

North Sea Wrecks

WP5 Report on Management Guidelines and Policy Recommendations

12-06-2023



Author:

Welmoed van der Velde

Contents

| | |
|---|----|
| Introduction | 3 |
| Legal analysis and stakeholder analysis | 4 |
| Appropriate forum | 6 |
| OSPAR..... | 8 |
| Conclusion..... | 10 |
| Summary | 11 |

Introduction

According to the NSW project plan WP5 aims to define a common approach and transnational policy recommendations to address hazards (and opportunities) emerging from aircraft and ship wrecks and UXO (in wrecks) in the North Sea. The NSW project plan instructs that in order to develop North Sea Region Management Guidelines and Policy Recommendations, the project will offer suggestions to OSPAR to develop a framework proposal for application of management measures. and will prepare policy recommendations for aligning national and regional approaches.

This report contains the results of the legal research projects that were carried out at NHL Stenden University of Applied Sciences and Hanze Hogeschool. We are grateful for the valuable contributions made by law students Wilbert van der Velde, Ayla Bosma, Ninamarije van 't Noordende, Amarins Reidenbach and Ilse de Boer.

This report also describes the impact the NSW project has had on the work of the OSPAR EIHA Committee to come to a common approach and transnational policy recommendation with regard to risk assessment of munition in the OSPAR marine area.

Legal analysis and stakeholder analysis

WP5 started with an analysis of the current policy and legislation on wrecks and ammunition in the North Sea Region. An overview was made of the relevant international, EU and national legislation in this area. These data were used as input for the NSW risk assessment tool developed under WP4.

Wrecks

From this legal analysis it became clear that although the 2007 Nairobi International Convention on the Removal of Wrecks (WRC) contains valuable criteria to determine whether a wreck poses a hazard (Article 6 WRC), its relevance for war wrecks is limited due to its exclusion of war wrecks.

According to this convention “hazard” means any condition or threat that:

(a) poses a danger or impediment to navigation; or

(b) may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States.

“Related interests” of a coastal State include: (a) maritime coastal, port and estuarine activities, including fisheries activities, (b) tourist attractions and other economic interests of the area concerned; (c) the health of the coastal population and the wellbeing of the area concerned, including conservation of marine living resources and of wildlife; and (d) offshore and underwater infrastructure

According to the Nairobi Wreck Removal Convention the following criteria should be taken into account to determine whether a wreck poses a hazard:

(a) the type, size and construction of the wreck;

(b) depth of the water in the area;

(c) tidal range and currents in the area;

(d) particularly sensitive sea areas or a clearly defined area of the exclusive economic zone where special mandatory measures have been adopted pursuant to article 211, paragraph 6 UNCLOS;

(e) proximity of shipping routes or established traffic lanes;

(f) traffic density and frequency;

(g) type of traffic;

(h) nature and quantity of the wreck’s cargo, the amount and types of oil (such as bunker oil and lubricating oil) on board the wreck and, in particular, the damage likely to result should the cargo or oil be released into the marine environment;

(i) vulnerability of port facilities;

(j) prevailing meteorological and hydrographical conditions;

(k) submarine topography of the area;

- (l) height of the wreck above or below the surface of the water at lowest astronomical tide;*
- (m) acoustic and magnetic profiles of the wreck;*
- (n) proximity of offshore installations, pipelines, telecommunications cables and similar structures;*
and
- (o) any other circumstances that might necessitate the removal of the wreck.*

If it is determined that a wreck constitutes a hazard according to these criteria, the registered owner shall remove the wreck. If the owner fails to do so, the affected State may remove the wreck by the most practical and expeditious means available, consistent with considerations of safety and protection of the marine environment (Article 9 WRC).

Although the Nairobi Wreck Removal Convention offers helpful criteria to determine whether a wreck constitutes a hazard, it doesn't set legally binding rules in case of war wrecks. The Nairobi Wreck Removal Convention does not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise (Article 4-2 WRC).

If the Nairobi Convention would be applicable, the registered owner shall in principle be liable for the costs of locating, marking and removing the wreck. However, this obligation does not apply if the registered owner proves that the maritime casualty that caused the wreck resulted from an act of war, hostilities, civil war or insurrection.

A similar situation exists under the UNESCO Convention on the Protection of Underwater Cultural Heritage. This convention does not affect sovereign immunities and any State's rights with respect to its State vessels (such as warships) (Article 1-8 and 2-8 of the UNESCO Convention).

