

On the International Legal Protection of Underwater Cultural Heritage

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Abstract: Based on the fact that in recent years more and more underwater cultural heritage is disturbed and damaged by unauthorized activities directed towards it, protecting this kind of heritage has become ever more important and urgent, however underwater cultural heritage has not received systematic protection under international law until the 21st century. Referring to international instruments concerning cultural property, the law of the sea, and salvage law, this article argues that although efforts to protect underwater cultural heritage have begun, such protection has been accompanied by various defects and issues. The adoption of the 2001 Convention on the Protection of Underwater Cultural Heritage signifies the establishment of a relatively comprehensive legal framework in this regard. This convention created some significant regimes for the protection of underwater cultural heritage, including preservation *in situ*, strict restrictions on the application of salvage law, and rules relating to the jurisdiction over underwater cultural heritage within the exclusive economic zone and on the continental shelf. Under current international law, however, conflicts regarding the protection of underwater cultural heritage may still exist, especially concerning issues related to jurisdiction and ownership. This article recommends pathways for State action, *inter alia*, to proactively implement the 2001 Convention and to encourage further negotiations and cooperative agreements concerning relevant issues.

Key Words: International legal protection; Underwater cultural heritage; Convention on the Protection of Underwater Cultural Heritage

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I. Introduction

A. *The Value of Underwater Cultural Heritage*

The world has been undergoing a process of modernization, and more and more countries have begun to realize the significance of cultural heritage, either tangible or intangible. We should bear in mind, however, that underwater cultural heritage (hereinafter referred to as “UCH”) constitutes an important part of such heritage. Underwater cultural objects also have historical or archaeological value since they may assist us in understanding the past, or may even become the symbol of a nation State. For instance, the *RMS Titanic*, a ship whose wreckage was found at sea, is a precious historical object since it is an accurate reflection of conditions at the time it sank.

Moreover, cultural rights are closely linked to cultural heritage, including UCH.¹ The United Nations Universal Declaration of Human Rights entitles every person to “cultural rights.”² Cultural rights are typically individual rights, however it is also recognized that the citizens of a State enjoy this kind of human rights as a group.³ Cultural heritage could be vital to the preservation of a people’s identity, and therefore can be seen as an important element of human rights.⁴

Noticeably, undisturbed UCH is more likely than inland cultural heritage to maintain complete and original historical information. Having been embedded in the seabed for many years, sunken ships and other cultural objects often go undisturbed and are able to reach a stable condition in the underwater environment.⁵ In contrast, inland heritage is more likely to quickly degrade or be physically damaged even without human interference.

B. *The Protection of UCH: Severe Challenges*

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- 1 Janet Blake, On Defining the Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 49, Issue 1, 2000, pp. 61~85.
 - 2 United Nations Universal Declaration of Human Rights, Article 22.
 - 3 Peter Jones, Human Rights, Group Rights, and Peoples’ Rights, *Human Rights Quarterly*, Vol. 21, No. 1, 1999, p. 90.
 - 4 John Alan Cohan, An Examination of Archaeological Ethics and the Repatriation Movement Respecting Cultural Property (Part One), *Environs: Environmental Law and Policy Journal*, Vol. 27, No. 2, 2004, pp. 389~390.
 - 5 UNESCO, Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage, 1995, p. 6.

It is estimated that three million shipwrecks and sunken cities as well as thousands of prehistoric sites are lying on the seabed around the world.⁶ Nevertheless, UCH is occasionally understood as goods with a purely economic value. For example, in 1999, 350,000 Chinese ceramic artifacts were recovered from the sea and put up for auction in Germany, ignoring the historical and archaeological value of these pieces.⁷

Recent technological developments have facilitated the rescue of ancient shipwrecks. In order to locate and recover UCH, technology designed for deep sea operations is crucial. At present, it is possible to reach depths of over 300 meters.⁸ Within this context, as pointed out by a United Nations Educational, Scientific and Cultural Organization (UNESCO) study, UCH is threatened by private looting, unscientific excavation or recovery.⁹ Sanctions against such behaviors, however, have proven to be ineffective. Given that UCH affects the interests of diverse stakeholders, including coastal States, the flag States of sunken ships, other States in connection with UCH and companies recovering UCH, it ought to be more strictly controlled and protected.

In comparison with the legal regimes which protect inland cultural heritage, the legal regime which protects UCH is inadequate. The majority of UCH is located in areas beyond the sovereign territories of States, and therefore we cannot solely rely on domestic statutes to regulate and control activities directed towards it. With this in mind, it will be necessary to establish and develop a systematic international legal regime which can protect UCH, such as the 2001 Convention on the Protection of Underwater Cultural Heritage (CPUCH).

II. International Legal Regimes for the Protection of UCH before the CPUCH: Defects and Development

Efforts to establish international legal regimes to protect UCH began long

6 Events at UNESCO Headquarters to Improve the Protection of Underwater Cultural Heritage, at <http://www.unesco.org/new/en/unesco/resources/heritage-under-the-waves/>, 6 April 2014.

7 Lin Wenrong, *The Shipwreck Keeps Germans Busy*, at <http://www.people.com.cn/GB/paper40/2027/324471.html>, 6 April 2014. (in Chinese)

8 *A Journey to 308 Meters: The Deepest Open Circuit Scuba Dive Ever*, at <http://www.tech-dive-academy.com/journey.html>, 6 April 2014.

9 UNESCO, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, 1995, p. 6.

before the conclusion of the CPUCH. Undoubtedly, the regimes established at that time had various limitations. Even so, new developments can be identified among these regimes. The following section of this paper will review and comparatively analyze existing legal regimes from the perspective of treaty and customary laws.

