

The Case for Using the Law of Salvage to Preserve Underwater Cultural Heritage: The Integrated Marriage of the Law of Salvage and Historic Preservation

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I INTRODUCTION

Almost ten years ago this Journal published, *The Case Against the “Salvage” of the Cultural Heritage*.¹ It compared and contrasted the application of historic preservation law and the law of salvage and finds. It concluded that the public interest in preserving historic shipwrecks was better served through the

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¹O. Varmer, *The Case Against the “Salvage” of the Cultural Heritage*, 30 J. MAR. L. & COM., 279-302 (1999). That article was primarily based on the issues raised by Ole Varmer and Caroline Blanco (formerly, Caroline M. Zander) in an essay published by National Park Service (NPS) in their *Common Ground* magazine: Ole Varmer and Caroline M. Zander, *Closing the Gaps in Domestic and International Law: Achieving Comprehensive Protection of Submerged Cultural Resources*, NPS ARCHEOLOGY PROGRAM: COMMON GROUND ONLINE (Fall/Winter 1996), available at http://www.nps.gov/archeology/Cg/vol1_num3-4/gaps.htm. The *Closing the Gaps* article was updated by OLE VARMER, BOEM, OCS STUDY NO. 2014-005, UNDERWATER CULTURAL HERITAGE LAW STUDY (2014), available at <http://www.data.boem.gov/PI/PDFImages/ESPIS/5/5341.pdf>; BOEM, ACCESS NO. 00050, TECHNICAL SUMMARY: UNDERWATER CULTURAL HERITAGE STUDY (2014), available at <http://www.data.boem.gov/PI/PDFImages/ESPIS/5/5340.pdf> (“UCH Law Study”).

application of historic preservation laws and posited that the salvage law tenet of returning ships and cargo to the stream of commerce should only be applied to relatively recent maritime casualties. Since then, courts with admiralty jurisdiction have been incorporating the principles of historic preservation law into the maritime law of salvage with increased frequency, as most notably reflected in the RMS *Titanic* litigation.

This article first summarizes the development of salvage law and then provides examples of how both international and domestic law support the preservation of cultural heritage. admiralty court cases involving historic shipwrecks over the past couple of decades, which incorporate environmental and historic preservation law in considering the public interest in cultural heritage, are then discussed, with a particular focus on the *Titanic* litigation. The article closes with a recommendation that the law of salvage be applied in the future to historic shipwrecks in a manner consistent with the principles embodied in international agreements and domestic historic preservation law.

The authors call for maritime and historic preservation lawyers, admiralty court judges and others to, in the absence of available historic preservation law, to apply uniformly the legal paradigm articulated by Chief Judge Rebecca Beach Smith in the *Titanic* case to ensure the protection of historic shipwrecks by adhering to United States environmental and historic preservation laws in a manner consistent with the customary practice of nations to protect cultural heritage as reflected in the Law of the Sea Convention and recognized scientific standards.

II

THE ORIGIN OF MARITIME LAW

A. Ancient Maritime Law

Maritime law dates back centuries to the time when ancient Egyptian, Phoenician, and Greek ports were in use. The first

codification of maritime law, which remains in existence today, is the ancient Code of Hammurabi, dating to around 1780 BCE. The Code addressed the pay for the services of sailors and shipbuilders, and salvage.²

In ancient Athens, commercial maritime courts were created to adjudicate complaints between parties, regardless of their country of origin or residence. Athens was eventually eclipsed as a maritime economic power by the island of Rhodes, located midway between the Greek Aegean Sea and ports of Egypt, Cyprus, and Syria. An independent city-state at the time, Rhodes was recognized as one of the best-governed city-states, and its people were renowned for their naval power and discipline. Due to the vast amount of maritime trade in the port of Rhodes, many international maritime disputes were settled by Rhodian magistrates. In order to facilitate this trade, the people of Rhodes developed, codified, and promulgated a system of maritime laws.

The Rhodian collection first codified the principle of offering a reward for the saving of imperiled maritime property. Under this code, one-fifth of anything saved from an imperiled vessel was awarded to the salvor. If the vessel was already lost to the sea floor, either one-third or one-half was awarded to the salvor, depending on the danger taken to retrieve the items.³

B. Modern International Maritime Law

In modern times, the Dutch jurist, Hugo Grotius, has been widely recognized as the father of international maritime law.⁴ While his work influenced the development of public international laws of nations regarding war, peace, and the law of the sea, the catalyst for this work all started with the defense of his cousin, Captain Jacob van Heemskerck, and the Dutch East

²See generally, STEVEN SNELL, COURTS OF ADMIRALTY AND THE COMMON LAW, ORIGINS OF THE AMERICAN EXPERIMENT IN CONCURRENT JURISDICTION (2007).

³3A BENEDICT ON ADMIRALTY § 5 (Frank L. Wiswall, Jr. ed., 7th ed. rev. 2018).

⁴ROBIN R. CHURCHILL & ALLAN V. LOWE, THE LAW OF THE SEA 5 (2008).