Munition

OSPAR created in 2010 a framework for reporting encounters with conventional and chemical munitions in the OSPAR Maritime Area (Recommendation 2010/20). This recommendation does not cover risk analysis nor remuneration measures.

Stakeholder analysis

After it was established that the current legal framework contains gaps in relation to war wrecks and munition, a stakeholder analysis was executed in 2019 and 2021 to see whether there is a need to create additional policy and legislation for war wrecks and munition in the North Sea Region.

Interviews were held with national authorities, salvage companies, environmental protection agencies and wreck divers. From these interviews it became clear that in relation to wrecks most stakeholders did not feel the need for additional legislation for wrecks. However, one stakeholder expressed the need to clarify the legal situation with regard to war graves in Dutch law. The UK Protection of Military Remains Act 1986 could, despite its limited applicability to UK ships and UK nationals, serve as an example. From the stakeholder analysis it also became clear that with regard to munition and polluting substances, additional policy and legislation may be necessary.

Appropriate forum

After the finding that additional policy and legislation for munition and polluting substances may be needed, WP5 made an analysis of the appropriate forum to address this issue.

As part of WP 5 Ayla Bosma of NHL Stenden created a conceptual model to give insight in the suitability of OSPAR and the European Union as an appropriate forum for this issue.

| Intended regulation | OSPAR | Suitable OSPAR | EUROPEAN UNION | Suitable EU |
|--|--|---|---|---|
| 1. Scope on territory | | | | |
| Which territory needs to be regulated? | The North Sea | Are the state(s) a member of the intended regulator? Yes → All states are member No → Not all states are member | Are the state(s) a member of the intended regulator? Yes → All states are member No → Not all states are member | Are the state(s) a member of the intended regulator? Yes → All states are member No → Not all states are member |
| Which states control the territory? | Belgium, Denmark, France, Germany, Netherlands, Norway and the United Kingdom | Also worth mentioning is that OSPAR divided her territory into specific regions, including the North Sea on which she's able to establish specific rules based on article 24 of the OSPAR-Treaty. | | |
| 2. Scope on | | | | |
| What needs to be regulated? | The protection of human well-being, maritime environment and the (blue) economy against the dangers that may arise because of war wrecks, munition and lost cargo, by determining when such dangers must be salvaged, monitored or can be left alone. To be protected: - Human well-being (including food-safety) - Maritime environment - Chemical weapons (including safety of navigation) To be protected against: - Ship and aircraft wrecks - Munition - Chemical weapons - Hazardous substances Including: - War wrecks - Seamen graves - Historical archaeological wrecks - Maritime environment (leaving a wreck be because of the maritime environment) | Does the intended regulator have the authority to regulate this? Does the intended regulator have the authority to regulate this? Yes → All authority is present Mostly → A significant part of the authority is present Mostly not → A small part of the authority is present No → No authority is present Is the intended regulator able to execute this authority without any obstructions? Yes → No obstructions are present Mostly → A few obstructions are present Mostly not → A significant number of obstructions are present No → All obstructions are present War wrecks and other possible problems aren't a problem, since OSPAR doesn't specifically prohibit creating rules on war wrecks. The same goes for historical/ archaeological wrecks and the maritime environment. However, seamen graves might be a problem since they state that they do not see seamen graves as waste or other matters (which is seen as pollution of the seabed). In any case, OSPAR-regulation is only enforceable when contracting parties agreed. It's not foreseeable that a state commits to OSPAR-regulation only to not respect it because of possible interfering international Law. | Does the intended regulator have the authority to regulate this? Does the intended regulator have the authority to regulate this? Yes → All authority is present Mostly → A significant part of the authority is present Mostly not → A small part of the authority is present No → No authority is present Is the intended regulator able to execute this authority without any obstructions? Yes → No obstructions are present Mostly → A few obstructions are present Mostly not → A significant number of obstructions are present No → All obstructions are present | Mostly, the EU is able to regulate if they have the competence. The EU does have a shared competence regarding to the environment (which agrees with the goals set out). Again, economy isn't a part of this particular competence, but I can imagine that this won't be a problem since transboundary economy is an important part of EU. Mostly not, there are no clear indications that the EU isn't able to regulate war wrecks, historical/ archaeological wrecks or maritime environment, since the Treaties don't clearly state what the role of international law within European Law is. In principle this would mean, that everything is possible. However, it's the question if (for example) the Council would agree with such regulation. Especially since the European Court of Justice mentioned that immunity of heads of state is a rule that applies in EU law. |
