). Customs is also involved in the prevention of illegal excavation underwater by means of enforcement. This derives from its responsibility for controlling the import of goods to the territory of the Netherlands. It is therefore mostly concerned with underwater cultural heritage from outside the 24 miles zone.

The Ministry of Defense, in particular the Navy, may also be involved in the protection of underwater cultural heritage, especially when it concerns military wrecks and aircrafts from both World Wars. It tends to offer assistance on an *ad hoc* basis (Otte 2009, 118). However, it seems its role in enforcement is limited.

Another group active at sea of a different character than the governmental bodies is formed by the community of amateur divers. The possibility to transform the threats posed by these divers into a positive contribution has long been realized; an advice to focus governmental efforts on incorporating divers in the protective system was already mentioned by Maarleveld in 1981 in his 'Future plan for archaeology in Dutch waters,' a policy document which would lay the foundations for the creation of the Department of Underwater Archaeology (Maarleveld 1981, 5). This is because next to the group of divers that consider anything lying on the sea bed as free to collect as souvenirs or to sell for profit, a group seems to exist with a genuine interest in, and respect for, underwater cultural heritage (Green 2004, 401). Hence, the 'avocational diving community', sometimes united in organizations of amateur archaeologists,<sup>34</sup> nowadays plays an

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<sup>34</sup> Examples of these organizations which play a pro-active role in collecting information on underwater sites are the National Archaeology Underwater Study Group LWAOW (*Landelijke*

important role in collecting information about underwater sites and the government, for instance represented by the Cultural Heritage Agency tries to stay in close contact with the divers. This seems in line with the governmental point of view that monitoring activities with regard to compliance of heritage law are a responsibility of society as a whole (Beukers 2009, 212). Adhering to guidelines mirroring the provisions of the Annex to the 2001 Convention on the Protection of the Underwater Cultural Heritage, amateur divers can nowadays be considered ‘acceptable partners in heritage management’ (Maarleveld 2006a, 173). Lending their eyes and ears to governmental bodies involved in the protection of underwater cultural heritage, information from divers about new discoveries or possible illegal activities at known sites will reach the appropriate authorities quickly and efficiently. Such members of the diving community can therefore be considered a valuable support of the Agency. The same can be said for fishermen who actively share information on archaeological remains that are recovered during their daily activities (Brouwers and Manders 2008, 20). Most archaeological finds at sea are still found by chance, often by the fishing industry (Pearsall 2008, 1602).

The first component of the enforcement mechanism consists of criminal investigation. Criminal investigation can be defined as inquiry aimed at solving a criminal offence and/or the preparation of imposing sanctions of criminal law (Michiels 2006, 24). Neither the Agency nor the Inspectorate is endowed with investigative powers. These have only been granted to the police and to the Public Prosecution Office (*Openbaar Ministerie, OM*) under the responsibility of the Minister of Justice (Beukers 2009, 212). Officials of the National Police Agency (*Korps Landelijke Politiediensten, KLPD*) may therefore be involved in the matters with regard to underwater cultural heritage as well, if criminal offences such as illegal excavations or trade of antiquities are reported at the police station.

The second component of the enforcement mechanism is criminal prosecution. The Public Prosecution Office is charged with the responsibility to prepare prosecutions, to impose sanctions and to take legal action. The prosecution of illegal activities regarding underwater cultural heritage has been an even harder struggle than that with regard to archaeological remains on land. Hypothetically, cases where an infringement was successfully registered could lead to a conviction of the perpetrator in the form of a

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*Werkgroep Archeologie Onder Water*) and the Foundation for Maritime Research STIMON (*Stichting Maritiem Onderzoek*) (Manders and Maarleveld 2006, 132).

substantial fine or even imprisonment. The Public Prosecution Office even had some drastic internal guidelines at its disposal to demand sentences: first offenders would risk a fine and recovery of the illegally excavated materials, while for reoffenders a seizure of equipment used, including the salvage vessel, would be at stake. However, these guidelines were never used in court (Maarleveld 2006a, 186). Legal action aimed at the protection of archaeological remains in general seems to have a low priority. The number of prosecutions following illegal excavation, whether on land or at sea, is illustrative: of the 22 complaints reported to the Dutch police following violations in the period 2001-2008, only 10 resulted in a criminal report (Beukers 2009, 222).

Finally, the enforcement mechanism consists of the possibility to impose sanctions by a court of law. Although chapter VI of the Monuments and Historic Buildings Act, dealing with enforcement and penalty provisions, opens up the possibility to enforce parts of the Act by means of administrative law – for example, by revoking a license after monitoring by the Inspectorate has shown that the norms of the Dutch Archaeology Quality Standard (*Kwaliteitsnorm Nederlandse Archeologie, KNA*) have not been adhered to – illegal excavation is sanctioned in the Economic Offences Act (*Wet Economische Delicten, WED*). Apparently, the legislator deemed the punitive sanctions of criminal law better suited for fighting against illegal excavation than the more modest sanctions of administrative law. Considering that administrative law is based on repair of a situation rather than inflicting harm, this does not seem surprising: after all, the nature of illegal excavation and the fragility of cultural heritage will usually make restoration of the original situation impossible. After qualifying violations of Article 45(1) of the Act as economical offences in Article 1a(2), Article 6 of the Economic Offences Act provides two regimes of sanctions on illegal excavation. The choice between the two regimes depends on *mens rea*; in other words, it depends on the question whether criminal intent to carry out an illegal excavation can be proven or not, and whether the violation must be considered a crime or a common offence as a consequence (Lubina 2009, 17). In case of a crime, one may be convicted to community service, a maximum fine of € 19,000 or imprisonment for up to two years. In case of an unintended act of illegal excavation, the means are comparable; however, imprisonment is limited to a maximum of six months only. Additional sanctions such as seizure of illegally excavated objects are provided in Article 7. The current sanctions are somewhat different from the sanctions posed in the past by the dilapidated Articles 62 and 63. Forming part of the Act until October 2010, these used to provide that violations would be considered a criminal act with maximum

penalties payment of € 76,000 or a half to one year of imprisonment. Interestingly, the new regime seems to give more weight to imprisonment and less weight to financial sanctions. This could possibly reflect the fact that it is quite difficult to put a price on cultural heritage due to the fact that its intrinsic value can differ significantly from its value as an inheritance from the past, surrounded by meanings, claims and values (Skeates 2000, 9). However, one might argue that financial sanctions are crucial. As salvage operations are primarily motivated by the intrinsic value of wrecks, it may be advisable to counter them by financial measures in order to make sure that the financial profits of an illegal excavation are reversed as much as possible and the salvage activities are forcefully discouraged.

## VI. ENFORCEMENT WEAKNESSES IN PRACTICE

### VI.1 *Theory versus practice*

From a legal point of view, underwater cultural heritage in Dutch state waters seems well-protected. From the descriptions above, one may infer that the protection of underwater cultural heritage against illegal excavation as provided by Article 45 of the Monuments and Historic Buildings Act is sufficiently taken care of by the Dutch government, and that the stakeholders involved are cooperating closely to establish a firm level of compliance. However, it seems practice significantly differs from theory: although formally protected, practice does not seem to look as good as theory suggest. In the following chapter, the downsides of the enforcement mechanism in daily practice are discussed. This is done by analyzing the experiences of representatives of some governmental bodies already mentioned above who are involved in the protection of underwater cultural heritage. Their views on enforcement practice were discussed during several interviews. Hence, while the previous chapters merely focused on law and literature, in the following chapters emphasize current practice, in order to answer the question as to what weaknesses the enforcement mechanism shows in practice with regard to protection against illegal excavation. As will be shown, most of the weaknesses identified are interrelated.

### VI.2 *Low priority*

One of the most severe problems hampering an efficient enforcement of the ban on illegal excavation seems to be the relatively modest level of priority attributed to protection against illegal excavation. The Cultural Heritage Inspectorate, for example, has paid less attention to enforcement of the prohibition of illegal excavation in the last decade and more on the quality of legal excavation, due to the focus on the upcoming market for commercial archaeology (Beukers 2009, 218). However, the problem of priority may be even greater within the organizations of stakeholders involved in Dutch waters who, unlike the Cultural Heritage Agency and the Cultural Heritage Inspectorate, may not have cultural heritage as their key priority (Beukers 2009, 167). For example, as the

Coastguard has to divide its limited means over several fields of attention, manpower available may be used to fight drug smuggling or to save the lives of drowning persons at the expense of monitoring violations of the Monuments and Historic Buildings Act Likewise, the responsibility of the Directorate-General for Public Works and Water Management within the underwater domain is first of all to act against rising water and to assure navigable waterways; the protection of underwater cultural heritage will never have the same priority as these tasks. In fact, as can be deduced from correspondence between the Coastguard and the Cultural Heritage, the Coastguard announced in 2011 to stop their enforcement efforts of the Act completely.

The situation within the police organization is also illustrative. The police are endowed with other priorities which are considered to weigh heavier than the protection of cultural heritage and the enforcement of the Monuments and Historic Buildings Act (Beukers 2009, 221); violations of the Act are deemed less important than other offences (Beukers 2009, 167).

A similar argument was brought forward by the officials interviewed from the National Police Agency, Mr. M. Finkelnberg and Mrs. E. Willems-Hirsch. Observing a low priority for the protection of cultural heritage within the police forces, he considered this a consequence of the low impact of damage to cultural heritage in comparison to other fields of attention. From the point of view of the National Police Agency, the impact of a looted shipwreck on society as a whole is considered less important than, for instance, the theft of millions of bicycles every year. Indeed, one might argue that the average citizen will encounter more problems due to a stolen bike than from the illicit excavation of a monumental ship. A possible explanation for this may be the fact that illegal excavation does not lead to a distinct victim, other than the society as a whole. One might wonder if society as a whole is going to lose any sleep over an illegal excavation. Even if it would, an abstract entity like 'society' will clearly have more trouble to get the attention of the police than an individual.

