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The UNESCO Convention on the Protection of Underwater Cultural Heritage: how do we make it work?

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United States law on underwater cultural heritage: Can it support the goals and objectives of the UNESCO Convention?

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Background

The law of the sea is one of the oldest areas of international law. It stretches as far back as the 17th century with the "Cannon Shot Rule" which set up a three-mile territorial sea. More recently, in 1949, the United States made its mark on the modern framework of the law of the sea when President Harry Truman asserted the U.S.'s jurisdiction and control of natural resources of the continental shelf. Known as the Truman Declaration, this assertion gave rise to a modern rethinking of the law of the sea with the gathering of UNCLOS I in 1956. UNCLOS I resulted in four conventions: the Territorial Sea and Contiguous Zone, the Continental Shelf, the High Seas, and the Fishing and Conservation of Living Resources of the High Seas. UNCLOS convened two more times in 1960 with UNCLOS II and in 1973 with UNCLOS III. UNCLOS III resulted in the Law of the Sea Convention (LOSC) which came into force in 1994 and codified modern international rights and responsibilities in regard to use of the world's oceans and their resources.¹

Maritime zones play a particularly relevant role in laws regarding UCH and their protection. Under the LOSC, territorial waters are considered to be the first 12 nautical miles from the coast. This zone is considered to be under the sovereign control of the nations to which it applies. The next significant boundary is the Contiguous zone which reaches 12 nautical miles beyond the Territorial sea. In this zone, a nation can enforce its laws in regard to customs, taxation, immigration, and pollution. Outside of the Contiguous zone, extends the Exclusive Economic Zone (EEZ) which stretches 200 nautical miles from the coast of the state. Finally, there is the continental shelf. The border of this area is somewhat unique because, depending on the topography of the ocean floor, it could extend beyond the EEZ. As mentioned above, the U.S. was the first nation to declare its exclusive right to control and exploitation of the natural resources contained within the continental shelf. The LOSC adopts this same understanding of a nation's rights to this area.

Another major accomplishment of the LOSC was its creation of a mechanism for international cooperation and dispute resolution over maritime issues: The International Tribunal for the Law of the Sea (ITLOS).

The LOSC also provided some legal framework for the protection of underwater cultural heritage (UCH) found at sea; in particular, Articles 149 and 303 are relevant to UCH. Article 149 deals with archaeological and historical objects located on the ocean floor which lay beyond the limits of national jurisdictions. It states:

¹ Division for Ocean Affairs and the Law of the Sea, "United National Convention on the Law of the Sea of 10 December 1982, Overview and full text." United Nations. http://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (accessed October 1, 2017).

"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."²

Article 303 deals with archaeological and historical objects found at sea. This article is primarily concerned with the international trafficking of cultural heritage. It creates a duty for states to "protect objects of an archaeological and historical nature found at sea" and allows states to assume that the removal of such objects from their Contiguous zone as an infringement of its territory and laws.

Most of the LOSC is now recognized as customary international law, perhaps including the duty to protect the UCH covered by Articles 149 and 303. However, protection of UCH on the continental shelf beyond the contiguous zone was considered by many legal scholars to be inadequate. This was, in part, the impetus for the 2001 UNESCO Convention.

The US and the 2001 UNESCO Convention

While the U.S. is not a party to LOSC, it actively participated as an observer delegation during the development of the 2001 UNESCO convention. In fact, the U.S. had one of the largest delegations representing a variety of interests, the most controversial being those of the salvage industry. The U.S. delegation expressed support for the preservation principles included in the Convention. However, as with the LOSC, the U.S. did not become a signatory. Nevertheless, the delegation indicated support for UCH protection and management consistent with customary international law.