| 3. Extent of | | | | |
| Who needs to be bound by the intended regulation? | Flag states and coastal states, civilians need not necessarily to be bound | Does the intended regulator have the ability to bind these subjects? Yes → All subjects can be bound Mostly → A significant number of subjects can be bound Mostly not → A few subjects can be bound No → No subjects can be bound | Does the intended regulator have the ability to bind these subjects? Yes → All subjects can be bound Mostly → A significant number of subjects can be bound Mostly not → A few subjects can be bound No → No subjects can be bound | Does the intended regulator have the ability to bind these subjects? Yes → All subjects can be bound Mostly → A significant number of subjects can be bound Mostly not → A few subjects can be bound No → No subjects can be bound |
| Is the necessary degree of commitment high or low? | 1. Specific, written. Realisation that a high degree of commitment might not be possible. 2. Difference between current behaviour and 3. Norms and values: consensus on the issue, but not on the responsibility. Norms and values depend on time and place and 4. expanding/ restrictive: Restrictive, states are deprived of their right to not salvage a wreck or dangerous coming from a wreckage. 5. Economic benefits: Economic benefits aren't clear, while economical disadvantages are clear. 6. Types of behaviour: Rational Total: High commitment necessary | Does the actual level of binding of the intended regulator meet the desired level of binding? Yes → Actual binding is equal to desired binding Mostly → Actual binding is nearly equal to desired binding Mostly not → Actual binding is nearly unequal to desired binding No → Actual binding is unequal to desired binding | Does the actual level of binding of the intended regulator meet the desired level of binding? Yes → Actual binding is equal to desired binding Mostly → Actual binding is nearly equal to desired binding Mostly not → Actual binding is nearly unequal to desired binding No → Actual binding is unequal to desired binding | Does the actual level of binding of the intended regulator meet the desired level of binding? Yes → Actual binding is equal to desired binding Mostly → Actual binding is nearly equal to desired binding Mostly not → Actual binding is nearly unequal to desired binding No → Actual binding is unequal to desired binding |
| 4. Establishment of | | | | |
| Is a high degree of control necessary? | 1. Maintaining sovereignty → Yes → High degree of control Yes, it's a sensitive subject especially for flag states. 2. Necessary degree of commitment high → Yes → High degree of commitment Yes, a high degree of commitment is necessary and therefore a high degree of control. | Does the actual level of control of the intended regulator meet the desired level of control? Yes → Actual control is equal to desired control Mostly → Actual control is nearly equal to desired control Mostly not → Actual control is nearly unequal to desired control No → Actual control is unequal to desired control | Does the actual level of control of the intended regulator meet the desired level of control? Yes → Actual control is equal to desired control Mostly → Actual control is nearly equal to desired control Mostly not → Actual control is nearly unequal to desired control No → Actual control is unequal to desired control | Does the actual level of control of the intended regulator meet the desired level of control? Yes → Actual control is equal to desired control Mostly → Actual control is nearly equal to desired control Mostly not → Actual control is nearly unequal to desired control No → Actual control is unequal to desired control |
| Does it re-regulating what has stand to come? | No, although now is a good time to move things up since everybody is looking in the same direction, there is no real urgency in establishing the regulation rapidly. | Does the actual pace of establishment of regulation at the intended regulator meet the desired pace of establishment? Yes → Actual pace is equal to desired pace Mostly → Actual pace is nearly equal to desired pace Mostly not → Actual pace is nearly unequal to desired pace No → Actual pace is unequal to desired pace | Does the actual pace of establishment of regulation at the intended regulator meet the desired pace of establishment? Yes → Actual pace is equal to desired pace Mostly → Actual pace is nearly equal to desired pace Mostly not → Actual pace is nearly unequal to desired pace No → Actual pace is unequal to desired pace | Does the actual pace of establishment of regulation at the intended regulator meet the desired pace of establishment? Yes → Actual pace is equal to desired pace Mostly → Actual pace is nearly equal to desired pace Mostly not → Actual pace is nearly unequal to desired pace No → Actual pace is unequal to desired pace |
| TOTAL | | | | |

Figure 1 Conceptual model created by Ayla Bosma, NHL Stenden.