A. International Instruments concerning Cultural Property or Heritage

UNESCO has drafted three legal instruments for the protection of cultural property or cultural heritage, namely the Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970), and the Convention concerning the Protection of the World Cultural and Natural Heritage (1972). Although these instruments protect cultural heritage, each fails to explicitly mention UCH. Even if they could be applied to the protection of UCH, it appears that UCH was not taken into consideration by the drafters at that time. In another UNESCO instrument, the UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, UCH was expressly not a concern.¹⁰

The term UCH was finally raised by the International Council on Monuments and Sites (ICOMOS) in the Charter on the Protection and Management of Underwater Cultural Heritage in 1996. Notwithstanding some advanced, yet realizable “fundamental principles” within the Charter, this instrument is without legal force and merely “intended to encourage” the protection of UCH.¹¹ In brief, international heritage law has not yet established a legal framework for the protection of UCH.

B. International Law of the Sea and the Protection of UCH

1. The 1958 Geneva Conventions

The Geneva Conventions have established many legal mechanisms, including

10 UNESCO Recommendation on International Principles Applicable to Archaeological Excavations, Article 1.

11 Charter on the Protection and Management of Underwater Cultural Heritage, Introduction & Article 1.

those for the contiguous zone and continental shelf.¹² These Conventions primarily focus on the governance of “natural resources”, and no reference is made to the protection of UCH. Could “natural resources” be interpreted so as to include UCH? The International Law Commission, in 1956, clearly denied this view, stating that the rights of coastal States did not cover “objects such as wrecked ships and their cargos.”¹³

In this sense, UCH located beyond the territorial sea of States may not be governed by any legal regime, either international or domestic. Some have even suggested that UCH was governed by the “freedom of the high seas” and therefore anyone was allowed to excavate and recover pieces of UCH.¹⁴ Yet it could still be assumed that the disturbance and destruction to UCH would be as severe as today even without the limitation of underwater technologies.

2. The United Nations Convention on the Law of the Sea

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) is an essential and comprehensive international legal instrument governing marine affairs, including the protection of UCH. On the whole, UNCLOS established rules aimed at the protection of UCH. First, it established two basic duties which are beneficial to UCH and binding upon States, namely, 1) to protect UCH found at sea, and 2) to cooperate for this purpose.¹⁵ Second, coastal States are empowered in the sense that they are able to determine whether UCH is allowed to be recovered from the seabed within the areas of their contiguous zone.¹⁶ Finally, UCH found in the Area shall generally be protected for the “benefit of mankind as a whole.”¹⁷

However, two provisions, Articles 303 and 149, are not enough to establish a

12 1958 Geneva Conventions include the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on Fishing and Conservation of the Living Resources of the High Seas and the Convention on the Continental Shelf.

13 The United Nations, *Yearbook of the International Law Commission*, 1956, p. 298.

14 Tullio Scovazzi, *The Entry into Force of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage*, *Aegean Review of the Law of the Sea and Maritime Law*, Vol. 1, Issue 1, 2010, pp. 23~24.

15 UNCLOS, Article 303(1), “States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.”

16 UNCLOS, Article 303(2), “In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.”

17 UNCLOS, Article 149, “All 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, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.”

systematic legal regime for the protection of UCH. Indeed, the Convention does not use the term “Underwater Cultural Heritage.” Instead, it uses “objects of an archaeological and historical nature”,¹⁸ yet it fails to clarify what constitutes such objects. Furthermore, the duties of protecting UCH and cooperation for this purpose are described within a short sentence in Article 303(1). The two duties seem to be too general and are not adequately elaborated upon. This may significantly decrease the ability of States to protect UCH. Furthermore, no concrete standards or requirements have been made concerning the approaches to preserving UCH found in the Area “for the benefit of mankind as a whole.” Article 149 concerning UCH in the Area makes particular reference to the “preferential rights” of three types of States, namely, the State or country of origin, the State of cultural origin, and the State of historical and archaeological origin. Nonetheless, UNCLOS does not specify the content of such preferential rights. Furthermore, these three types of States may overlap, and it may be difficult to distinguish between them.¹⁹ Thus, this provision fails to clarify how to settle any conflicts that may arise if those kinds of States exist at the same time.

Above all, a vital gap exists, since neither of these two provisions address the rights of coastal States concerning UCH in the areas beyond 24 nautical miles, including the continental shelf, exclusive economic zone and the Area. As a consequence, it remains controversial which State shall have the jurisdiction to regulate and control UCH within those areas.

The provisions concerning UCH within UNCLOS have continued to receive criticism for their negative effects on UCH. For instance, Article 303(3) stipulates that any aspect of this article will not affect the law of salvage.²⁰ The law of salvage, however, as widely acknowledged, encourages the removal of UCH from the seabed for commercial purposes, thereby promoting its damage and destruction.²¹ Without proper guidance from professional archaeologists, vital information that can be discovered through the recovery of UCH could also be destroyed by the

18 UNCLOS, Articles 303 and 149.

19 Francesco Francioni, Cultural Heritage, *Max Planck Encyclopedia of Public International Law*, 2013, p. 7.

20 UNCLOS, Article 303(3), “Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges”.

21 Craig Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, pp. 309~349.

salvers.²² In this sense, it seems that UCH would not be well protected if the law of salvage could be applied to UCH without any restrictions, since salvage law is contrary to the basic purpose of protection. Fortunately, Article 303(4) allows for future international agreements in regard to the protection of UCH so as to supplement the incomplete legal regime under UNCLOS.²³

C. International Salvage Law and the Protection of UCH

The 1989 International Convention on Salvage (ICS) established the prevailing international salvage regime.²⁴ Compared with UNCLOS, this treaty took a step forward regarding the protection of UCH even though its legal regime is not directly related to UCH.