The U.S. cited two primary reasons for refraining from signing the 2001 Convention. First, the U.S. disapproved of the "creeping coastal state jurisdiction" over the UCH on the outer continental shelf (OCS) and EEZ, seeing the possibility of creating new rights for coastal states over foreign nationals and vessels. Second, the U.S. objected to the provision allowing a coastal state to impose protective measures, including recovery, in situations of "immediate danger" to UCH without the formal consent of the flag state to be inconsistent with the current legal regime in the U.S.³

US cooperation

Although the U.S. is not a formal party to the 2001 Convention, it has shown that it seeks to follow the fundamental spirit of the Convention. One example of this is The Agreement Concerning the Shipwrecked Vessel RMS *Titanic* which the U.S. negotiated with the United Kingdom, France, and Canada. This agreement provided for the preservation and management of the RMS *Titanic* which currently lies on the Canadian continental shelf. It designates the wreck as a historical wreck of international importance and establishes it as a memorial to the lives lost from the tragedy. The agreement also obligates the parties to take "all reasonable measures" to protect recovered artifacts and regulate access to the wreck.⁴

² UN General Assembly, *Convention on the Law of the Sea*, Dec. 10, 1982, 1833 U.N.T.S. 397, Article 149.

³ Varmer, Ole, Jefferson Gray, and David Alberg, "United States: Responses to the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage." *Journal of Marine Archaeology* 5 (2010): 129-141.

⁴ *Agreement Concerning the Shipwrecked Vessel RMS Titanic*, National Oceanic and Atmospheric Administration, Article 3.



Bow of the RMS Titanic, photographed in June 2004, NOAA Photo Library.



View from the stern of the hull of La Belle undergoing reassembly in Austin, December 2014, Yamplos, distributed under a CC BY-SA 4.0 license.

The U.S. has also entered into agreements with France to manage and protect the sunken warships *CSS Alabama* and *La Belle*, and with Japan on the *Kohyoteki* midget submarines.⁵ These agreements recognized the ownership and sovereign immunity of the respective sunken warships and, more generally, that coastal states hold jurisdiction and authority over foreign sunken warships located within their territorial seas.

⁵ *La Belle Agreement between France and the U.S.*, March 31, 2003; *CSS Alabama Agreement between France and the U.S.*, March 8, 1995; *Agreement between United States and Japan* (February 12, 2004).



Japanese Type A midget submarine recovered in 1960 off Pearl Harbor, HI, Official U.S. Navy Photograph.



One of the canons from the CSS Alabama on display at La Cite De La Mer, CSS Alabama 2005 Project Photo Album, n.d. Web 19 Oct 2017, www.superiortrips.com.

US laws and policies

In addition to the aforementioned international agreements, the U.S. has adopted a number of laws and formal policies that are consistent with the 2001 Convention. Specifically, these laws include:

- Antiquities Act of 1906
- Archaeological Resources Protection Act of 1979
- National Marine Sanctuaries Act of 1972
- Abandoned Shipwrecks Act of 1987

- Sunken Military Craft Act of 2004
- National Historic Preservation Act of 1966
- National Environmental Policy Act of 1969

Below is a brief explanation of each of these laws and how they mesh with the policies promoted by the 2001 Convention.

Antiquities Act of 1906

The Antiquities Act, passed by the United States Congress and signed into law by President Theodore Roosevelt in 1906, gives the President authority to proclaim national monuments on lands owned or controlled by the United States and to protect “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.”⁶ While most monuments are on land, there are several marine national monuments managed by the National Oceanographic and Atmospheric Administration (NOAA).⁷ The most notable marine national monuments include the Marianas Trench, Papahānaumokuākea, and Northeast Canyons and Seamounts. Beyond designation, research and recovery of antiquities on such lands requires permits. The Antiquities Act, has been used to protect cultural property in a marine environment managed by the U.S. National Park Service, the Canaveral National Seashore.⁸ Yet, while designating marine national monuments to protect natural and cultural heritage within the EEZ/OCS is clearly within the U.S. government’s authority, it is unclear whether and to what extent the U.S. will use its authority to enforce the permit process on lands outside designated Marine National Monuments.