It is not very likely that this state of affairs is about to change in the near future. As the interviewees argued, this situation is a consequence of the fact that archaeology, whether underwater or terrestrial, does not seem to have much political priority. Competing with topics like heavy crime, manslaughter or child porn, it will always end up lower down the list. This is in line with the observation of Manders and Maarleveld in the past that "the opportunities to 'score' politically with this topic are generally considered to be fairly meager", since underwater cultural heritage tends to be invisible to

the public (Manders and Maarleveld 2006, 137). Furthermore, a low priority of protection of underwater cultural heritage may also be a consequence of the fact that specialist knowledge of cultural heritage is virtually absent within the law enforcement agencies. This will be discussed in the following paragraph. Moreover, in some cases low priority for underwater cultural heritage may also be a well-considered policy decision, arising from the idea that, due to inadequate legislation and a history of dismissing cases by the Public Prosecution Office, the chances of a conviction of the offenders will in the end be minimal, or that the level of punishment will be disproportional to the efforts put into enforcement. In others words, it is based on the idea that enforcement of the provisions of the Act is virtually useless as it does not pay off. The decision of the Coastguard to stop the enforcement of the Act can be seen from this perspective. As will be discussed below, such fear, originating from experiences with disappointing outcomes of the enforcement process in practice, is not entirely without substance. Since the Agency and the Inspectorate are highly dependent on others for observing illegal excavations at sea, the observation that giving priority to cultural heritage is unlikely within the organizations of enforcement partners such as the police must without doubt be considered to be problematic. After all, the assistance of the aforementioned parties is crucial to successfully take legal action against offenders of the Monuments and Historical buildings Act. Without proper assistance, action at all prior levels of enforcement becomes useless, causing a form of frustration amongst the partners involved which may lead to less enforcement in turn.

### *VI.3 Lack of knowledge and awareness*

Except for a scarcity of available means, explanations for such a lack of priority may also be related to a lack of knowledge and awareness of the value of cultural heritage, as was already indicated in the previous paragraph.

Knowledge and awareness about underwater cultural heritage seem minimal within Dutch society as a whole. Even Dutch universities, for example, have paid very little attention to underwater archaeology for a long time. Although this has recently begun to change, for example with the introduction of a Master specialization in Maritime Archaeology offered by the State University of Groningen and Master courses on the subject being taught by the University of Leiden, a firm basis of knowledge has been

absent for a long time (Manders and Maarleveld 2006, 137). Like in other parts of society, a sufficient level of knowledge about underwater cultural heritage and how to distinguish artifacts from other materials is often limited within the partner organizations of the Cultural Heritage Inspectorate and the Cultural Heritage Agency. Unfamiliarity and disinterest may be possible explanations. Without sufficient knowledge of underwater cultural heritage people may also lack appreciation and awareness of the importance of protection of underwater cultural heritage. The National Police Agency and the Public Prosecution Office are illustrative for these issues: those interviewed at the National Police Service indicated that specialist knowledge about underwater cultural heritage, let alone its problems, is virtually absent within the police organization as well as in the Public Prosecution Office. Moreover, even if professionals involved are familiar with archaeology, they may not be acquainted with the legal framework surrounding it. The Monuments and Historic Buildings Act and other regulations with regard to cultural heritage are certainly not the best known laws in the Netherlands – in fact, even among most archaeologists the extent of knowledge about the content of the Act seems limited. Not surprisingly, the protective provisions of the Act are often virtually unknown to government officials working at the Police and the Public Prosecution Office as well. As a consequence, offences regarding underwater cultural heritage may simply not be recognized as such, and reports may not be filed by the police due to a lack of familiarity and affinity with the Act and with the underlying idea of protecting cultural heritage (Beukers 2009, 222). Likewise, the potential of the Act may not be applied to its full extent by the public prosecutor. Unfortunately, illegal excavators will get away with their offences as a consequence.

#### *VI.4 Legal issues*

Legal issues with regard to enforcement of the protection of underwater cultural heritage are diverse.

First of all, one of the most important problems with regard to legal protection of underwater cultural heritage arises from the fact that the legal framework surrounding cultural heritage in the Netherlands is highly focused on terrestrial sites. In the Monuments and Historic Buildings Act underwater sites seem to be the poor relative of heritage law. It seems this problem can even be traced back to the 1985 decision of the

Dutch government to treat underwater cultural heritage in the same way as mainstream cultural heritage. Protecting it with the same law as was applicable on land at the time, the Dutch government made a pragmatic but fundamental choice for analogous legislation. While other states opted for particular legislation tailored to the specific character of wet environments, states like the Netherlands chose to protect their underwater heritage by ‘terrestrial’ legislation.<sup>35</sup> One could argue, as some scholars have done, that a uniform legal framework is at odds with the different characteristics of archaeology in terrestrial and marine environments.<sup>36</sup> With respect to the matter, Maarleveld observed: “(W)e may, quite rightly, be convinced that the significance and meaning of archaeological remains are not affected by their being under land or underwater. On the other hand, whether we like it or not, the development of the archaeological and heritage disciplines demonstrates ample evidence to the contrary” (Maarleveld 2007, 49). If differences are that obvious, applying terrestrial legislation to marine environments does not do justice to the divergent character of underwater cultural heritage. As Maarleveld concluded: “(M)aritime heritage should not perhaps be treated differently from other types of heritage, though the organization of its management unavoidably needs to be different” (Maarleveld 2007, 56). Using terrestrial management models for underwater sites is therefore questionable, since the marine environment creates a totally different setting. At sea, the possibilities for humans to impair archaeological remains unseen – and the possibilities of governments to prevent this by monitoring – are incomparable to terrestrial environments (Vadi 2009, 898). Hence, the choice for analogous application of the Monuments and Historic Buildings Act may lie at the core of the problems surrounding monitoring and enforcement. Comparing incomparable spheres of action will soon or later create friction, as these differing fields require totally different kinds of approaches and resources. The fact that the Monuments and Historic Buildings Act better suits terrestrial settings than underwater settings is also evident in the fact that archaeological heritage management in the Netherlands, both before and after the Malta Treaty, tends to focus primarily on rescue excavations as a result of spatial development. This certainly makes sense within the terrestrial territory of the Netherlands, where a continuous need to develop new land for industry and housing

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<sup>35</sup> See for example Dromgoole 2006 for an extensive overview of the legal frameworks concerning underwater cultural heritages in different states.

<sup>36</sup> See for example Boesten 2002, 3, arguing in favour of separate legislation.

can be felt, but overlooks the fact that threats at sea may manifest themselves rather differently than in the form of construction projects (Maarleveld 2006a, 177). This is problematic, as the particular threats to underwater cultural heritage, such as destructive natural processes or illegal excavation, tend to get ignored, for example in funding. As Maarleveld annotated on the current focus on development-led archaeology: “(W)ho will pay for the (...) safeguarding (...) of the extremely important sites in such areas like the Wadden Sea?” (Maarleveld 2007, 56).

Secondly, a legal issue hampering enforcement of Article 45 is related to the terrestrial focus of the Act: its formulations are sometimes problematic from the point of view of the characteristics of underwater cultural heritage. While a successful prosecution, ending up in adjudication, requires proof of all components specified in a provision, some of the components of the Act tend to be at odds with the reality in the underwater area, which makes it almost impossible to prove the alleged offences. The most important example of this problem is formed by the definition of ‘to excavate’ as formulated in Article 1(h): in order to qualify an act as an illegal excavation as laid down in Article 45, proof is required that activities are performed “with the purpose of tracing or investigating monuments causing disturbance of the soil.” However, the crucial last words of this phrase can create great difficulties among lawyers, and more particularly, in a court of law dealing with an illegal excavation: in the underwater realm, archaeological remnants are often (partially) situated *on* the river or sea bed rather than *in* it. As such, no disturbance is necessarily needed to take them out of context. Here, the implicit focus on terrestrial archaeology discernible within the Act backfires again, as it creates problems with regard to definitions: although the spirit of the law clearly wouldn’t allow for picking up cultural heritage from an underwater site, the letter of the law does. Without disturbance of the soil, not all components of an indictment based on Article 45 will be fulfilled, and illegal excavation in the legal sense is not considered to have taken place. Hence, a conviction will never be possible, even if unearthed ingots are seen in the grip arm of a salvage vessel. Unfortunately, this semantic problem creates an insurmountable obstacle in cases of illegal excavations.<sup>37</sup>

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<sup>37</sup> Even if this crucial element of the indictment can be proven, this is still no guarantee that a prosecution will take place that will end up in a successful conviction as is clear from the case of the anchor salvaged by airlift from the Oostvoornse Meer in 2010: even though recordings, clearly indicating that the anchor was physically detached from the sediments partially surrounding it, have been put on display on a public website (probably by the salvors themselves), events have not

Thirdly, the collection of evidence must be considered a major issue of a legal nature with regard to protection of underwater cultural heritage against illegal excavation. If it is suspected that an infringement of Article 45 may have taken place, it is up to the enforcing governmental services to prove a violation actually did take place. This requires hard evidence to support such a claim in court. After all, the fact that the names of the vessels which are actively salvaging are well-known to most professionals involved in the protection of underwater cultural heritage is not enough for adjudication. This may be quite difficult in wet environments. For example, disturbance of the soil may be quite easy to prove on the static environments of land, where illegal activities will leave demonstrable traces of disturbance on the soil in the form of discoloration, sagging and mixtures of different sediments. On the sea bed, however, disturbance is hard to prove as the notion of the currents will wash away any signs of disturbance of the soil in the blink of an eye: whereas nature is a useful witness at land, on sea she acts as a capable accomplice, removing crucial evidence from the crime scene. However, as practice shows according to those interviewed, the problem of gathering information is even increased by the fact that currently a broad variety of data do not seem to be regarded by the public prosecutor as sufficient evidence to start a prosecution. Examples of such insufficient data may consist of documentation of coordinates of salvage vessels floating above archaeological monuments,<sup>38</sup> reports on the internet about finds from illegal excavations written by witnesses or by the perpetrators themselves,<sup>39</sup> and the presence of maritime antiquities of dubious origins on online shopping websites.<sup>40</sup> But even photographs of salvage vessels unloading antiquities or footage on the internet, documenting looters in

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led to a conviction to this day. The salvage operation can be witnessed at [http://www.youtube.com/watch?v=vI1cVjO\\_itQ](http://www.youtube.com/watch?v=vI1cVjO_itQ) (contents of 01/12/2011).

<sup>38</sup> Coordinates of ships can for instance be tracked down by means of the technology of AIS (Automatically Identification System), which can be installed on a ship to indicate its location for safety reasons. See for example <http://www.marinetraffic.com>.

<sup>39</sup> See for example <http://www.theamsterdampost.com/ancor/ih/labels/VOC%20kist.htm> (contents of 19/05/2010).