Article 30(1) of the ICS provides that States parties can reserve the right not to apply the provisions of the Convention “when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed.”²⁵ Some scholars have pointed out that by making reservations to Article 30(1)(d), States can exclude the “maritime cultural property” located at the seabed from the scope of salvage law.²⁶ In other words, the ICS or salvage law cannot be applied to UCH when reservations exist. Consequently, the ICS contributes to the protection of UCH since it allows the exclusion of salvage law at this point.

Furthermore, “salvage” is defined as “any act or activity undertaken to assist a vessel or any other property in danger in any waters.”²⁷ Thus, marine danger is a vital precondition for applying salvage law to the marine property concerned.²⁸ Some held that the ICS does not imply that the shipwreck is necessarily in peril, the

22 Craig Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, pp. 309~349.

23 UNCLOS, Article 303(4), “this article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature”.

24 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, London: Cambridge University Press, 2012, p. 173.

25 ICS, Article 30(1)(d).

26 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, London: Cambridge University Press, 2012, p. 179.

27 ICS, Article 1.

28 Craig Forrest, Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?, *Journal of Maritime Law & Commerce*, Vol. 34, 2003, pp. 309~349.

“nature and degree” of which shall be properly proven.²⁹ In other words, even when no reservations are made, salvage law or the ICS cannot be automatically applied to UCH. So shall UCH be considered to be “in danger”? Even if some American courts have recognized the possibility that UCH is in danger,³⁰ many scholars do not believe so.³¹ At any rate, this debate indicates that it is no longer likely that salvage law could be universally applied to UCH without any limitation.

D. Customary International Law

Various customary international laws may also concern UCH. For instance, coastal States have exclusive jurisdiction over UCH found within their territorial waters, as reflected in UNCLOS. Nevertheless, it remains controversial whether coastal States have the right, within customary international law, to extend their jurisdiction over UCH found within their EEZ or on their continental shelf. As mentioned, before the CPUCH was adopted, international law, including UNCLOS, did not address the rights and jurisdiction of coastal States over UCH found in sea areas beyond 24-nautical miles from their baselines. Consequently, a number of States extended their jurisdiction beyond their territorial sea by enacting domestic legislation, in order to prevent looting and unscientific recovery of UCH.³²

Table 1 List of States That Have Extended Their Jurisdiction

State	Legislation
Denmark	Protection of Historic Shipwrecks Act, 1963
Australia	Section 7, Historic Shipwrecks Act, 1976 (Amended)
China	Art. 2, Underwater Cultural Relics Regulation, 1989
Ireland	Section 1, National Monuments (Amendment) Act, 1994; Section 2, Merchant Shipping (Salvage and Wreck) Act, 1993

29 Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage: Before and after the 2001 UNESCO Convention*, Leiden/Boston: Martinus Nijhoff Publishers, 2003.

30 See the case of *Cobb Coin Co. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 549 F. Supp. 540 (S.D. Fla. 1982).

31 Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002.

32 Etienne Clément, Current Developments at UNESCO concerning the Protection of the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, Issue 4, 1996, pp. 313~316.

Whether such jurisdiction asserted by States has become customary international law is a controversial issue within the academic community. Actually, some prefer a negative answer.³³ They argue that, notwithstanding the substantial amount of State practice available, there seems to be no *opinio juris* to support that this is in fact customary.

III. The Legal Framework under the CPUCH for the Protection of UCH

The CPUCH is a vital international treaty that constructs a relatively comprehensive legal framework for the protection of UCH. The following section will review new developments within the international legal regime set out by this Convention and attempt to explore the implications of such developments for UCH.

A. Major Creative Regimes

Compared with UNCLOS, the CPUCH has set out many more specific rules for the protection of UCH. New developments could be identified in the CPUCH since it has established some significant new regimes.

1. Preservation *in situ* of UCH

One significant principle under the CPUCH is that preservation *in situ* shall be the first option for the protection of UCH.³⁴ This has been recognized by many experts as the best way to protect UCH.³⁵ This principle implicitly acknowledges that the recovery of UCH often negatively impacts it, thus departing from the purpose of protection. Patrick O'Keefe believed that UCH was able to reach a stable condition while within the underwater environment and therefore any interference to UCH would disturb this state of equilibrium.³⁶ On the other hand,

33 For instance, Rau disapproved of it. See Markus Rau, The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea, *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, p. 402.

34 CPUCH, Article 2(5), "The preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage."

35 Roberta Garabello, Salvage, *Max Planck Encyclopedia of Public International Law*, 2007, p. 4.

36 Patrick J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 49.

when UCH is recovered from the seabed, its degradation may accelerate, especially for those metal objects whose outer layers will quickly erode.³⁷

There are, however, exceptions for preservation *in situ*. Activities directed at UCH may be authorized only if they could “make a significant contribution to protection or knowledge or enhancement of UCH.”³⁸ This creates a rigorous limitation upon other mechanisms and we can conclude that the Convention requires the best preservation option that could provide optimal benefits for UCH.

2. Strict Restrictions on the Application of Salvage Law

Even if preservation *in situ* is not considered under some circumstances, the CPUCH has set out an alternative regime to protect UCH. Contrary to Article 303(3) of UNCLOS, the CPUCH expressly rejects the application of salvage law to the activities directed at UCH in most circumstances. Article 303(3) of UNCLOS should not be interpreted to prevent later conventions from modifying or excluding salvage law.³⁹ Article 4 of the CPUCH stipulates that salvage law could be applied to UCH only if three conditions are satisfied.⁴⁰ The use of the wording “in full conformity” and “maximum protection” indicates that these are strict conditions.