One of the Wake Island shipwrecks just outside the channel to the marina. Image courtesy of USAF/Mark Ingoglia.

Archaeological Resources Protection Act of 1979

The Archaeological Resources Protection Act of 1979 was enacted

“...to secure, for the present and future benefit of the American people, the protection of archaeological resources and sites which are on public lands and

⁶ 54 U.S.C. § 320301

⁷ National Marine Sanctuaries, NOAA. <https://sanctuaries.noaa.gov/> (accessed October 1, 2017).

⁸ *Lathrop v. Unidentified, Wrecked, and Abandoned Sailing Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993).

Indian lands, and to foster increased cooperation and exchange of information between governmental authorities, the professional archaeological community, and private individuals (Sec. 2(4)(b)).”

OCS is not included in the definition of “public lands.” The US has notified other nations that it will enforce national law against foreign-flagged vessels and nationals within the 12-mile territorial sea, 24-mile contiguous zone, and 200-mile EEZ in a manner consistent with customary international law. However, this statute does not protect cultural resources in those zones from either foreign or U.S. nationals and flagged vessels. Consequently, while this statute establishes the U.S.’s authority to protect UCH, it has not resulted in concrete steps towards enforcement of such policies. Nonetheless, ARPA may be a tool to prevent trafficking in underwater cultural property. Section 6(c) prohibits interstate or international sale, purchase, or transport of any archaeological resource excavated or removed in violation of a State or local law, ordinance, or regulation.⁹

National Marine Sanctuaries Act of 1972

In 1972, President Richard Nixon signed the National Marine Sanctuaries Act (NMSA), authorizing the designation and protection of areas in the marine environment. The laws specifically called for protection of areas possessing significant “conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, or esthetic qualities.” The law grants the U.S. authority to protect natural and cultural resources on the OCS and within the 200-mile EEZ. Authority is delegated to the National Oceanographic and Atmospheric Administration (NOAA) to regulate activities, issue permits, assess civil penalties, and conduct enforcement to protect resources. The NMSA prohibits removing or injuring historic resources within the sanctuary, and any alteration of the seabed. The NMSA may be enforced against US-flagged vessels and nationals or against foreign-flagged vessels and nationals with their consent. However, in the case of seabed alteration, the law may be enforced against foreign vessels and nationals without their consent. The NMSA appears to be entirely consistent with customary international law as incorporated in the LOSC.¹⁰



Thunder Bay National Marine Sanctuary, NOAA.

⁹ 16 U.S.C. §§ 470aa-470mm

¹⁰ Varmer, Ole. “Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf.” *Stanford Environmental Law Journal* 33, no. 2 (May 2014): 251–87.



Simon Senior Scientist, Steve Lonhart (MBNMS), photographing a shipwreck in the Florida Keys National Marine Sanctuary. NOAA/ONMS/Hickerson.



The shipwreck known as the "Dunkirk Schooner" found on the bottom of Lake Erie.