<sup>40</sup> See for example <http://www.antiek-kunst.marktplaats.nl/antiek-keramiek-en-aardewerk/467134068-antieke-17e-eeuwse-kookpan.html> (contents of 10/11/2011). Like in other cases, in this case the description on the site – “very large fragment (...) with a lot of barnacles. Find from North Sea shipwreck” – leaves no doubt about the origins of the find.

action, may not necessarily be accepted as sufficient evidence.<sup>41</sup> As a result, some manifestly clear-cut cases of illegal excavation are not brought to court at all. Frustrating as it is for the stakeholders involved, the hesitation of the Public Prosecution Office to accept such material as proof is somewhat understandable: confronted with these kinds of soft evidence, the defendant may for instance argue successfully that the finds involved were picked up outside the 24 miles zone, making a Dutch court of law not susceptible to try the case. Likewise, it could be argued that the finds on the photographs were chance discoveries, caught in the nets during fishing, leaving only the blame that the find was not reported in time. In other words, whereas it is absolutely clear in most of these cases that illegal excavation of underwater cultural heritage is involved, it is often problematic to gather enough evidence to actually support such a claim in a legal sense. As Maarleveld already noted in the past: “To assume that an object has been illegally excavated, there must be more circumstantial evidence than the simple fact that such an object has most likely come from an archaeological context” (Maarleveld 2006a, 179). In fact, the most successful, if not the only solid basis for prosecution seems to be to catch the offenders in the act (Beukers 2009, 223) – something which is clearly highly problematic with regard to underwater settings, especially as the physical means of Dutch government to enter the water are limited, as will be discussed below. The fact that diving is virtually unrestricted in the Netherlands does not make things any easier. As one of the interviewees from the Cultural Heritage Agency, Mr. J. Opdebeeck, indicated, it is not possible to restrict diving activity in the surroundings of underwater cultural heritage as long as no clear evidence is available for illegal excavation, because diving activity in the Netherlands can only be restricted for safety reasons or health risks, for instances by the Directorate-General for Public Works and Water Management because the presence of explosives is suspected. Except for these cases, diving activities must otherwise be tolerated, even if they take place on the location of a fragile archaeological monument. The Monuments and Historic Buildings Act does not provide any possibilities to issue a preventive ban to protect cultural heritage: after all, only excavating without a required license can be prohibited by Article 45 of the Act. Since the grey area between conducting a perfectly legal observation and conducting a prohibited excavation of an underwater site is in a physical

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<sup>41</sup> For example, severe disturbance of the wreck of the *Delft* can be witnessed on <http://www.youtube.com/watch?v=m-8AFoZeE-k> (contents of 01/12/2011). The footage and the commentaries accompanying it clearly show that metal objects are torn loose from the wreck.

sense only obscured by the body of water separating the site from the eyes of the authorities, the malevolent is provided substantial room to maneuver underwater. Chances of getting caught red-handed for conducting an illegal excavation underwater therefore seem negligible. This is even more the case since the government lacks the equipment to keep an eye on underwater cultural heritage, as will be described below. Creating the possibility of a preventive ban to protect cultural heritage in the future seems therefore not of any use either.

Fourthly, a problem is that most of the time no prosecution is filed against offenders of Article 45 at all. This is not a new problem. It was already observed by Maarleveld in 2006 (Maarleveld 2006a, 179). To give an impression: none of the four people charged in the past years by the Coastguard for illegal excavation were confronted with prosecution (Beukers 2009, 224). A number of reasons are thinkable why prosecution does not take place. For instance, a complaint about the violation of the prohibition to excavate may never be reported at the police, whether because the offence is considered too insignificant for the sanctions possible or because the evidence available may be considered too meager for a successful case (Beukers 2009, 218), for instance because the perpetrators were not caught red-handed. The first reason may be dependent on the importance ascribed to cultural heritage by the potential informer, which may vary from person to person; the latter may depend on prior experiences of enforcement partners with unsuccessful cases of prosecution in the past. However, as described above, another reason for the fact that no prosecution is initiated may originate from the fact that the knowledge of archaeology and its legal protection is absent among the officials which may decide to prosecute, or because protection of cultural heritage has a low priority within the police forces or the Public Prosecution Office.

Fifthly, a legal problem regarding the enforcement of the Act is formed by the low level of measures of punishment for illegal excavation in general, whether on land or at sea. Even when violations of Article 45 are observed, prosecution is filed against the alleged offenders and evidential obstacles can be overcome, practice suggests that the sanctions imposed are not nearly as severe as the maximum sanctions provided by Article 2 of the Economic Offences Act. Whereas offenders may in theory be punished with community service, a maximum fine of € 19,000 or imprisonment for up to two years, sanctions of this scale of magnitude have never been imposed in the Netherlands. There are no records of convictions which even come close to a € 19,000 fine, let alone imprisonment. A frequently heard complaint during the stakeholder interviews therefore

consisted of the fact that convictions, if any, are negligible: based on the level of sanctions mentioned by the Inspectorate and the Agency, it seems the few financial sanctions that were imposed in the past for a case of illegal excavation of cultural heritage varied approximately between € 500 and € 5,000. As such, they clearly do not succeed in fulfilling their intended goals of inflicting harm in order to deter possible new offenders, and to safeguard cultural heritage. Even if one takes into account that the court is competent to balance the weight of the offence and the circumstances involved, there is still a striking gap discernible between the maximum fines in theory and the actual fines in practice. It may well be argued that the message sent to society by such modest sanctioning is one which denies the importance of cultural heritage and labels illegal excavation as excusable. Furthermore, the amounts mentioned clearly do not outweigh the possible profits to be gained by illegal excavation of underwater cultural heritage, where antique cannons can easily yield prices up to € 100,000. To give an example, one of the richly decorated cannons from the *Ritthem*, a man-of-war from the Eighties Years' War that sunk in de Westerschelde near Vlissingen, was sold for a price of € 80,000 to the Flemish city of Mechelen.<sup>42</sup> Furthermore, confiscation of illegally excavated objects seems to be highly exceptional. One of these exceptions was the set of Baccarat-crystal objects from the 20th century steamer *Kursk*, which were taken from the sea bed by two divers in a dinghy. These objects were seized by Customs in 2004 after an accidental catch.

Finally, a problematic issue of a legal nature which must be mentioned here is that the position of parties involved as governmental bodies often creates problems in the aftermath of the enforcement process. As governmental bodies, they are expected more than others to abide by the law. After an illegal excavation has taken place, this may for instance create friction when a practical solution in the best interest of the cultural heritage involved gets blocked because of this position. The case of the collection of 21 complete and incomplete Roman Nehalennia altars from the Colijnsplaat in the province of Zeeland, which could be deduced from documentation provided by the Cultural Heritage Agency, is illustrative. After the National Museum of Antiquities (*Rijksmuseum van Oudheden*) had been informed in 2006 that the collection, almost certainly excavated illegally by an amateur diver who had frequently worked with the government in the past,

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<sup>42</sup> See [http://wrakkenmuseum.nl/sites/wrakkenmuseum.nl/files/beeld/artikelen/2011/04/mp-3-17\\_00.pdf](http://wrakkenmuseum.nl/sites/wrakkenmuseum.nl/files/beeld/artikelen/2011/04/mp-3-17_00.pdf) (contents of 10/11/2011)

was offered for sale at a price of € 750,000, a discussion started among the Inspectorate, the Agency, and the National Museum about the following steps to take in this complex legal and ethical case, which *inter alia* entailed issues of ownership, illegal export and limitation periods. The general aim was to safeguard this unique collection of votive altars for the Netherlands. However, the governmental status of the parties involved turned out to be problematic for two reasons. First of all, negotiations between the government and an alleged offender of the Monuments and Historic Buildings Act about a financial compensation were considered to be out of question. This correct point of view unfortunately greatly reduced the chances to retrieve the collection, because the case did not seem strong enough to lead to conviction in a court of law due to invalid legislation. Furthermore, the question was raised as to whether the amateur diver's previous contacts with governmental representatives could be seen as a form of legitimation, since it was generally known that he owned underwater cultural heritage of a doubtful origin – the altars had even been described in scientific publications. Besides these legal aspects, the case also confronted the government with the ethical dilemma of purchasing a particular collection at the expense of stimulation of the trade in illegal objects. Another example of the sometimes problematic status of government bodies came to the fore during an interview with J. Opdebeeck from the Cultural Heritage Agency: the obligation of government officials to file a complaint to the police in situations of known offences can sometimes conflict with the necessity to maintain the crucial bond of trust with informants, such as amateur divers. This obligation, which is in particular at odds with the position of knowledge institutes such as the Cultural Heritage Agency, entails the obligation to reveal one's sources, even if these sources only wanted to share information if they could remain anonymous. This may become an obstacle when attempting to gather as much information as possible to prepare a viable case against illegal excavation at the expense of prosecuting minor offences.

#### VI.5 *Practical problems*

Besides problems of priority and knowledge, as well as legal issues, the enforcement mechanism to protect underwater cultural heritage against illegal excavation suffers from problems of a more practical nature. Does the Dutch government even possess the

technical means and the capacity needed to actually enforce legislation in the vastness of the Dutch waters?

A first point in this respect is manpower. The numbers of staff charged as policy officers for the coordination of enforcement of the Monuments and Historic Buildings Act within the governmental parties involved are modest. For example, of the approximately thirty persons working at the Cultural Heritage Inspectorate, only the three persons forming the archaeological unit are charged with the monitoring of compliance of the provisions of the Act. As these three – two archaeologists, one part-time senior archaeologist – have to see to compliance of the rules of law and the Dutch Archaeology Quality Standard for both terrestrial and underwater archaeology, only a limited quantity of time is available to dedicate to underwater cultural heritage. This is in striking contrast to the five senior archaeologists employed in the past by the National Inspectorate for Archaeology (*Rijksinspectie voor de Archeologie*), the predecessor of the current Inspectorate, which was clearly far better equipped for the task. In 2009, the Cultural Heritage Agency employed only twenty-two persons involved in underwater archaeology, five of which were reserved for policy officers and an information manager. This may seem acceptable. However, only three of them are trained as underwater archaeologists. Furthermore, based on their job descriptions only two persons are employed as divers (Otte 2009, 117). The situation within the National Police Agency is comparable. According to the interviewees only two functions have been created within the Agency to take on the daily responsibility for antiquities and cultural heritage. As a result it is also faced with a tension between tasks and numbers of personnel available. The officials of the division involved have to divide their time over a whole range of topics related to cultural heritage, such as illegal trade of antiquities. As a result, protection of underwater cultural heritage against illegal excavation is not the core business of the division. Moreover, the numbers of professionals involved in the protection of underwater cultural heritage in an operational function seem limited, especially as one takes into account that they may not be actively involved in underwater cultural heritage on a daily basis due to different key priorities. As can be deduced from official documents from the period 2005-2006, in parliament a lack of capacity within the Coastguard was already anticipated from the moment that it was charged with monitoring of the Monuments and Historic Buildings Act at sea. When the blanket protection of the Act was extended in 2007, questions were therefore posed in parliament about the consequences of this new burden for the Coastguard. The Secretary of State of the Ministry of Education, Culture and

Science then responded that the new jurisdiction area would not lay an extra claim on the capacity of the Coastguard; in the opinion of the Secretary, the burden would rather be reduced as the legal regimes in the terrestrial and the contiguous zone would be identical from 2007 on, ending the differences which enabled evasion of control and regulation (Maarleveld 2006b, 38).<sup>43</sup>

Secondly, the availability of necessary equipment forms a practical problem. The management of underwater cultural heritage requires special techniques, knowledge and equipment. It is questionable whether these techniques and equipment are sufficiently available in the Netherlands. The abolition of an operational team of professional divers of the Cultural Heritage Agency for financial reasons in 2005, as mentioned by J. Opdebeeck, seems illustrative. In any case, it is hardly conducive.