3. Specified Operation Guidance for Activities Directed at UCH

Even if activities directed at UCH are authorized, the CPUCH has established concrete requirements for such activities in many aspects. Rules concerning Activities Directed at Underwater Cultural Heritage within the Annex of the CPUCH are said to be a vital achievement.⁴¹ When authorizing such activities, the Rules should be observed.⁴² The Rules restate that the principle of preservation *in situ* is the first option before any further activities directed at UCH.⁴³ More importantly, these Rules elaborate upon a series of guiding requirements for

37 Etienne Clément, Current Developments at UNESCO concerning the Protection of the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, Issue 4, 1996, pp. 313~316.

38 CPUCH, Annex, Rule 1.

39 Patrick J. O’Keefe, Protecting the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, No. 4, 1996, p. 303.

40 CPUCH, Article 4, “Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorized by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.”

41 Valentina Sara Vadi, Investing in Culture: Underwater Cultural Heritage and International Law, *Vanderbilt Journal of Transnational Law*, Vol. 42, No. 3, 2009, pp. 865~866.

42 Patrick J. O’Keefe, Protecting the Underwater Cultural Heritage, *Marine Policy*, Vol. 20, No. 4, 1996.

43 CPUCH, Annex, Rule 1.

such activities, including the details of project design prior to such activities,⁴⁴ preliminary assessment,⁴⁵ as well as due documentation and reporting during these activities.⁴⁶

4. Jurisdictional Regimes Covering All Sea Zones

The CPOCH constructs a comprehensive legal regime concerning jurisdiction and regulation of UCH in the territorial waters, contiguous zone, exclusive economic zone and the Area as well as UCH on the continental shelf.⁴⁷ UCH located in territorial waters is under the exclusive jurisdiction of coastal States, however they are required to comply with all Rules contained in the Annex when authorizing and conducting activities directed at UCH. The regime concerning UCH within the contiguous zone is similar to Article 303(2) of UNCLOS, however parties to the CPOCH shall also require that the Rules in the Annex be applied.

The CPOCH entitles coastal States, under certain circumstances, to authorize or prohibit activities conducted towards UCH located within the EEZ or on the continental shelf.⁴⁸ Meanwhile, a coastal State shall request its nationals, or the master of the vessel flying its flag, to report the discovery of or intended activities to UCH within those areas, either to it or to all other parties.⁴⁹ Coastal States are required to consult with other parties who have declared an interest in being consulted on how to effectively protect UCH. Ultimately, protection measures consented by all consulting States shall be taken and certain urgent measures are allowable.

Similar regimes exist for UCH in the Area, which could be generalized as three steps – “report, consultation and protection or urgent measures.” The uniqueness of this regime is that reporting must be made to all States parties.

5. Particular Protection Regimes regarding State Vessels or Aircrafts

UNCLOS has no specific rules about whether sunken State vessels or aircrafts could be considered under the immunity of State property. The CPOCH treats those

44 CPOCH, Annex, Rule 10.

45 CPOCH, Annex, Rules 14 & 15.

46 CPOCH, Annex, Rules 26, 27, 30 and 31.

47 CPOCH, Articles 7~11.

48 CPOCH, Article 10(2), “A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.”

49 CPOCH, Article 9(1).

State vessels or aircrafts differently from other kinds of UCH. If the State vessels or aircrafts are located within territorial waters, coastal States shall notify the flag State parties.⁵⁰ When located in EEZ or on continental shelf, those vessels or aircrafts are immune from activities by coastal States, subject to certain exceptions, including the existing conditions under Article 10(2).⁵¹ State vessels or aircrafts located within the Area are only subject to the actions of flag States, without exception.⁵²

B. Positive Effects of CPUCH

1. An Essential Step in Order to Fill the Gap of International Law

Compared with other international legal instruments, the CPUCH must be the most comprehensive and specific convention that focuses on the protection of UCH. Prior to its adoption, neither the treaties concerning cultural property or heritage, nor the international law of the sea have set out such comprehensive legal regimes related to UCH. In this light, this Convention makes a significant contribution to the development of international law by bridging a gap in the system of UCH protection worldwide.

2. Eliminating Unregulated Looting and Damage of UCH

An overall review of the new regimes created by the CPUCH reveals that, in theory, it may effectively restrain those human activities which are harmful to UCH. The priority principle of preservation *in situ* denies that UCH could be recovered or exploited without adequately considering its cultural value. This strict limitation on the application of salvage law is another method for the protection of UCH. Moreover, activities that are directed at UCH would be subject to Annex Rules. Under the CPUCH, all types of sea areas have respective rules for regulating the plundering and destruction of UCH. If those new regimes could be successfully implemented, theoretically, UCH may acquire further protection.

3. Raising the Awareness of States to Protect UCH

The CPUCH fully demonstrates an emphasis on the protection of UCH. Even non-States parties to the CPUCH may begin to recognize the particular status of UCH, which constitutes a large part of the cultural heritage of humanity. This may

50 CPUCH, Article 7(3).

51 CPUCH, Article 10(7).

52 CPUCH, Article 12(7).

provide additional States with motivation to participate in the protection UCH.

Furthermore, the CPUCH exists as a minimum requirement for the work of protection.⁵³ As one of the basic principles, the parties are required to take measures to protect UCH in accordance with their capabilities.⁵⁴ As indicated in Article 6, the CPUCH encourages parties to conclude agreements that will ensure better protection of UCH.⁵⁵ In this way, the awareness of States to protect UCH can be promoted.

