

Legal Order in the World's Oceans: Exploration of the 2001 Underwater Cultural Heritage Convention in the Context of the Broader Ocean Policy of International Law

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Abstract

The primary objective of this thesis is to make a significant contribution to our understanding of the origins of and historical developments in the protection of underwater cultural heritage and to evaluate the potency of the 2001 Convention on the Protection of the Underwater Cultural Heritage (CPUCH) to protect culturally significant shipwrecks; in particular, sunken World War II (WWII) vessels.

The 2001 CPUCH is analysed within the context of the broader ocean policy discernible in International Law, such as the 1982 United Nations Convention on the Law of the Sea, the doctrine of freedom of the high seas, and relevant domestic law and State institutions pertaining to maritime matters, in particular in this connection, the United States' Admiralty Courts. The 2001 CPUCH is further examined in the historical framework of the United Nations environmental programmes and specialist agencies relating to sustainable development and the prevention of marine pollution, in particular in this connection, the International Maritime Organisation (IMO).

The effectiveness of the 2001 CPUCH and related international arrangements is tested by the lack of protection afforded WWII underwater cultural heritage, in particular sunken battleships located in the Pacific Ocean. The reason for focusing on WWII wrecks is because they raise a number of unique issues, such as age, toxicity, safety, salvage and treasure hunting. Moreover, the dismantling of WWII wrecks on the seafloor by metal pirates illuminates the contentious ethical issue of recycling large chunks of metal from sunken battleships. It further highlights the threat posed to the marine environment by oil pollution from illicit scrap metal recovery operations.

This thesis contends that sunken WWII vessels are culturally significant and thus deserve legal protection no less than historic and colonial wrecks. However, WWII wrecks do not meet the legal definition of underwater cultural heritage now found in International Law by virtue of the 2001 CPUCH. This thesis recommends that the 2001 convention be amended to include WWII wrecks as a special category of underwater cultural heritage. This will ensure that WWII wrecks are protected similarly to vessels from World War One (WWI).

A further aim of this thesis is to highlight the politically sensitive legal issue of toxic underwater cultural heritage and the absence of uniform guidelines on the management of WWII wrecks at an international level. The legal regime surrounding sunken WWII wrecks is ambiguous and requires clarification by one of the specialist agencies of the United Nations; that is, either the International Maritime Organisation (IMO) or the United Nations Education, Scientific, Cultural Organisation (UNESCO). This thesis concludes that UNESCO should develop a protocol pertaining to the management of toxic underwater cultural heritage which could be attached to the 2001 CPUCH.

A third motivation for this thesis is to examine the capacity of the United States' Admiralty Courts to shape domestic policy regarding historic wrecks, in particular in countries affiliated with the US, such as the Federated States of Micronesia. It will be shown through an examination of leading US Admiralty Court decisions that in recent years the US Federal Courts have been successfully applying an 'archaeological criterion' in respect to historic shipwreck recovery in international waters. This thesis contends that precedents of the United States' Admiralty Courts promoting an 'archaeological duty of care' for all historic wrecks, irrespective of the age of the vessel, represent at

the minimum, useful guidelines for other national courts to follow. Further, US Federal case law which expounds the importance of customary State practices, such as sovereign immunity of State vessels and the sanctity of war graves may serve as constructive influences on coastal States around the globe, especially in Micronesia.

This thesis undertakes an extensive case study of WWII wrecks located in the territorial waters of Chuuk, an island state of the Federated States of Micronesia (FSM). This case study greatly illuminates the issues identified by the thesis concerning application of the 2001 CPOCH and broader International Law. The FSM is a developing State with historic ties to the US. The US has maintained a constant presence in the area since Japan's surrender at the close of the Pacific conflict. Following Japan's capitulation in 1945, the islands of what is now the Federated States of Micronesia (FSM) became part of the United Nations Territory of the Pacific Islands, administered by the United States (1947-1986). The FSM became independent in 1986, when it entered into a Compact of Free Association with the United States. Reflecting the legacy of the trusteeship, the FSM Constitution and judicial system are modelled after those introduced by the US at the end of the Second World War.