The last practical problem, which is clearly related to the lack of manpower and equipment, consists of a shortage of financial means for enforcement of the Act with regard to the protection of underwater cultural heritage. This shortage is connected with a scarcity of financial means regarding underwater cultural heritage in general. For example, in the years around 2009, the annual budget of the Cultural Heritage Agency for underwater cultural heritage was € 200,000 (Otte 2009, 117). Considering that operational costs form only a part of this amount and that operating underwater is an expensive activity due to the special resources and equipment needed (Pearsall 2008, 1600), this is only a modest sum of money for managing underwater cultural heritage in the inner waters, the territorial sea and the contiguous zone of the Netherlands. Budgets of other stakeholders for or related to underwater cultural heritage could not be found but are not expected to be very substantial either. Here again, issues of priority are at stake. “A shortage of resources hinders the monitoring of illicit activities at archaeological sites”, Skeates noticed (Skeates 2000, 53). The same goes for enforcement of provisions protecting these sites.

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<sup>43</sup> See *Wijziging van de Monumentenwet 1988 en enkele andere wetten ten behoeve van de archeologische monumentenzorg mede in verband met de implementatie van het Verdrag van Malta (Wet op de archeologische monumentenzorg)*, Tweede Kamer der Staten-Generaal, vergaderjaar 2005-2006, 25 259, nr. 19, 12.

## VI.6 Consequences

Enforcement of Art 45 of the Monuments and Historic Buildings Act is crucial to prevent illegal excavation. However, practical and legal issues, as well as problems concerning knowledge and priority all add up to the general feeling that enforcement of the prohibition on illegal excavation is not carried out as frequently as originally intended, however willing the Dutch government may be. Enforcement rather seems to take place on an *ad hoc* basis, and infrequently. This is problematic, as a regular observation of violations over a period of time is crucial for the effectiveness of enforcement (Beukers 2009, 221). Taking the variety of problems with regard to enforcement into account, it seems that enforcement is currently not sufficiently organized and may therefore fail to protect the fragile underwater cultural heritage. In 1991, Reinders already concluded something similar with respect to the management of underwater cultural heritage in the Netherlands as a whole. Assessing with regret the state of the Dutch underwater archive, threatened *inter alia* by dredging and salvaging, he observed: “If a similar situation would exist in our archives, the State Archivist would make a tremendous fuss. There is, however, no institution in the Netherlands charged with the management of shipwrecks; nor is there a department sufficiently equipped to take care of this task” (Reinders 1991, 47). Although a lot of things may have changed for the better since then, it seems that the latter remains undeniably true as long as the practical problems surrounding the enforcement of the prohibition of illegal excavation are not solved.

However, the fact that the enforcement mechanism is not without its shortcomings does not only result in a low level of actual enforcement but also in a decrease of the deterring influence of the Monuments and Historic Buildings Act. Both make the underwater cultural heritage vulnerable for looting. It also creates some substantial ‘collateral damage’ by creating frustration among stakeholders inside and outside the government.

For example, the lack of efficient enforcement may negatively influence cooperation between the stakeholders which should rather keep their ranks closed in order to come to a more efficient enforcement mechanism. In an article in a magazine for amateur divers, a member of the diving community complained: “For years I have been arguing for enforcement of legislation and compliance to the Malta Treaty (...) In the meantime, destruction continues unabated and I do not expect any input from [the Cultural Heritage Agency]. The policymakers there do not have any money, time [or]

knowledge.”<sup>44</sup> Although far from being unobjectionable, the statement clearly indicates frustration about the enforcement mechanism. Such frustration may hamper effective cooperation between the stakeholders. In their disappointment, diving clubs may stop sharing crucial information, or even decide to take matters into their own hands and – with the best intentions but not in accordance with the relevant regulations – start excavating themselves in order to keep the cultural heritage out of the wrong hands, sometimes offering their finds to museums. Furthermore, such frustration may lead to a decreased tendency among enforcement partners to enforce in future cases, as is clearly shown by the decision of the Coastguard to stop putting energy in the enforcement of the Monuments and Historical Buildings Act. Hence, frustration about a lack of enforcement may have some far-reaching consequences which may eventually jeopardize the enforcement mechanism as a whole.

Furthermore, a lack of enforcement, giving those who destruct cultural heritage free play, definitely sends the wrong message to society. “Too lenient an approach to activities directed at the UCH (...) risks a situation which could become disastrous, not only for the heritage in question, but also for the credibility of government’s other policies regarding the heritage continuum”, Maarleveld already noted in the past (Maarleveld 2007, 56).

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<sup>44</sup> See the article on demolition of North Sea-wrecks in the October 2010 issue of ‘*Onderwatersport*’, the magazine of the Society for Underwater Sports on [http://www.duikdenoordzeeschoon.nl/wp-content/uploads/2011/01/Onderwatersport\\_StopDeSloop.pdf](http://www.duikdenoordzeeschoon.nl/wp-content/uploads/2011/01/Onderwatersport_StopDeSloop.pdf) (contents of 01/12/2011).

## VII. SUGGESTIONS FOR IMPROVEMENT

### *VII.1 A non-exhaustive list of suggestions*

In accordance with the observation that the problems surrounding the effectiveness of the legal framework of the Monuments and Historic Buildings Act can be reduced to one overall problem – the observation that the level of enforcement of the Act’s provisions in practice is not sufficient – the solution is unambiguous as well: more frequent, more structural and therefore better enforcement is needed to discourage or even disable illegal excavations. Therefore, in this chapter a few possible suggestions for improvement are formulated, accompanied by some critical annotations. However, it is important to stress that the following list of suggestions to improve the enforcement of Article 45 is indicative only. It is not intended to be a complete list of solutions to the problems outlined above, but rather a selection of options derived from the stakeholder interviews in combination with the available literature.

### *VII.2 Increasing the frequency of enforcement*

“The lesson here is that the fate of cultural heritage depends less on a country’s legal framework (...) than on its power to enforce whatever laws it has” Rothfield once observed (Rothfield 2008, 165). Although referring primarily to the destruction of antiquities in Iraq and Afghanistan, his words are clearly applicable with regard to the legal protection of underwater cultural heritage against illegal excavation as well. Hence, at the risk of stating the obvious, the first suggestion must be an appeal for more enforcement. As compliance of the prohibition of illegal excavation is inextricably connected to the level of enforcement, more frequent enforcement action is crucial for the protection of the underwater cultural heritage of the Netherlands. This cannot be stressed enough: as lack of adequate enforcement equals a lack of protection, more enforcement equals more protection. As protection of the underwater archive starts with more enforcement, the Dutch government should aim for more criminal investigation, more prosecution and more adjudication of violations of Art 45. This would not only lay down the foundation for a more efficiently functioning enforcement mechanism, but it would

also generate less frustration and more confidence within the cooperating stakeholders that their efforts to end illegal excavation are not in vain and may end at up with a successful conviction at the end of the chain. Successful cases may in turn create a deterrent warning to potential offenders, as was originally intended. Furthermore, as monitoring is crucial for enforcement, more enforcement should be linked to more monitoring. A more visible presence on the water, whether by ship or by plane, may already make a major difference, as was underlined by some of the interviewees.

More and better enforcement may also require more cooperation between stakeholders. Although working together is already the credo when it comes to Dutch underwater cultural heritage (Brouwers and Manders 2008, 19), it may be beneficial to strengthen cooperation. For example, the interviewees at the Netherlands Police Agency, M. Finkelnberg and E. Willems-Hirsch, suggested a more structural form of cooperation between the parties dealing with the prohibition of illegal excavation of underwater cultural heritage. Although the current contacts between parties involved are considered cooperative, the Agency also considers it too informal. In its view, a more structural way of working together would allow an efficient pooling of different kinds of expertise that is currently missing: this is because the parties involved may be connected by the common denominator of illegal excavation of underwater cultural heritage but tend to reason from diverging frames of reference such as heritage management, guarding the seas and crime fighting. Complementing knowledge, experiences and ideas are therefore not always sufficiently exchanged at the moment. The Netherlands Police Agency would therefore opt for a more formalized form of cooperation, for example by means of formation of a more permanent team consisting of professionals from different governmental services. Besides involvement of governmental parties, involving amateur divers in such a ‘community of practices’ could also be an option. Unfortunately, as J. Opdebeeck from the Cultural Heritage Agency pointed out, the Labour Conditions Act (*Arbeidsomstandighedenwet*) may not allow this, as it raises some technical difficulties with regard to such a cooperative construction between the divers and the government. Furthermore, as was indicated by Mrs. A. Otte-Klomp from the Cultural Heritage Agency, such a more structural form of cooperation was already established in the past in the form of the Permanent Contact Group Enforcement North Sea (*Permanente Kontaktgroep Handhaving Noordzee, PKHN*). However, the Cultural Heritage Agency decided to withdraw cooperation with this group because of the limited outcomes of its

meetings. Nevertheless, the Agency indicated that it does not exclude a renewal of this form of cooperation.

### *VII.3 Increasing priority*

Solving the problem of priority is crucial to enable proper protection of cultural heritage. However, this is clearly not an easy thing to do as cultural heritage has to struggle for attention in competition with other fields of interest within the organizations of the stakeholders involved. M. Finkelberg and E. Willems-Hirsch from the Netherlands Police Agency suggested finding a solution by putting pressure on the government. Based on the fact that their national database of reported crimes only contains two files dealing with illegal excavation – one on an excavated anchor and one on an excavated propeller<sup>45</sup> – it was suggested forcing a higher priority by creating an extensive amount of criminal reports. According to this view, the Cultural Heritage Agency would have to report each and every illegal excavation consequently. Even if the reports will not immediately lead to criminal investigation or even prosecution, the build-up stacks of unattended or dropped cases will sooner or later form an instrument to create enough (political) pressure to put illegal excavation of underwater cultural heritage higher up the agendas of the stakeholders involved. Filing a complaint does however require sufficient information on the location of the alleged offence and its legal basis, the persons involved, the characteristics of the cultural heritage involved etcetera. This means that the enforcement partners have to find a way to make sure that the necessary information is adequately gathered, if only by means of a standard form.