C. Some Doubtful Issues Arising from the CPUCH

1. The Definition of UCH

The CPUCH defines UCH as all traces of human existence that must be under water for at least 100 years, with concrete examples listed.⁵⁶ This definition is rather specific when compared with “objects of an archaeological and historical nature”, the definition found within UNCLOS. Although it is assumed that objects older than 100 years of age are more likely to have archaeological or historical value,⁵⁷ it is doubtful whether these time periods are the best standard to define UCH. Some objects that could not be called UCH under the CPUCH may be of significant cultural value. For instance, the shipwreck of the *Titanic*, which sank in 1912 and was found in 1985,⁵⁸ would not be regarded as UCH under the CPUCH until 2012. At that point it would have remained on the seabed for up to 100 years. Although States may rely on domestic law or other treaties to protect those artifacts not labeled as UCH, the definition of UCH within the CPUCH is, at times,

53 Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 59.

54 CPUCH, Article 2(4), “States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.”

55 CPUCH, Article 6(1), “States Parties are encouraged to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage. All such agreements shall be in full conformity with the provisions of this Convention and shall not dilute its universal character. States may, in such agreements, adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention.”

56 CPUCH, Article 1(1).

57 Craig Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, No. 3, 2002, pp. 524–525.

58 *Titanic Discovered*, 1st September 1985, at <http://www.titanicandco.com/discovery.html>, 6 April 2014.

unreasonable.

2. Contradictory Provisions

Article 3 of the CPUCH shows that the Convention intends to be consistent with UNCLOS.⁵⁹ The provision of Article 10(2) reflects this idea. As a new legal instrument specially aimed at protecting UCH, however, the CPUCH may need to have more independent regimes in order to produce the maximum protection of UCH. Indeed, it is hard to ensure full conformity with UNCLOS. For example, Article 4 of the CPUCH is entirely contradictory to the relevant provision in UNCLOS. However, in the author's opinion, the former represents a better approach for the protection of UCH. As a result, the CPUCH itself has problems pertaining to the uniformity of the Convention.

3. Article 10(2) of the CPUCH

Article 10(2) of the CPUCH grants coastal States the jurisdiction over UCH in their EEZ or on their continental shelf, by stipulating that they have the "right" to authorize or prohibit activities directed at UCH in these areas.⁶⁰ However, it is believed that Article 10(2) does not create a direct and new jurisdiction for coastal States that is contrary to the old regime created in UNCLOS.⁶¹ Such a "right" could be exercised by a State party only in order to prevent "interference with its sovereign rights or jurisdiction provided by international law including the UNCLOS."⁶²

What are the "sovereign rights or jurisdiction provided by international law including the UNCLOS"? As many scholars have interpreted, they merely mean the sovereign rights and jurisdiction that coastal States can enjoy over the natural resources within their EEZ or on their continental shelf under UNCLOS.⁶³ These rights are entirely encompassed within the provisions of UNCLOS, and the "jurisdiction" over UCH remains subject to the jurisdiction of coastal States over their natural resources.

59 CPUCH, Article 3, "Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea."

60 CPUCH, Article 10(2).

61 Patrick J. O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 90.

62 CPUCH, Article 10(2).

63 Robert Blumberg, International Protection of Underwater Cultural Heritage, in *Oceans, Proceedings of MTS/IEEE*, 2005, p. 5.

This kind of regime designed under Article 10(2), however, is problematic. First, not every piece of UCH has a significant connection with natural resources and theoretically coastal States, under many circumstances, would be unable to protect UCH by invoking this article. Second, even if some activities directed at UCH may influence natural resources and prohibiting such activities may be able to “prevent the interference”, it is still confusing why “authorizing” these activities could have the same effect. In this connection, it is unclear whether this article encourages coastal States to exercise their “jurisdiction” without prior study.

IV. Potential Conflicts concerning UCH under Existing Legal Framework

A. Conflicts regarding the Application of Salvage Law

In regard to the issue of whether salvage law shall or could be applied to UCH, the three international instruments, namely, UNCLOS, ICS and CPOCH, do not have identical regimes. A State party to the ICS, which makes reservations to exclude the application of salvage law to UCH, would not violate its obligations under UNCLOS. This is because UNCLOS does not “prejudice the application of salvage law over UCH,” while the ICS gives States a right to exclude salvage law. To some extent, these two conventions are not mutually exclusive. Conflict may exist, however, between the ICS and the CPOCH, which rigorously restricts the application of salvage law. Assuming that a coastal State has ratified the ICS without making a reservation to Article 30(1)(d), what should it do if it intends to join the CPOCH? This could lead to a legal dilemma for States.

B. Conflicts regarding Jurisdiction

The rights and jurisdiction of coastal States within their EEZ or continental shelf are particularly uncertain and controversial.

First, unlike the CPOCH, UNCLOS and other international conventions do not expressly grant rights to States over UCH found within the EEZ or on continental shelf. As stated in the commentary, the rights and duties of coastal States concerning UCH in those sea areas would be governed by “general international

law and applicable international treaties.”⁶⁴ For States that are not parties to the CPUCH, how to deal with their relationship in regard to UCH in those areas remains to be an issue.

Second, many coastal States claim jurisdiction over such UCH even if they have not ratified the CPUCH. As aforementioned, however, whether this kind of jurisdiction becomes part of customary international law remains controversial. This controversy could give rise to the conflicts between coastal States and other States. Other States may intend to exploit UCH as they may also have some linkage with UCH. Such States may include, for instance, the flag State or the State of cultural origin, etc.