Based on this model it was decided to investigate further, as part of WP5, whether OSPAR would be willing to discuss the issue of risks related to munition on the seabed.

After consultation with the OSPAR Secretariat in Spring 2020, members of the NSW project were kindly invited to give a presentation of the NSW project during OSPAR's EIHA Committee meeting. In October 2020. After this presentation and discussing the matter the EIHA Committee agreed:

- a. that wrecks was a suitable topic for the Committee, especially in light of wrecks containing ammunition or other hazardous substances;
- b. to invite Belgium, supported by France, KIMO and the North Sea Wrecks project partners to consider how the outputs from the project could be taken up by OSPAR, taking account of existing OSPAR measures and data, and identify potential tasks for inclusion in the draft NEAES implementation plan and to give an update of its findings at the EIHA 2021 meeting

The NSW project partners worked closely together with the Belgian delegation to prepare a proposal for the EIHA 2021 meeting. In March 2021 the Belgian delegation presented a document on a review of Recommendation 2010/20 on encounters with munitions and an overview of issues and priorities for the management of dumped munitions, including follow up to the Interreg North Seas Wrecks project. The proposed amended Recommendation would extend its scope to include the identification of wrecks containing, or possibly containing, conventional and chemical munitions, and promote discussion on risk assessment. The EIHA Committee decided in March 2021 that further input and amendments to the draft were needed and referred the topic to EIHA 2022.

The NSW project partners continued discussing the matter with several EIHA delegations. In March 2022 the Belgian delegation presented an update of Recommendation 2010/20 to the EIHA Committee. Concerns were raised by Committee members in relation to public accessibility to information on the location of wrecks. The EIHA Committee agreed to invite Belgium, the Netherlands, Germany and Norway to consider whether they could jointly co-lead an action to: address the comments made and submit updated advice to EIHA 2023.

In March 2023 the EIHA Committee discussed an amended draft revision presented by the Belgian delegation. EIHA agreed to approve the draft revision of Recommendation 2010/20 and forward it to OSPAR 2023 via jurist-linguists 2023 for adoption.

The draft revision of OSPAR Recommendation 2010/20 includes reference to the NSW project and states that Contracting Parties should promote information sharing on munitions, especially on environmental issues and risk assessment with the aim of developing a shared approach.

“BEING AWARE of research projects, e.g. DISARM and Interreg North Sea Wrecks in the OSPAR-region and DAIMON in other regions like the Baltic, which aim to provide a framework for the risk assessment of conventional and chemical munition in dumping sites and ship wrecks,”

(...)

3.4 Within the framework of the OSPAR Commission, Contracting Parties should promote information sharing on munitions in general, especially on environmental issues, and also on risk assessment of

conventional and chemical munitions within the OSPAR maritime area with the aim of developing a shared approach.

(...)

3.5 Contracting Parties which are Member States of the European Union should ensure that systems operated for the purpose of this Recommendation are consistent with the provisions of the Marine Strategy Framework Directive, the Water Framework Directive and related legislation

(...)”

Conclusion

WP5 of the NSW project has contributed to the realization of a revised OSPAR Recommendation on an OSPAR framework for reporting encounters with conventional and chemical munition in the OSPAR Maritime Area. The revised OSPAR Recommendation recognizes the need to share information on munitions, especially on environmental issues and risk assessment with the aim of developing a shared approach.

By doing so, WP5 has contributed to the development of a common approach and transnational policy recommendations to address hazards emerging from war wrecks and munition in the North Sea as instructed in the NSW project plan.

Summary

According to the NSW project plan WP5 aims to define a common approach and transnational policy recommendations to address hazards (and opportunities) emerging from aircraft and ship wrecks and UXO (in wrecks) in the North Sea. In order to develop North Sea Region Management Guidelines and Policy Recommendations, the project promised to offer suggestions to OSPAR to develop a framework proposal for application of management measures and prepare policy recommendations for aligning national and regional approaches.

WP5 of the NSW project has contributed to the revision of OSPAR Recommendation 2010/20 on reporting encounters with conventional and chemical munition in 2023. The revised OSPAR Recommendation recognizes the need to share information on munitions, especially on environmental issues and risk assessment with the aim of developing a shared approach.

WP5 has thus contributed to the development of a common approach and transnational policy recommendations to address hazards emerging from war wrecks and UXO (in wrecks) in the North Sea as instructed in the NSW project plan.