### *VII.4 Changing or reinterpreting Article 1 of the Act*

As indicated in the previous chapter, legal definitions may cause a problem when trying to enforce the prohibition of illegal excavation, something which seems related to the terrestrial focus of the Act. The example given above was the definition of ‘to excavate’,

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<sup>45</sup> This number is based on the data as registered in the documentation system of the Netherlands Police Agency on August 10, 2011. Courtesy of E. Willems-Hirsch (National Police Agency).

which is defined in Article 1(h) as “performing activities with the purpose of tracing or investigating monuments causing disturbance of the soil.” The definition of excavating should clearly be reconsidered in order to put an end to the undesirable situation in which those who perform an illegal excavation can remain unprosecuted because they technically only pick up archaeological objects such as ingots or anchors from a site without disturbing the soil. It seems there are two possibilities to do this. First of all, the Ministry of Education, Culture and Science could initiate an amendment of the Act, by submitting a proposal for a changed definition to parliament. Secondly, as came out of the interview with the Cultural Heritage Agency, one could try to create jurisprudence about the interpretation of the verb, by starting a test trial and invoking a judicial decision about it. The court might then be able to conclude for example that picking up artifacts from the sea bed may be interpreted henceforth as ‘disturbance of the soil’ as well. If the court would not alter the interpretation of Article 1 of the Act, this would be disappointing; however, it would also create a window of opportunity to question the phrasing of the Act and possibly even to initiate an amendment, for example in the form of an alteration of its phrasing away from focusing on disturbance of the soil to focusing on disturbance of a site as a whole. Although both alternatives may take a lot of time and money, they both seem a realistic option to improve the enforcement mechanism. As such, they could result in an understanding of the definition of excavating that is better suited to prevent removal of archaeological objects from the sea bed.

#### *VII.5 Designating more protected monuments*

As described in the previous paragraph, the requirement of ‘disturbance of the soil’ under Article 1(h) of the Monuments and Historical Buildings Act can create some severe problems in protecting underwater cultural heritage. Instead of changing the interpretation or the phrasing of the Act, these problems may also be avoided in another way: by designating sites of underwater cultural heritage as a protected monument. Article 3 of the Act opens up the possibility for the Minister of Education, Culture and Science to designate such protected monuments. As a result of Article 11(1), it then becomes prohibited to damage or destroy such a site at all. In addition, Article 11(2) prohibits any other alterations without a license. Due to Article 7, the obligation to previously consult the Mayor and Councilors involved about the Minister’s intention to designate a protected

monument is only applicable for the inner waters belonging to a specific municipality. For the territorial sea such an obligation is waived. However, as A.D.C. Otte-Klomp from the Cultural Heritage Agency indicated, designating more protected monuments has some major disadvantages. For example, the process of designating the sites requires putting efforts into administrative actions. Furthermore, the scope of protection is limited: it can not be applied to the contiguous zone, as Article 3 of the Act does not have any legal value outside Dutch territory. Moreover, the site has to be known to the government. Last but not least, governmental presence on the water would still be required to oversee compliance. Such drawbacks may explain why only six underwater sites were listed as an archaeological monument until 2009 (Otte 2009b, 116).

#### *VII.6 Aiming for an overall approach*

Since it seems the legal weaknesses of the Monuments and Historic Buildings Act may create obstacles which stand in the way of a successful conviction, one may wonder whether other laws may offer opportunities to prevent looting or destruction of underwater cultural heritage as well. Considering that enforcement of the prohibition of illegal excavation of underwater sites is often only dealt with from the specific perspective of cultural heritage only, the interviewees at the National Police Agency stressed to come to a more comprehensive approach, in which the activities of salvors and amateur divers are not merely qualified as low-priority breaches of heritage law, but as breaches of other regulations that enjoy a higher (political) priority as well. For example, the unauthorized removal of metal parts from a ship by forcefully detaching it by means of a grip arm, for instance like in the cases of the Dutch East-Indiaman *De Delft* and the British WWI destroyer *HMS Scott*, should not only be characterized as a breach of the provisions of the Monuments and Historic Buildings Act, but should also be approached as criminal acts punishable under the Penal Code, such as destruction (Article 350), theft (Article 310), or, in case of sunken warships which are considered war graves, as desecration (Article 149). In this way, a variety of diverging, better-known and often better enforced laws comes into play, as well as their often more severe penalties in practice. An additional advantage of this overall approach would be the fact that officials from police and Public Prosecution Office, who have to prepare prosecution and take legal action, are usually more familiar with the offences from the Penal Code than with

offences founded in heritage law, such as the provisions of the Monuments and Historic Buildings Act. There is, however, a drawback: other laws also mean new legal questions and problems. For example, in legal terms, most archaeological artifacts are considered a *res nullius*, i.e. an object which is considered to have no owner, as it has become impossible to track down the rightful owner over the ages. As a result, Dutch law assigns the ownership of underwater cultural heritage to the state, although the ownership of a chance discovery will have to be shared with its discoverer.<sup>46</sup> As the contiguous zone is not formally part of the territory of the Netherlands, the Dutch legislation to assign an owner does not have any legal value. Lacking an owner, the question may then arise as to who should file a complaint and on behalf of whom prosecution should be initiated. Furthermore, from a more legal-philosophical point of view one might wonder if revenge and reparation, the goals of criminal law, can be attained by adjudging an offender of Art 45 for another crime, only for the sake of punishment. In other words, can society's sense of justice be satisfied by a conviction for just an ordinary case of destruction, if what is at stake is destruction of cultural identity?

A rather similar alternative, which was mentioned by J. Opdebeeck from the Cultural Heritage Agency, can be found in tax law and is connected to the fact that taxes should be paid when goods are imported from abroad. Whereas a lack of evidence may often enable a salvor to get away unpunished with illegally excavated goods when arguing that they have come from outside the zones in which the Act applies, the import of illegally excavated underwater cultural heritage may then at least be fined as an infringement of tax law.<sup>47</sup> Concluding such an infringement is relatively easy to do, as it may require port control only by Customs. To a certain extent it therefore resembles the previous suggestions on Penal Law: it concerns a legal alternative to a sanction based on the Act. However, this solution is clearly only slightly softening the blow. Taking away infliction of harm and replacing it with the modest obligation of import duty, the question

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<sup>46</sup> An important exception to this rule of thumb is the ownership of ships of the East-India Company, which lies with the Dutch State, since it is considered its legal heir. In practice, the Dutch Ministry of Finance acts as its representative.

<sup>47</sup> See for example <http://www.volkskrant.nl/vk/nl/2664/Nieuws/article/detail/2965666/2011/10/13/Ook-al-op-koperjacht-in-de-Noordzee.dhtml> (contents of 01/12/2011) for a recent case in which salvors were fined for violating the obligation to pay import duties.

whether this solution may serve to satisfy society's sense of justice can clearly be answered in the negative.

### *VII.7 Reversing the burden of proof*

Another suggestion of Mr. N. Aten, the interviewee from the Cultural Heritage Inspectorate, with regard to difficulties surrounding the evidence required for enforcement consisted of reversing the burden of proof. Since it is currently up to the governmental services to generate enough evidence to prove that a violation of the ban on illegal excavation did take place but gathering sufficient evidence turns out to be highly problematic in practice, one could opt for a system in which it is not the accuser who has to prove the offence *did* take place, but in which the accused has to prove that the offence *did not* take place. After all, this is a method which is successfully used in other fields of law as well. Ending the problem of finding hard proof, there is no doubt that a reversed burden of proof would significantly enhance the effectiveness of the enforcement mechanism and allow for more successful prosecutions of illegal excavation. If the crew of a salvage vessel cannot explain why their vessel was anchored over an underwater site which later on turned out to be looted, the crew could already be faced with prosecution. Likewise, if the crew is caught with antiquities on deck and cannot make a plausible argument for a discovery outside the 24 miles zone, or if the internet-seller of a historical submarine cannon covered with barnacles cannot provide an acceptable explanation of its provenance, the alleged offenders could already be prosecuted. However, lawyers generally consider reversal of the burden of proof a drastic measure as it ignores the so-called presumption of innocence: no one is assumed innocent until proven otherwise. This fundamental principle of law, protecting people against injustice and abuse of power, is laid down in important legal instruments such as the European Convention on Human Rights and should not be taken lightly. For this reason, it is only reluctantly applied in legal matters. For example, the owner of a car may be charged with the burden to prove that he was not the driver at the time the car was involved in an offence (De Hullu 2009, 209). Furthermore, in spite of the presumption of innocence, a reversal of the burden of proof is sometimes allowed in cases involving terrorism or in cases of organized crime (Van den Wyngaert 2009, 305). Taking the seriousness of these offences into consideration, it seems unlikely that a reversed burden of proof would be allowed in

cases dealing with illegal excavations. After all, these offences are probably seen as less severe than the aforementioned crimes, at least by the majority of society. Even if a reversal will be possible for cases of illegal excavation, it will entail an amendment of law, or development of adequate jurisprudence on the matter.

#### *VII.8 Appointing a public prosecutor for cultural heritage*

The lack of knowledge about cultural heritage, its problems and its legal framework is a serious problem which may manifest itself in enforcement issues within governmental parties like the police and the Public Prosecution Office. This lack of knowledge may be connected to the lack of investigation and prosecution of illegal excavations. A solution *inter alia* suggested by the Cultural Heritage Inspectorate may therefore be to appoint a public prosecutor specialized in offences related to cultural heritage, or even for underwater cultural heritage. If such a specialized official were to be employed by the Public Prosecution Office, several problems surrounding (underwater) cultural heritage could be solved more easily, at least in theory: in the view of the proponents of this idea, it would of necessity be someone with enough archaeological knowledge to understand which steps to take to provide sufficient protection for cultural heritage. In addition, the appointment of such a prosecutor would create a platform within the Public Prosecution Office which would make sure all information on cultural heritage would be collected at a central point within the Office, making it easier to get a better insight in the problems surrounding cultural heritage. The idea of a prosecutor specialized in cultural heritage has already been discussed with the Public Prosecution Office, although no concrete initiative seems to have arisen from these discussions. This may have to do with some critical reflections which can be put to this proposal, the most important one being that appointing a prosecutor focused on cultural heritage may only be useful if the previous partners in the chain of enforcement, such as the police, pay more attention to cultural heritage.

### *VII.9 Focusing on additional sanctions*

As stated in paragraph V.2, the Economic Offences provides in Article 6(1) a legal basis for fines, imprisonments and additional sanctions. These additional sanctions seem very well suited to counter illegal excavation. Being able to be imposed next to a fine or sanction as a result of Article 6(2), Article 7 creates the possibility to seize the excavated objects, to seize the equipment used in the act or even to shutdown a company involved in illegal excavation temporarily. All these forms of additional sanctions seem an interesting option in the case of illegal excavation as they take away the necessary means or the financial profits of illegal excavations.