Third, not all States have extended their jurisdiction over UCH within their EEZ or on their continental shelf. Thus, another potential conflict arises between a coastal State and another State, neither of which has ratified the CPUCH, nor have they claimed an extended jurisdiction. Each intends to exploit UCH in the EEZ or on the continental shelf of the coastal State at the very same moment, however they may have different opinions concerning which State has relevant jurisdiction or who has the right to claim more benefits from it.

C. Conflicts concerning Ownership

The first question that may be raised is whether UCH can be owned. According to scholars like Professor Dromgoole, ownership will persist for sunken property lying on the seabed for centuries.⁶⁵ If a piece of UCH belonged to a person or entity at one time, then this raises the question as to whether the piece of UCH can be regarded as an abandoned object after one hundred years? It is believed that the physical act of abandoning and the intention to abandon should be two factors that help us to decide whether sunken properties have been abandoned, however it would be very difficult to find evidence to support this.⁶⁶ With this difficulty in mind, UCH is usually not considered to be ownerless or abandoned, however doubts exist.

64 Myron H. Nordquist, Shabtai Rosenne and Louis B. Sohn, *United Nations Convention on the Law of the Sea 1982: A Commentary, Vol. V*, Leiden/Boston: Martinus Nijhoff Publishers, 2011.

65 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, London: Cambridge University Press, 2012, pp. 102~103.

66 Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, London: Cambridge University Press, 2012, p. 106.

Another issue is whether UCH has become the common property of mankind. Pursuant to UNCLOS, the area beyond the limits of national jurisdiction as well as its resources are recognized as the common heritage of mankind.⁶⁷ Therefore, it seems that UCH within the limits of national jurisdiction cannot be the common property of mankind. Moreover, as aforementioned, the term “resources” does not cover UCH. Nevertheless, the CPUCH regards UCH as “an integral part of the cultural heritage of humanity.”⁶⁸ This could lead us to believe that the ownership of UCH asserted by States is illegitimate or illegal.

Neither UNCLOS nor the CPUCH have attempted to address issues relating to the ownership of UCH, even if the UCH consists of government ships or military aircrafts with sovereign immunity.⁶⁹ Other international or regional conventions have rarely addressed the issue of ownership.⁷⁰

In spite of this, one possible approach to determining the ownership of UCH may be the doctrine of intertemporal law. Recognized by *The Island of Palmas Case*, this doctrine requires that historical facts shall be examined through historical law.⁷¹ Therefore, any fact, action or situation shall be assessed in light of the rules of law that are contemporaneous with it.⁷² Since UCH may have sunken for many years, the ownership of the artifact may be determined by the law at the time when sank. However, what if the contemporaneous law is unable to determine ownership? What if the identified owners no longer exists? Under modern international law, it is difficult to find a suitable standard for determining the ownership of sunken vessels. There are multiple, diverse standards which relate to the status of States as a coastal State, flag State, finder State, salvage State or a State with cultural, historical or archeological link with UCH, etc. However, even if ownership of UCH can be determined, conflicts remain.

UNCLOS provides that it would not affect the rights of the “identifiable owners.”⁷³ However, it fails to clarify what standards should be followed when determining the extent of “identifiable”. It also remains unclear whether the

67 UNCLOS, Preamble and Article 136.

68 CPUCH, preamble.

69 CPUCH, Article 13.

70 Craig Forrest, A New International Regime for the Protection of Underwater Cultural Heritage, *International and Comparative Law Quarterly*, Vol. 51, No. 3, 2002, p. 525.

71 See the case of *United States v. the Netherlands*, 2 R.I.A.A.831, 845 (1928).

72 Max Sorensen, The Intertemporal Problem in Public International Law, p. 1, at http://www.idi-iil.org/idiE/resolutionsE/1975_wies_01_en.pdf, 1 July 2015.

73 UNCLOS, Article 303(3).

ownership that “identifiable owners” enjoy over UCH located within the territorial sea or contiguous zone would prevail over the rights of coastal States.

The purpose of the CPUCH is to protect UCH. Since no issue of ownership has ever been mentioned, it implies that the protection or control of UCH is independent from ownership. In other words, when conflict arises the integrity of UCH has priority over ownership.⁷⁴ This may benefit the protection of UCH when conflicts exist between two States parties to the CPUCH, however if one of them is not a party, then the issue of ownership may affect the protection of UCH in the potential dispute.

D. Conflicts among States with Certain Interests

Under UNCLOS or the CPUCH, some types of States may not have jurisdiction or ownership over UCH but are entitled to “certain interests.” For example, parties to the CPUCH are obliged to inform “other States with a verifiable link, especially a cultural, historical or archaeological link.”⁷⁵ States parties also have a right to declare their interest in being consulted based on such a link.⁷⁶ Similarly, according to UNCLOS, preferential rights upon UCH in the Area are recognized for three types of States, namely, the State or country of origin, the State of cultural origin, and the State of historical and archaeological origin.⁷⁷ With this in mind, we may wonder what makes a State, for instance, a “State with a verifiable link”, or a “State of origin”. Furthermore, if there are multiple States which fit this criteria, which one shall enjoy priority? Each of these questions may lead to disputes among States, which ultimately will deter the protection of UCH.

V. Suggestions to Further Protect UCH

A. Appropriate Amendment to CPUCH

Following the aforementioned analysis, some suggestions are proposed to make reasonable amendments to the CPUCH.

74 Thijs J. Maarleveld, How and Why will Underwater Cultural Heritage Benefit from the 2001 Convention?, *Museum International*, Vol. 60, Issue 4, 2008, p. 57.