Abandoned Shipwreck Act of 1987

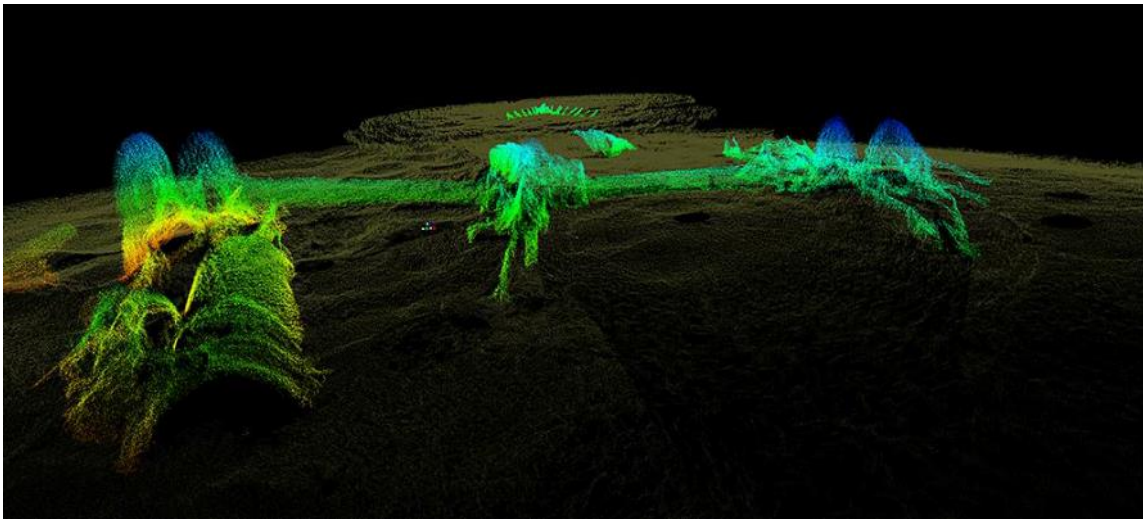
The Abandoned Shipwreck Act of 1987 (ASA) law grew out of legal uncertainty and the severe damage caused by treasure hunters to wrecks in the Great Lakes and other coastal areas during the 1970s. It asserts title to "abandoned shipwrecks" embedded in a State's submerged lands, embedded in coralline formations protected by a State on its submerged lands, and abandoned shipwrecks located on a State's submerged lands and

included in or determined eligible for inclusion in the National Register of Historic Places. The Act transfers title and control of the shipwrecks to the states on which land it rests.¹¹

In general, abandonment is established after a considerable period where the owner has not attempted to salvage the property or claim it under salvage law, or through other evidence. One example where abandonment was established was in the case of the “Dunkirk Schooner,” pictured above. The court in *Northeast Research v. One Shipwrecked Vessel* found the wreck to be abandoned and title passed automatically to the State of New York under the ASA.¹²

Sunken Military Craft Act (SMCA) 2004

This statute was the product of a series of court cases¹³ that eventually led President William Clinton to adopt the Statement on the United States Policy for the Protection of Sunken Warships.¹⁴ Not long thereafter, Congress passed the Sunken Military Craft Act of 2004. SMCA protects sunken U.S. military craft in U.S. waters, the high seas, and marine zones controlled by foreign nations. SMCA also provides authority for the protection of foreign military craft lying within U.S. waters. In addition to protecting these military resources, SMCA also protects associated contents including archaeological and historical resources and, often, war graves. The Naval History and Heritage Command (NHHC) manages the wrecks of more than 17,000 ships and aircraft across the globe. The Department of the Navy has established a permitting program for “controlled site disturbance” of military craft for archaeological, historical or educational purposes.¹⁵



3D rendering of the USS Hatteras wreck site, looking at the starboard and port paddle wheels. Generated by BlueView mapping data. Image: NOAA/ExploreOcean/James Glaeser, Northwest Hydro, Inc.

¹¹ 43 U.S.C. §§ 2101-2106

¹² *Ne. Research, LLC v. One Shipwrecked Vessel*, 729 F.3d 197 (2d Cir. 2013).

¹³ *Hatteras, Inc. v. The USS Hatteras*, 698 F.2d 1215 (5th Cir. 1983); *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992); *Sea Hunt v. Unidentified Shipwrecked Vessel*, 221 F.3d 634 (4th Cir. 2000); *Int'l Aircraft Recovery, L.L.C. v. Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255 (11th Cir. 2000).

¹⁴ 37 WCPD 195 (Monday, January 22, 2001).

¹⁵ Naval History and Heritage Command, “Sunken Military Craft Act”.

<https://www.history.navy.mil/research/underwater-archaeology/policy-and-resource-management/sunken-military-craft-act.html> (accessed October 1, 2017).