### *VII.10 Focusing on administrative law*

Another possible suggestion to improve the enforcement system is to enforce the ban on illegal excavation by means of administrative law rather than by criminal law. Whereas the applicable sanctions are now provided in the Economic Offences Act and are aimed at inflicting harm, one could also choose to enforce the ban by means of administrative measures which are based on repair of an undesirable situation. Possible sanctions under administrative law would include fines or warnings. Although these measures may be less drastic than the sanctions under criminal law, the Minister of Education, Culture and Science, represented by the Cultural Heritage Agency, would then be able to impose sanctions itself, without being dependent on interference of governmental parties like the police forces and the public Prosecution Office. This means that the slightly inadequate enforcement mechanism based on criminal law would be transferred into the less weighty, but more effective system of protection by means of administrative law. Such a shift may even be better in line with the extent of support for severe criminal charges for violations of heritage law within society. If society's judgement on the illicit excavation of cultural heritage makes punishment by means of the *ultimum remedium* of criminal law a disproportional tool, it may be more realistic to downscale the punitive instruments available, hopefully creating a more balanced system better suited to be applied more often. Of course, a drawback of such an approach would be that the gap between fines and the possible financial benefits of illegal excavation might increase. However, as long as the current approach prevails, which in most of the times does not lead to any

sanctions whatsoever, administrative law may still provide a more effective legal framework than at present. The possibilities for enforcement of the provisions of the Monuments and Historic Buildings Act are currently being studied by the legal consultants of Pro Facto. The outcomes of this research, which also aims to evaluate the criminal enforcement of other provisions of the Act, are expected to be presented to the Cultural Heritage Agency at the end of 2011.<sup>48</sup>

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<sup>48</sup> See the website of Pro Facto for the progress of the research: <http://www.pro-facto.nl>.

## VIII. CONCLUSION

As Maarleveld and Manders previously concluded, the richness of the underwater cultural heritage in the Netherlands is both a luxury and a burden (Maarleveld and Manders 2006, 138). The Dutch government has to put considerable effort into the protection of the fragile underwater archive, an important source of knowledge about the past, against threats such as illegal excavation. Legal protection against this threat based on the Monuments and Historic Buildings Act of 1988 and an efficient system of enforcement of this protection is crucial. The aim of the previous chapters therefore was to take a critical look at the way enforcement of Article 45 of the Monuments and Historic Buildings Act currently takes place with regard to underwater cultural heritage. Furthermore, they intended to provide an answer to the question as to whether the current enforcement mechanism needs to be improved and if so, in what ways. This was done by means of searching for answers to five sub-questions. These questions dealt with the threat posed to the underwater cultural heritage by illegal excavations, the protection currently provided by the Monuments and Historic Buildings Act, the mechanism to enforce legal protection, the weaknesses of this enforcement mechanism in practice and the solutions available to solve the weaknesses identified in the future.

The methodology used to answer these questions was twofold and consisted of a desk-based survey supported by several interviews. The desk-based survey intended to provide insight in the legal and theoretical framework of legal protection of underwater cultural heritage against illegal excavation and, more in particular, the mechanism to enforce this protection. Moreover, as identifying weaknesses of the enforcement in practice was considered a key issue, the observations during the desk-based survey were discussed during several interviews with representatives of the stakeholders involved in enforcement. In this way, the research intended to provide an overview of enforcement of the prohibition on illegal excavation not only firmly rooted in theory, but in practice as well. The interviews clearly provided insights in the matter which could not be derived from a sole study of the literature or regulations. However, the interviews had some disadvantages as well. First of all, each stakeholder observed enforcement from his own specific perspective. The interviews with the stakeholders from different organizations therefore made it possible to analyze enforcement from different angles. However, this entailed a risk as well: a specific perspective may be a somewhat restricted perspective. Secondly, the interviews did not always provide the verifiable data on enforcement issues

which could have been provided by documents. Finally, as some of the stakeholders indicated, some (operational) information could not be provided during the interviews due to the importance of confidentiality. As such, confidentiality was considered a drawback of the interview methodology, although it is unlikely that the concealed information could have been easily retrieved in another way.

So does the current enforcement mechanism, aimed at protecting the underwater cultural heritage against illegal excavation as mentioned in the Monuments and Historic Buildings Act of 1988, need to be improved? It seems the finite and fragile resources of Dutch underwater cultural heritage may be more endangered by illegal excavation than ever. In practice, illegal excavation seems to be carried out by recreational divers, professional wreck divers and salvors. Although their intentions may vary from picking up archaeological remains as a souvenir, collecting artifacts to sell on the antiques market or dismantling wrecks to sell their construction parts as old metal, their actions result in a destruction of archaeological remains which belong to society as a whole. As the technical means to find and reach the underwater cultural heritage are continuously developing and becoming generally available, illegal excavations underwater also form a more serious threat than ever before. The Monuments and Historic Buildings Act of 1988 currently provides for protection against illegal excavation in Article 45, where every excavation without a required license is criminalized. Since the extension of the reach of the Act from the border of the territorial sea to the border of the contiguous zone in 2007, this provision has become applicable up to 24 nautical miles into the sea. With maximum sanctions which can add up to payment of € 19,000 or even imprisonment for two years, the sanctions for violation of Article 45 of the Monuments and Historic Buildings Act seem severe at first sight. However, the effectiveness of the Act does not look as good in practice as it appears in theory. As interviews with stakeholders involved in enforcement show, practice differs significantly from theory: in reality, the level of enforcement is disappointing. Criminal investigation, prosecution and adjudication of illegal excavations only rarely take place in practice. The same is true for monitoring of violations of the Monuments and Historic Buildings Act at the water, which is a crucial condition for successful enforcement. As a result, the vulnerable underwater water archive lies unprotected. The reasons for the fact that enforcement and monitoring, which are the responsibilities of the Cultural Heritage Agency, the Cultural Heritage Inspectorate and their partners, do not seem to function properly originate from the weaknesses in the enforcement mechanism. Those weaknesses seem diverse and are often interrelated. They

vary from problems regarding priority and knowledge to problems of a legal and practical nature. The pragmatic decision in the 1980s of the Dutch government to opt for analogous legislation and to extend the ‘terrestrial’ Act to Dutch state waters seem to lie at the core of the current problems. Comparing incomparable spheres of action is bound to create friction, as differing fields require different approaches and resources. In the current century, such friction has manifested itself in the Monuments and Historical Buildings Act and, as a result, in the enforcement mechanism as well. A frequently recurring theme in enforcement issues, the decision to extend terrestrial legislation to the underwater domain can be considered a fundamental shortcoming of the protective system. However, more weaknesses can be identified. A low priority for the protection of underwater cultural heritage within the organization of the enforcement partners may for instance explain why most violations of the Act do not lead to a conviction. Legal problems *inter alia* consist of the use of problematic definitions in the Act which clearly do not suit the reality of illegal excavation underwater, problems with gathering evidence and the difficult position of government parties. Moreover, even when it comes to a conviction, the sanctions imposed are low and disproportional to the potential financial benefits to be gained in illegal excavations. Practical problems which hamper proper enforcement of the Monuments and Historic Buildings Act are formed by budgets, manpower and equipment. These weaknesses are not only problematic because of the fact that a lack of enforcement leaves the underwater cultural heritage at times unprotected, enabling divers and salvors to take away cultural heritage; it also causes frustration between the stakeholders involved in enforcement and hampers cooperation between them, the more so because the names of the offenders are usually well-known. This frustration may even be the most important threat to enforcement mechanism. Without the conviction that efforts put into enforcement are of use, the network of stakeholders, which forms the foundation of legal protection of underwater cultural heritage, may fall apart. In fact, the Coastguard has already indicated to put an end to enforcement of the protective provisions of the Act. Furthermore, the credibility of the way the government manages underwater heritage is at stake when enforcement fails and offenders have free rein. More importantly, however, a lack of enforcement sends the wrong sign to society about cultural heritage itself. It denies its importance and labels illegal excavation as excusable, paving the way for the perception that illegal excavation is just an easy way to earn money. As the level of awareness of the importance of cultural heritage among the general public is already a point of concern, this is problematic.

Thus, it can be concluded indeed that the current enforcement mechanism does need some improvement. There are certainly possibilities to improve the enforcement of the prohibition of illegal excavation in Article 45. All stakeholders interviewed seem to agree on this. A difference of opinion exists, however, about the way the mechanism needs to be improved, besides the fact that the frequency of enforcement should be increased. Possible solutions are as varied as the weaknesses they originate from. To name a few: increasing priority for underwater cultural heritage within the organizations of the stakeholders to enhance the chance of criminal investigation, prosecution and imposing sanctions after a case of illegal excavation; reconsidering the definition of excavating in the Monuments and Historic Buildings Act to make illicit activities underwater fall unambiguously within the scope of Article 45 of the Act; and paying more attention to other laws applicable to cases of illegal excavation, sanctioning more common crimes like theft of destruction as well which are enforced more easily. As already indicated, critical annotations can be made with respect to all of these suggestions. However, some of these suggested solutions seem interesting enough to consider, although they will take time and money. The suggestions to reconsider the interpretation of Article 1 of the Act, to designate more monuments, to focus on the additional sanctions of the Economical Offences Act and to focus on administrative law seem the most promising. Unfortunately, this study is too short to discuss the possibilities in detail. What it will take to implement the suggested solutions in daily practice in order to strengthen enforcement of Article 45 of the Act is something which requires further study. All suggestions in chapter VII, and the four possible solutions mentioned above in particular, are therefore recommended for additional research.

As long as adequate and frequent enforcement with regard to the underwater cultural heritage is absent, the importance of Article 45 of the Monuments and Historic Buildings Act is limited for underwater cultural heritage. Since there is no point in legislation without enforcement, the enforcement mechanism to protect against illegal excavation underwater needs improvement to counter the problems in practice. Although this will require additional efforts, the necessary improvements may be reached by the stakeholders involved, creating firmer protection for the underwater cultural heritage. After all, “mankind is the real enemy, with our diving (...) equipment, motivated by financial gain, the most powerful opponent of cultural heritage. Mankind is the true threat to underwater cultural heritage, but (...) can also be its protector.” (Grenier 2006, x).

## **ABSTRACT**

This study focuses on illegal excavation as a threat to underwater cultural heritage in the Netherlands. More specifically, it deals with enforcement of legal protection of the Dutch underwater cultural heritage against the destructive effects of illegal excavation, whether by recreational divers or by professional salvors, to shipwrecks and other archaeological remains underwater. It aims to provide an overview of the enforcement practices currently in operation under the 1988 Monuments and Historical Buildings Act in the inner waters, the terrestrial sea and the contiguous zone of the Netherlands. As a result, Article 45 of the Act, providing a prohibition on illegal excavation, plays a key role. Furthermore, it aims to provide suggestions for improvement of the current enforcement mechanism in a time of turbulent developments within the underwater domain. This is established by means of an analysis of available literature and interviews with governmental stakeholder organizations which are involved in the protection of underwater cultural heritage in daily practice.