75 CPUCH, Article 7(3).

76 CPUCH, Articles 9(5) and 11(4).

77 UNCLOS, Article 149.

First, the author recommends that the CPUCH incorporate general rules concerning the ownership of UCH, based upon accepted international principles. In line with common State practice or customary international law, one possible stipulation could be that UCH found within the internal waters, archipelagic waters and territorial sea of a State party, should belong to that State. Exceptions to such a rule would include a foreign State's government ships or aircrafts being found within those areas, which indicates respect for the sovereignty of other States. As for UCH discovered in other sea areas including the EEZ and continental shelf, it could generally be a rule that the original owners of UCH shall continue to be its owner. If the original owners cannot be identified, then the States of historical origin shall enjoy ownership. Surely, a set of feasible standards concerning what constitutes "historical origin" will require further elaboration. Suppose that a sunken item could not be identified since its historical or cultural information has gone missing. In this scenario it would be best to keep the artifact intact on the seabed. In any event, the CPUCH, as amended, shall make it clear that the object of preservation and protection shall overrule the ownership of UCH. A State shall be liable for the failure to fulfill its international obligations even if it is the owner of UCH.

Second, it remains unclear how to address issues of jurisdiction in relation to UCH within the EEZ or on the continental shelf of a coastal State. In order to correct this Art. 10 of the CPUCH ought to be redrafted since it lacks feasibility and enforceability. The provision needs to clarify the necessary preconditions for States to exercise their "jurisdiction" over UCH within the area in question. Those preconditions may be linked to other conventions, including UNCLOS, therefore a well harmonized provision shall be adopted. In light of the fact that a substantial number of States parties have claimed jurisdiction over UCH within their EEZ or on their continental shelf, the CPUCH, as amended, could legalize this kind of State conduct, but may also impose far more obligations upon such States for the benefit of protecting UCH.

Additionally, some other changes are recommended. For instance, the definition of UCH within the CPUCH shall be revised appropriately. The time period as required to constitute a kind of UCH could be reduced properly, and a more reasonable description of up-to-date characteristics of UCH shall be provided.

B. Better Enforcement of CPUCH

Overall, the CPUCH has established a strong regime for the protection of UCH. Nevertheless, the efficiency of this Convention is in doubt. First, its binding force has not been widely accepted by States. This Convention was adopted in 2001, however it did not enter into force until 2009 when twenty parties ratified it, as required by Article 27.⁷⁸ As of now, the number of States that have ratified the CPUCH is only 46.⁷⁹ Given these low levels of ratification and implementation, it does not appear that this Convention would be an effective tool for the protection of UCH.

States were reluctant to ratify the CPUCH for various reasons. One possible reason is that, prior to 2001, many States enacted domestic legislation which aims to manage and even determine ownership of UCH. These States are typically not willing to amend their laws which may be incompatible with the CPUCH. For instance, no provision about preservation *in situ* can be found within China's Underwater Cultural Relics Regulation, however, the issue of ownership is addressed by this regulation.⁸⁰ Given this incompatibility, China may lose many rights and interests once it becomes a party to CPUCH.⁸¹ Another reason is that many States lack the financial ability to implement the obligations stipulated under the CPUCH.⁸² It is true, however, that specific requirements for parties to protect UCH are laid out in the CPUCH, but these requirements may be too idealistic for developing countries.

Therefore, in order to better implement the CPUCH, it is recommended that States shall promptly adjust and amend their domestic laws so as to be in conformity with the Convention. Furthermore, developed countries with advanced technologies and financial abilities should proactively assist other States. At the same time, other States need to cherish the opportunities to cooperate with those developed countries.

78 CPUCH, Article 27, "This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in Article 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territory three months after the date on which that State or territory has deposited its instrument."

79 At <http://treaties.un.org/pages/UNTSONline.aspx?id=2>, 15 April 2014.

80 China's Underwater Cultural Relics Regulation, Articles 2 & 3.

81 For example, according to Articles 2 and 3 of China's Underwater Cultural Relics Regulation, China enjoys ownership and jurisdiction over UCH of China's origin found in its EEZ, which seems to be in conflict with the relevant provisions of CPUCH.

82 Valentina Sara Vadi, Investing in Culture: Underwater Cultural Heritage and International Law, *Vanderbilt Journal of Transnational Law*, Vol. 42, No. 3, 2009, pp. 865~866.

C. Training Specialists in UCH

Dealing with UCH is relevant to all heritage professionals. In order to fully implement the CPUCH, a new and larger generation of maritime archaeologists needs to be trained. The Annex to the CPUCH reveals that the technical guidelines for the UCH preservation project are complex. Without sufficient professional knowledge, the preservation of UCH and the full implementation of the CPUCH would be impossible.

The protection and preservation of UCH also requires legal experts. Article 25 of the CPUCH has set out a regime for dispute resolution. For those parties that have also ratified UNCLOS, the Choice of Procedure Clause in UNCLOS can be applied to the disputes arising from the CPUCH.⁸³ Four procedures under UNCLOS include the International Tribunal for the Law of the Sea (ITLOS), the International Court of Justice (ICJ), a special arbitral tribunal constituted under Annex VIII and an arbitral tribunal constituted under Annex VII.⁸⁴ However, for the first three procedures, the judges or arbitrators are unlikely to have specialized knowledge or experience concerning matters of UCH. ICJ judges, however, are only the most qualified publicists in the world,⁸⁵ and it seems that no case precedents settled by this Court have been concerned with the protection of UCH. Additionally, members of ITLOS are just specialists with competence in the field of the law of the sea.⁸⁶ Furthermore, the “special arbitral tribunal” deals with four types of issues which are also unrelated to UCH. Consequently, as pointed out by Patrick O’Keefe, none of these three procedures would have specialists in the protection of UCH.⁸⁷

Parties to the CPUCH, which have not ratified UNCLOS, are entitled to nominate arbitrators for the arbitral tribunal constituted under Annex VII to UNCLOS.⁸⁸ Thus, this procedure is more likely to involve UCH specialists. However, this regime is only applicable under certain conditions, i.e., when States are not parties to UNCLOS.