National Historic Preservation Act of 1966

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to conduct a review process to “take into account” the effects of any proposed federally funded or licensed projects (“undertaking”) impacting any historic property included in or eligible for listing in the National Register of Historic Places (National Register).¹⁶ The U.S. National Park Service, which administers the National Register program, has published a bulletin dedicated to the nomination of historic vessels and shipwrecks both floating and submerged.¹⁷ As part of its required procedural review, NHPA regulations provides for inventorying a project area, determining if properties eligible for the National Register will be affected and whether an adverse effect is expected. A consultation process with appropriate parties seeks to mitigate or avoid any adverse effects. Unfortunately, the Act is procedural rather than substantive in nature and cannot prevent an undertaking or require mitigation.

National Environmental Policy Act of 1969

The Environmental Policy Act of 1969 (NEPA)¹⁸ seeks to ensure that all branches of government give prior consideration to the effects of “major federal action significantly affecting the quality of the human environment,” including UCH. Environmental assessments (EA) and environmental impact statements (EIS) are the tools used to assess the likely impacts from the proposed actions and their possible alternatives. Agencies are to take a “hard look” at the potential long and short-term impact of their actions on the environment (including historical and archaeological resources) as they conduct activities under the authorizing legislation.

Summary

Although the United States has not ratified either the Law of the Sea Convention or the Convention of the Protection of the Underwater Cultural Heritage, a number of federal laws have recognize importance of cultural property, including UCH. The protection of UCH under these laws varies greatly. Some laws like the NHPA and NEPA are purely procedural but, if the best of circumstances, can result in the avoidance of UCH or mitigation of the effects of federal projects. Others like the Archaeological Resources Protection Act and the Antiquities Act potentially provide substantive protections, but have not been utilized to their full potential. Other laws could have substantive and far-reaching implications. The Abandoned Shipwreck Act protects UCH in the submerged lands of the states and the National Marine Sanctuaries Act protects any UCH located in National Marine Sanctuaries. The Sunken Military Craft Act protects U.S. military craft wherever they are located as well as foreign sunken craft in US waters. These laws provide substantive protections, but such protections tend to be narrow in scope or jurisdiction. Yet, taken as a whole, these tools could serve to establish a comprehensive UCH preservation framework for the U.S. that supports the goals of 2001 UNESCO Convention.

Gaps in protection of UCH on outer continental shelf under US statutes

The greatest gap in the protection of UCH is within the EEZ/OCS, outside of sanctuaries and marine national monuments, and from looting and unscientific salvaging. Enacting a

¹⁶ 16 U.S.C. § 470 et seq.

¹⁷ James P. Delgado & A National Park Service Maritime Task Force, *National Register Bulletin 20: Nominating Historic Vessels and Shipwrecks to the National Register of Historic Places*, U.S. Department of the Interior, National Park Service, 1992.

¹⁸ 42 U.S.C. § 4321 et seq.

law to fill this gap would help fulfill the duty under international law to protect UCH and be consistent with emerging international legal trends and standards.

Potential ways to fill the gaps

Ole Varmer, an attorney and scholar on UCH, believes the best place to begin redressing the gaps in protection for UCH is to amend the NMSA by extending the existing authorization system and sanctions to activities that affect UCH outside of National Marine Sanctuaries. Next, he suggests that an amendment could be made to the Archaeological Resources Protection Act to apply to the Outer Continental Shelf. Finally, an amendment to the Antiquities Act or its implementing regulations could be made to clarify its application on the outer continental shelf outside of marine national monuments.¹⁹ All of these actions have the potential to bring the United States into closer alignment with the 2001 UNESCO Convention and partnership with its States Parties.

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¹⁹ Varmer, Ole. "Closing the Gaps in the Law Protecting Underwater Cultural Heritage on the Outer Continental Shelf." *Stanford Environmental Law Journal* 33, no. 2 (May 2014): 251-87.