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## **ANNEX 1: OVERVIEW OF OFFICIALS INTERVIEWED**

- N. Aten, inspector, Cultural Heritage Inspectorate
- M. Finkelberg, head Arts and Antiques Crime Unit, National Police Agency
- J. Opdebeeck, policy officer/maritime archaeologist, Cultural Heritage Agency
- A.D.C. Otte-Klomp, senior policy officer, Cultural Heritage Agency
- E. Willems-Hirsch, Analysis specialist, National Police Agency

The author would like to thank the aforementioned persons for sharing their valuable information during the interviews.

## **ANNEX 2: INTERVIEW REPORTS**

Interviews with representatives of the enforcement partners were held in the period between July and September 2011. The aim of these interviews was to gain insight in the enforcement of the Monuments and Historic Buildings Act in practice. As a result, those stakeholders were selected for interviews which are actively involved in the protection of underwater cultural heritage. Since the tasks as well as the backgrounds of the different governmental bodies differ significantly no uniform questionnaire was used. Instead, the approach was chosen to base the semi-structured interviews on an open discussion centering around a limited number of questions specifically aimed at the stakeholder involved. The answers of the officials interviewed are provided below. Some information, such as specific referrals to alleged offenders or e-mail addresses of government officials informed, was left out by the author if considered inappropriate to mention in this document. All reports were approved by the interviewees.

**Interview I****J. Opdebeeck – Policy officer/maritime archaeologist, Cultural Heritage Agency****27/07/2011**

*What is currently the procedure in practice when an illegal excavation is suspected, which parties get involved?*

In contrast to the procedure in the past, offences are reported at the Maritime Information Centre (*Maritiem Informatie Knooppunt*), which will inform the Cultural Heritage Inspectorate (*Erfgoedinspectie*). The Cultural Heritage Agency (*Rijksdienst voor het Cultureel Erfgoed*) only gets involved in the role of an advisor to the Inspectorate.

*Are there any examples of cases of enforcement known to you which can be considered to be successfully dealt with?*

Not that I know of. There might have been one case. It concerned the case of an illegally excavated anchor in the Oostvoornse Meer, which was recorded on camera. You should ask the Cultural Heritage Inspectorate for details. It is a shame though that very little enforcement takes place. As an example: the English government is taking enforcement action against offenders. They have recently arrested some salvors in Kent, as can be witnessed on the internet. The link is <http://www.bbc.co.uk/news/uk-england-kent-12980240>.

*What do you consider the weaknesses or the strengths of the Monuments and Historic Buildings Act regarding enforcement?*

There are several problems involved, such as a lack of prosecution and far too modest sanctions in practice. Illegal excavation is currently sanctioned as an economic offence. In practice, people get away with fines of € 5,000. This is totally disproportional to the

possible financial profits to be gained from illegal excavations. In contrast, sanctions in other fields of law, such as sanctions concerning regulations on poaching are sanctioned far more effectively. Furthermore, there are issues revolving around evidence, in particular the burden of proof. This burden should best be reversed: the claim that excavation took place outside the 24 miles zone should then be proven by the salvor. The case of the *Kursk* could have turned out differently if such a reversal had been applicable.

*Which initiatives are already undertaken to counter these problems?*

The Monuments and Historic Buildings Act (*Monumentenwet*) could be adjusted. However, this would take a long time. Maybe the evaluation of the Treaty of Malta will refer to this as well. Evidence about the location of illegal excavation could be monitored by the Coastguard (*Kustwacht*) by means of radar or by the Automatically Identification System, as shown on <http://www.marinetraffic.com>.

The possibilities for better enforcement of the provisions of the Monuments and Historic Buildings Act are currently studied by the legal consultants of Pro Facto, which will deliver a report about it to the Cultural Heritage Agency.

*Except for evidence issues, are there any other problems of a legal nature?*

Gathering evidence is the main problem. The chances of getting caught are minimal. What is needed for a successful conviction is catching salvors red-handed. However, this is often problematic, especially since there are no diving teams available for monitoring and enforcement of the Monuments and Historic Buildings Act. Another issue is the fact that the Cultural Heritage Inspectorate lacks the financial means and the staff for underwater cultural heritage: it has only three people working on underwater cultural heritage.

*Is there enough support amongst the partners in the enforcement mechanism to focus on protection against illegal excavation?*

Due to the difficulties surrounding enforcement of the prohibition on illegal excavation, the Coastguard has already announced to the Cultural Heritage Agency in the past that they would no longer enforce the prohibition of illegal excavations.

*What is needed to overcome these difficulties?*

The Public Prosecution Office (*Openbaar Ministerie*) should start acting against violations of the Act by actually prosecuting offenders. To do this successfully, jurisprudence is needed on the interpretation of the provisions of the Act. A possibility to get this necessary jurisprudence would be to prepare a test trial. It is possible that such a test trial would become a failure, as a result of legal difficulties surrounding the Monuments and Historic Buildings Act with regard to underwater cultural heritage, such as the legal definition of excavation. A failure would be disappointing, but it would also create a window of opportunity to initiate a discussion about the Act and even a change of its provisions. Of course, a problem here is that most partners that are required for a test trial, first of all the Public Prosecution Office, do not like the idea of being involved in a failure, even if it would be for the sake of protection of underwater cultural heritage. Pro Facto is currently investigating how monitoring and enforcement of the Act as a whole could be improved.

*Can you tell something more about the alleged offenders of the prohibition to excavate, for example the divers?*

The diving community is a very diverse group of individuals. There is even a public prosecutor who is an enthusiastic diver. The Netherlands Diving Centre (*Nationaal Duikcentrum*) functions as an advisory authority to Dutch government. Some of the divers have been diving for a very long time: they started diving in a time when a lot more was allowed. Some rules of conduct have been created in the past by the government for diving which can be considered a kind of quality norms or codes of honor, but diving is virtually unrestricted in the Netherlands: diving is always allowed,

even on the location of a monument. There are no ways to forbid the divers to dive at a certain location, except for sites with explosives. In that case, the Directorate-General for Public Works and Water Management (*Rijkswaterstaat*) can issue a ban based on safety considerations. Due to frustration about a lack of effective enforcement some divers stop sharing information to the government, and start taking matters into their own hands: some diving clubs are excavating as much as possible to save it from the malevolent. After excavating the finds, they will bring it to a museum. Although their intentions may be honorable, their actions come down to destruction of context just as well. As the Cultural Heritage Agency needs to abide by the law, practical solutions with respect to divers are impossible.

*Does the government have a diving team available for underwater cultural heritage?*

There are no diving teams available for monitoring, which is a tool for the enforcement of the Monuments and Historic Buildings Act. As already mentioned, this is problematic because a successful conviction seems to depend on catching offenders red-handed. The government did use to have a diving team, but this team was abolished in 2005. This was mainly caused by a lack of money. An operational diving team could be very useful, because the government could monitor protected remains or excavate endangered sites. More importantly it would make the government visible in the water: at this moment, the governmental bodies involved in underwater cultural heritage are seen as living in an ivory tower. This is the more problematic because the numbers of divers are on the rise and illegal excavators are better equipped than ever before, for example with sonar. Fortunately, a lot of amateur divers cooperate with the government and function as its eyes and ears. Furthermore, they often possess a broad range of local knowledge. Unfortunately, it is difficult to actually dive together with these amateurs, as some legal aspects are connected to cooperation between the Cultural Heritage Agency and the divers: as soon as a hierarchic relationship would form a part of the cooperative structure, the requirements of the Labour Conditions Act (*Arbeidsomstandighedenwet*) become applicable, which may cause some practical problems.

**Interview II****M. Finkelnberg – Head Arts and Antiques Crime Unit, National Police Agency****E. Willems-Hirsch – Analysis specialist, National Police Agency****10/08/2011**

*What is the role of the Netherlands Police Agency (Korps Landelijke Politiediensten) with regard to the prevention of and fight against the looting of underwater cultural heritage?*

The Netherlands Police Agency provides information to the different police forces within the Netherlands and coordinates the dissemination of requests for information and legal assistance, both national and international. The Agency is not responsible for enforcement of the Monuments and Historic Buildings Act: this responsibility lies with the Cultural Heritage Inspectorate.

*How can the lack of enforcement of the Monuments and Historic Buildings Act with regard to underwater cultural heritage be solved?*

If the Monuments and Historic Buildings Act forms a problematic basis for enforcement, a possibility would be to focus on the other offences which are involved in the same incident: the police may lack particular expertise on archaeology and the Monuments and Historic Buildings Act, but it does have enough experience with other criminal offences which are applicable to illegal excavation such as theft, destruction, membership of criminal organizations and – in case of illegal excavation of war graves – desecration. These crimes are sanctioned in other laws which are often better known to the police and the Public Prosecution Office. An overall approach may therefore enable more convictions. In any case, it is important that a complaint is filed at the police station every time an illegal excavation is supposed to have taken place – even if problems of ownership are involved. This should be done by the competent Cultural Heritage Agency, and can be done at every police station. The quality of a criminal complaint is important

as well. Without a referral to the violated provisions involved no prosecution is possible. A standard form could improve the quality of the registration of a complaint.

*Why is there so little knowledge about archaeology within the police forces?*

The priority of archaeology and crimes against cultural heritage is very low. This has got to do with the level of impact of illegal excavations on society. The impact of theft of bicycles on society is far more substantial than the impact of illegal excavation of underwater cultural heritage. In the first case, distinct victims will be involved, while in the latter case there is none. Of course, society as a whole may be considered the victim, but this makes the victim a rather abstract entity. Furthermore, a lot of people are unaware of the things happening to the underwater cultural heritage or simply do not care. It is not very likely that this is about to change rapidly: this situation is a consequence of the fact that crimes against cultural heritage does not seem to have much political priority, unlike topics as heavy crime, manslaughter or child porn. This is reflected in the tasks of the police forces.

*Do you think it is possible to improve the enforcement mechanism?*

Efficient enforcement is possible. For example, the enforcement of heritage law on underwater cultural heritage in other countries like England, Italy and Israel is much better.

*If people do not now that the underwater cultural heritage is endangered, is creating awareness also a requirement for better enforcement?*

Creating awareness starts with consequent enforcement. There is an article on the internet which openly describes how salvors give away nails from a chest of an East-Indiaman which was illegally excavated underwater. Still, they can get away with it. Awareness can also start with students: police recruits should learn more about archaeology, crimes against cultural heritage and art crime in general during their training, to decrease the lack

of knowledge about art crime within the police forces. But archaeological students should learn more about legal issues and enforcement.