In this regard, although States could resort to various dispute settlement procedures, there are very few specialists in UCH. When the CPUCH becomes more

83 CPUCH, Article 25(4).

84 UNCLOS, Article 287.

85 Statute of the International Court of Justice, Article 2.

86 UNCLOS, Annex VI, Article 2.

87 Patrick J. O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, Leicester: Institute of Art and Law, 2002, p. 139.

88 CPUCH, Article 25(5).

widely accepted within the international community and more disputes concerning UCH arise, the training of such specialists would constitute a significant contribution to the international legal protection of UCH. UNESCO, the agency which adopted the CPUCH, may be able to play a leading role in such training.

D. Cooperative Negotiations and Agreements between States during Disputes

Under the current international legal framework, and even after the CPUCH is amended properly and implemented fully, as recommended within this article, the issues of jurisdiction and ownership continue to be difficult to address. There is a diverse array of factors and situations which may lead to disputes among States. For example, a shipwreck could be divided into two parts, the hull of the ship and the cargo on board. In this scenario, it is possible that there is more than one owner of the shipwreck and that the cargo may even belong to multiple owners. Given the possibility of these complex scenarios, there is still a long way to go in order to adopt a set of comprehensive rules which set out a feasible regime that is capable of addressing problems concerning the ownership of UCH, either through treaties or customary international law. Thus far, it appears to be difficult for States with different geographical features and variable cultural interests involved, to reach an internationally uniform understanding regarding those issues.

When disputes arise from the discovery or protection of significant items of UCH, it is recommended that the States concerned negotiate and cooperate. Surely, the disputing States are expected to respect each other and endeavor to conclude a bilateral or multilateral treaty based on mutual understanding regarding the specific UCH in question. Such cooperative agreements cannot be considered law-making treaties, however they are intended to regulate limited issues between States in dispute. Under circumstance where States with certain interests are involved, conflicts shall be resolved through negotiations and agreements, due to the lack of clear and enforceable legal regimes. As a consequence, these agreements are more likely to reflect disputes and provide a more practical solution, regardless of whether the States are parties to the CPUCH or are those with “certain interests” under that Convention. Given their freedom and autonomy, negotiating parties may also reach agreements which have a higher standard for the protection of the UCH in question. Therefore, these kinds of cooperative negotiations and agreements could not only play a significant role in eliminating or avoiding unnecessary

conflicts between States, but may also help to protect UCH in a more effective way.

Some examples of this include the Agreement concerning the Shipwrecked Vessel RMS Titanic.⁸⁹ The *RMS Titanic* was first located on the Canadian continental shelf and thus this agreement included Canada, France, the UK and the USA for the purpose of cooperation for the protection of the vessel and its artifacts, even though not all of those States are parties to the CPUCH. In addition, the USA and France reached a bilateral agreement concerning the ownership of the wreck of *La Belle* as well as other legal issues. Through this agreement, France will continue to retain its title to the wreck, but will not require the return of the wreck which is currently possessed by the USA.⁹⁰ At times the ownership of UCH may not be an important issue when these kinds of agreements have been reached regarding the collaborative protection of UCH, as was the case for the Agreement concerning the Shipwrecked Vessel RMS Titanic.

Any agreements concerned are advised not to go beyond other discernible international obligations upon States parties, and not to exceed the objective of protecting UCH. The legitimate interests of other States shall also be taken into account. For those States that have not ratified UNCLOS, the CPUCH or ICS, sincere negotiations and specific agreements are especially necessary. Furthermore, such rules and agreements could incorporate the Annex Rules of the CPUCH. In fact, the Annex to the Agreement concerning the Shipwrecked Vessel RMS Titanic is similar to the Annex Rules of the CPUCH.

E. Education and Research Enhancement

Beyond the creation and maintenance of international rules, we must strive to increase States' and their citizens' awareness to protect UCH. Even if States take steps to protect UCH, their citizens may continue to privately loot and damage UCH if they do not have knowledge of these obligations. In order to educate the public, States ought to establish more public museums exclusively dedicated to UCH.

Furthermore, each State ought to develop the necessary technologies in order to preserve UCH *in situ* and to scientifically exploit UCH only when necessary.

89 Agreement concerning the Shipwrecked Vessel RMS Titanic.

90 Agreement between the Government of the United States of America and the Government of the French Republic regarding the Wreck of "La Belle", Articles 1 & 2.

Enhancing communication and cooperation between States in regard to the study of UCH would also improve efforts to protect them.

VI. Concluding Remarks

From the international law of the sea, to international salvage law and finally to the CPUCH, we have discovered that the international community has made efforts to construct and develop legal regimes for the protection of UCH. However, through this analysis we have also discovered the defects and problems within these established regimes. In particular, issues related to the jurisdiction and ownership of UCH located in the areas including the EEZ are complex, however they are essential for the promotion of the international legal protection of UCH.

International law is necessary for the protection of UCH across the globe, however we must be aware that international law lacks a level of enforceability in comparison to domestic law. Thus, the noble responsibility rests with all States. Any international legal regime would have little value if States do not proactively apply and comply with international law in an agreeable manner.

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