Chuuk (formerly Truk) was the site of a powerful Japanese naval base during the Pacific conflict (1941–1945). Considered the Pearl Harbour of the Japanese navy, the lagoon was attacked by US aircraft carriers in 1944. Today, the pristine waters of Chuuk Lagoon contain over sixty sunken Japanese ships and numerous aircraft. The submerged wrecks form the final resting places of approximately 4,000 Japanese servicemen lost in the attack. To the US the wrecks are a historic

landmark associated with the US strategy of neutralising Japanese military strongholds in the Pacific Islands. The sunken vessels are also an important source of revenue for the local economy, particularly for local dive operators who depend on them for their livelihoods. However, for many local Chuukese people, these foreign owned ships and aircraft represent a reminder of a dark and painful period in their history, a constant reminder of colonialism and American neo-colonialism. The risk to Chuuk's Indigenous fishing grounds and coral reef structures from toxic WWII wrecks adds another layer of complexity in the *in situ* preservation of the lagoon's historic WWII vessels. The multiple national interests at stake in the lagoon are compounded by the lack of financial and human resources to address the legacy of toxic WWII wrecks

The case study of the Ghost Fleet of Chuuk Lagoon is used to illustrate the inability of the 2001 CPUCH to safeguard all culturally significant shipwrecks, including its failure to address the conflict between environmental protection and the preservation of sunken military wrecks *in situ*. Moreover, the case study demonstrates how regional geo-political, cultural and economic disparities between States impact on the capacity of International Law to protect sites of cultural significance, highlighting the importance of regional State cooperation. The Chuuk case study vividly illustrates the unique ethical, environmental and legal issues involved in the protection of foreign warships resting in the territorial waters of impoverished Pacific Island States.

Accordingly, this thesis brings together three distinct areas of International Law, namely Environmental, Heritage and Ocean Law. As cultural heritage is an evolving social concept, filled with dynamism and

dissonance, with potential to unite and divide, it is not surprising that the United Nations has concluded a number of international agreements, like the 2001 CPUCH, aimed at determining what constitutes heritage and protecting it. Moreover, the notion of cultural heritage is today intertwined with the Law of the Sea and thus demonstrates an expansion of the concept at the international level. Furthermore, the confluence of Heritage Law and the Law of Sea with International Environmental Law represents an important development in international governance strategies, in particular those regimes relating to the world's oceans and underwater cultural heritage protection. The connection between international legal regimes and institutions like the IMO and UNESCO has particular resonance for governance strategies that involve the regulation of marine pollution and historic shipwrecks like those in Chuuk Lagoon. Accordingly, this thesis investigates the case study of Chuuk Lagoon within the broader context of International Environmental Law, International Heritage Law and the United Nations' Law of the Sea.

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ABBREVIATIONS

Art.	Article
CPUCH	Convention on the Protection of the Underwater Cultural Heritage
EC	European Community
EEZ	Exclusive Economic Zone
FIC	Forum Island Countries
FMS	Federated States of Micronesia
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Material
IMO	International Maritime Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
LNTS	League of Nations Treaty Series
MoD	Ministry of Defence
NGO	Non-Governmental Organization
NHPA	National Historic Preservation Act
NRHP	National Register of Historic Places
NSP	National Park Service
PNG	Papua New Guinea
SPREP	South Pacific Regional Environmental Programme
UN	United Nations
UNCLOS I	First United Nations Conference on the Law of the Sea, 1958
UNCLOS II	Second United Nations Conference on the Law of the Sea, 1960
UNCLOS III	Third United Nations Conference on the Law of the Sea, 1972-82

UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNTS	United Nations Treaty Series
USSBS	US Strategic Bombing Survey
UXO	Unexploded Ordnance
WW I	World War I
WWII	World War II

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