*How can the enforcement mechanism be improved?*

The message the National Police Agency is currently consequently sending to its partners is that two things are crucial to improve the system: lodging adequate complaints at the police office and creating awareness. Furthermore, with regard to the salvors of old metal, an interesting option would be to create a duty to indicate the provenance of old metals, which could be controlled by the government. A similar system already exists for art and antiquities. Fair to say though that that system is not functioning properly because enforcement of the appropriate article in the Dutch penal code is not considered a priority. A higher priority for enforcement of the Monuments and Historic Buildings Act could be reached by filing as much complaints about illegal excavation as possible. The Cultural Heritage Service should therefore report each and every illegal excavation consequently at the police station. Even if the reports do not lead to criminal investigations or even to prosecution, the build-up stacks of dismissed cases will sooner or later form an instrument to create enough pressure to put illegal excavation of underwater cultural heritage higher on the agendas of the organizations involved. At this point in time, the number of complaints about illegal excavation of underwater cultural heritage is low. The national database of reported crimes only contains two files dealing with illegal excavation – one on an excavated anchor and one on an excavated propeller. Appointing a designated public prosecutor for cultural heritage is another option. The advantage of such an official would be that one official within the Public Prosecution Office would become informed of all cases of illegal excavation, which would provide better insight in the scale of the matter. Moreover, enforcement partners could deal more effectively with illegal excavation if the cooperation between the parties fighting against illegal excavation of underwater cultural heritage would be less *ad hoc*: although the current way of working is considered cooperative, the Agency also considers it too informal. A more structural way of working together would create an efficient pooling of different kinds of expertise that is missing at the moment: the different partners involved in enforcement tend to reason from totally different backgrounds such as heritage management, guarding the seas and crime fighting. Moreover, a less structural cooperation disables a sufficient

exchange of complementing knowledge and experiences. Forming a permanent team consisting of professionals from different partners involved in enforcement of the Monuments and Historic Buildings Act and other related legislation would therefore be a step forward.

### **Interview III**

**N. Aten – Inspector, Cultural Heritage Inspectorate**

**12/08/2011**

*How much capacity does the Cultural Heritage Inspectorate have with regard to illegal excavations?*

The Cultural Heritage Inspectorate is divided into four divisions. The archaeological division consists of three archaeologists, one of which is a senior according to the Dutch Archaeology Quality Standard (*Kwaliteitsnorm Nederlandse Archeologie*). One of the three jobs for an archaeologist is on a temporarily basis. The function for the senior is not a full-time function. With five senior archaeologists, the predecessor of the Cultural Heritage Inspectorate, the National Inspectorate for Archaeology (*Rijksinspectie voor de Archeologie*) was far better equipped with manpower.

*What is the exact role of the Inspectorate?*

Since 2010, it seems the monitoring responsibility with regard to illegal excavation has been brought back to the Inspectorate, whereas the Cultural Heritage Agency has taken a step back. The latter is now involved in an advisory role. This has happened somewhat by chance.

*How did this change come about?*

The Inspectorate seems a suitable candidate for responsibility at the moment, for two reasons: first of all, the Inspectorate has well-established connections with other stakeholders regarding import and export of goods, for example the National Police Agency, the Coastguard and Customs (*Douane*). Unlike the contacts with the other two, the contacts with the latter are already formally organized. Furthermore, the Inspectorate

was already investigating the possibility of a public prosecutor within the Public Prosecution Office specialized in (fighting import and export of) cultural heritage – this is something the Inspectorate was already working on for a long time, unfortunately without much effect until now. The shift that brought the responsibility back to the Inspectorate was caused last year by the case of the salvage of cannons from an 18<sup>th</sup> century man-of-war from England.

*How do other parties get informed of an alleged offence?*

There is no uniform procedure to inform other stakeholders or to confer with the Cultural Heritage Agency. However, considering the desirability of taking further action is always part of the procedure, because enforcement is a process which may take a lot of time and may involve a lot of people. The Inspectorate will take the lead in further actions, but not after the Agency, that possesses expertise and knowledge of the cultural heritage and the policies involved, has been consulted about the need and possibilities to take action. Reports about illegal excavation are currently received by the Inspectorate or the Agency. The Inspectorate would opt for the Agency as the single point of contact to report to.

*In what ways is collecting evidence an issue?*

Although the Inspectorate is not endowed with the powers to perform criminal investigations, it is endowed with special powers to gather information. However, the information gathered by the Inspectorate is not evidence per se.

Gathering evidence may be problematic. The case of an anchor in a garden that turned out to be a historic anchor from the Oostvoornse Meer is illustrative. Footage on the internet showed that it had illegally been excavated, disturbing the soil: it was clearly partially in and on the soil, since it clearly came loose with a jerk when it was brought to the surface.

*Is using other laws an option here, as the National Police Agency proposes?*

The Ministry of Justice clearly has more attention for theft than for illegal excavation. Illegal excavation may be enforced by means of considering it a violation of the Monuments and Historic Buildings Act as well as a case of theft. However, ownership is an issue when theft is involved: without an owner, there is no case of theft either. But who do the objects belong to? It is only possible to determine the owner of underwater cultural heritage if the original location and the circumstances of the find are known. Except for ownership of ships of the Dutch East-India Company, this is often difficult to establish.

*Do you know of cases which were successfully enforced?*

I do not know of a case which led to sanctions for violation of the Monuments and Historic Buildings Act with regard to underwater cultural heritage. In general, it can be said that only few adjudications of the Monuments and Historic Buildings Act take place. Even if they do, the sanctions involved are limited: for example, fines in an order of magnitude of € 500. Such modest sanctions do not create any deterrent warning to possible offenders. Nobody is arrested for common crimes such as theft either. The most promising case for successful enforcement was not even prosecuted. The case was dismissed. Whether this was done by the police or by the public prosecutor I do not know. It takes time and capacity to continue putting pressure on the stakeholders involved.

*Based on the current articles on enforcement in the Monuments and Historic Buildings Act, is it correct that enforcements of the Act can also take place by means of administrative law?*

No. With regard to illegal excavation, the following applies: offences are still mentioned in the Act itself, sanctions are still taken provided by the Economic Offences Act (*Wet Economische Delicten*). In other words, offences of the Monuments and Historic Buildings Act are considered economic offences. They are considered crimes if an intention to violate its provisions was involved. Other provisions of the Act, for example

with regard to destruction of listed monuments, may be enforced through means of administrative law however.

*Can you tell something more about the idea to appoint a public prosecutor specialized in cultural heritage?*

An official endowed with monitoring is obliged to report everything he knows about criminal offences to the police. Since this is problematic, the Cultural Heritage Inspectorate has approached the Public Prosecution Office in the past to negotiate a solution: a construction in which not every case and every detail had to be shared to avoid time consuming procedures. Mrs. M. van Heese of the Inspectorate is working on establishing and maintaining contact with the Public Prosecution Office as well as the Council of Chief Commissioners (*Raad van Commissarissen*) of the police: after all, there is no point in creating a firmer basis for prosecution if a basis to handle illegal activities regarding cultural heritage is absent within the police forces. The major benefits of a public prosecutor specialized in cultural heritage would be threefold: first of all, someone would be stationed in the Office with sufficient knowledge about cultural heritage, all information on the topic would pass a single point of contact which would create overview, and action can be taken more effectively.

*Which types of underwater sites are endangered by illegal excavation?*

In practice, they always turn out to be sites of shipwrecks. I do not know of any case of illegal excavation concerning a former terrestrial site.

*What is known about the salvors?*

The names of the vessels and their owners are often well-known.

*What are the chances of prosecution of these salvors?*

Complaints can be filed against salvors but will be dismissed if the offenders are not caught in the act, even if the archaeological finds would be laying dripping on deck. The phrasing of the Monuments and Historic Buildings Act also makes it difficult to come to a conviction. While it is quite easy on land to show that somebody has been digging, disturbance of the soil is problematic at sea.

*Are any initiatives undertaken at the moment to counter salvage activities?*

Something topical at the moment is the initiative of divers of ‘*Stop de sloop*’, a protest action against illegal destruction of wrecks in the North Sea since these wrecks are considered the habitat of underwater flora and fauna. The protest action underlines that the wrecks involved are often war graves. This is also brought under the attention of other nations, which may cause some attention through diplomatic channels. The contiguous zone has been legally protected by the Monuments and Historic Buildings Act, something which is quite extraordinary if compared to the situation in other countries. This was done while an amendment was passed through parliament. Interestingly enough, the legal protection in the contiguous zone was only included in this amendment at the very last moment.

**Interview IV**

**A.D.C. Otte-Klomp – Senior policy officer, Cultural Heritage Agency**

**09/09/2011**

*What is the current legal status of the 2001 Convention on the Protection of the Underwater Cultural Heritage in the Netherlands?*

The convention was never signed by the Netherlands. The Ministry of Education, Culture and Science thinks the Convention is the only way to protect the underwater cultural heritage in international waters. However, the Ministry of Foreign Affairs fears the Convention will harm the carefully constructed balance between flag state and coastal state jurisdiction that has been created by the International Law of the Seas (UNCLOS). A governmental advisory committee on international law will look at the matter and will formulate an advice at the end of this year.

*Have any sanctions ever be imposed for violation of the prohibition on illegal excavation?*

No. But what is interesting is that this week a request for legal assistance was sent out by a foreign government about a cannon near Terschelling.

*What does the operation between stakeholders currently look like?*

Cooperation has increased. It seems things have changed since the case of *HMS Victory* in 2010. What is important is to establish some kind of division of tasks. At this moment, the Coastguard will inform the Maritime Information Centre about an alleged illegal excavation. It is also possible that Customs will inform the Maritime Information Centre. The Centre will then inform the Cultural Heritage Inspectorate. The Inspectorate is also involved in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Cultural

Heritage Agency is involved as an advisor of the Inspectorate. The Public Prosecution Office has promised the Inspectorate to pay more attention to illegal excavations. Hence, the infrastructure has improved and currently everybody is moving in the same direction. *Ad hoc* the stakeholders involved confer in interdepartmental consultations. This started as a consequence of the questions posed by parliament about a salvage attempt in 2006, during which a person was killed (parliamentary questions 2050619250, 15 September 2006). The Ministry of Defense is involved as well.

*Is it correct that the Cultural Heritage Inspectorate is responsible for the underwater cultural heritage since 2010?*

Yes it is.

*Is it correct that enforcement of Article 45 of the Monuments and Historic Buildings Act only takes place through means of the Economic Offences Act, and not by means of administrative law?*

Yes it is. The severity of sanctions depends on the intention to violate the provisions: willful or not.