India Company for capturing a Portuguese ship, which resulted in an award of both the ship and its cargo as a prize.⁵

The Dutch captain's taking of the Portuguese ship, *Santa Catarina*,⁶ off the coast of Singapore was in response to Portuguese atrocities against the Dutch including the murder of a number of Dutch sailors. The Portuguese were fighting the Dutch and trying to preserve their monopoly over the spice trade with Asia. The captured Portuguese ship was towed to the Netherlands and the Amsterdam Admiralty Board awarded the ship and cargo as a prize to the Dutch company. The prize was granted but the Dutch company was concerned about how that would be received within the international community and hired Grotius to defend the prize.⁷

The work of Grotius to defend the prize ultimately led to his 1625 treatise, *De jure belli ac pacis* (On the Law of War and Peace), his earliest compilation of the laws of nations and, thus, the starting point for modern international maritime law. It was, however, his 1609 pamphlet entitled, *Mare Liberum* (Free Seas), that posited the new principle that the sea was open and free for use by all for shipping. This was disputed by other legal scholars, including the English jurist, John Selden, who published *Mare Clausum* (Closed Sea) in 1635 arguing that the sea was, in practice, capable of being as protected and controlled as terrestrial territory.⁸ This need for balance between free use of the sea by ships and a State being able to control the sea off its coast as part of its territory became the foundation for the practice of nations that became part of the customary Law of the Sea (LOS).⁹

The legacy of early disputes concerning the limits of jurisdiction of coastal States versus the flag State jurisdiction and high seas rights or freedoms is a major factor in the balancing of

⁵OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 3–18 (2017). Proceeds of the auction amounted to 37.5 metric tons of silver, which was approximately 60% of the average annual expenditure of the English government at the time.

⁶*Id.* at p. 4–5. The *Santa Catarina* weighed 1500 tons and was able to transport nearly a thousand people, both passengers and crew.

⁷*Id.* at 4

⁸CHURCHILL & LOWE, *supra* note 2 at 5.

⁹UCH Law Study *supra* note 1 at 18.

those interests in the Law of the Sea Convention. For example, the recognition of a 3 nm (5.6 km) territorial sea arose in part because that was the distance a cannon shot could reach at the time (also known as the “cannon shot rule”). A customs or contiguous zone also gained recognition as an area adjacent to the territorial sea in which foreign ships could be seized by the coastal state to protect its territory and enforce customs law.

In the United States, the creation of a territorial sea and contiguous zone dates back to the late 1700s in response to issues of national security and law enforcement within coastal areas, including a 1793 diplomatic note sent from Thomas Jefferson, and legislation passed by Congress in 1799, allowing the boarding of foreign flag vessels within 12 nm (22 km) from the coast. This zone was known as “customs waters” and later came to be more broadly recognized as the “Contiguous Zone” (contiguous with the territorial sea and dealing with pollution and cultural heritage as well as customs). The law applicable to marine salvage in the United States is the general maritime law, as modified by relevant statutes, treaties and other international law.¹⁰

III

INTERNATIONAL LAW RECOGNIZES THE IMPORTANCE OF PRESERVING UNDERWATER CULTURAL HERITAGE

A. Emerging Concerns about Cultural Heritage

The origins of international law and principles concerning the preservation of cultural property and heritage can be traced to ancient rule of war.¹¹ The destruction of cultural sites and objects in

¹⁰THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* (2017) § 16 n. 4, citing *Westar Marine Serv. v. Heerema Marine Contractors*, 621 F. Supp. 1135, 1988 AMC 1122 (N.D. Cal. 1985) and the International Convention on Salvage, 1989, 3A BENEDICT ON ADMIRALTY, App. B (7th rev. ed. 2017); 20 J. MAR. L. & COM. 589 (1989), entered into force July 14, 1996.

¹¹François Bugnion, *The Origins and Development of the Legal Protection of Cultural Property in the Event of Armed Conflict*, (Nov. 2004) (article for the 50th

both World War I and World War II, and, particularly in Warsaw, resulted in the first treaty protecting heritage, the Convention on the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”).¹² It protects monuments, art, manuscripts, books and other objects of artistic, historical, or archaeological interest, as well as scientific collections.¹³

Sixteen years later, the international community agreed to protect heritage through the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”).¹⁴ Its goal is to curb illicit international trafficking of cultural property. Under this pioneering treaty, States cooperate to protect the cultural property in their territory, and fight the illicit export, import, and transfer of cultural heritage often for private gain. It was followed by the 1972 World Heritage Convention (“WHC”).¹⁵ The United States demonstrated leadership in its development and was the first nation to ratify it.¹⁶ It recognizes the

anniversary of the 1954 Hague Convention noting ancient civilizations of Greece, Turkey, and Iraq developed rules of war so that destruction was to be limited to military objects and property; religious and civilian property were not be harmed; these principles are found in the ancient tenants of Islam and Hindu law of armed conflicts, which respected the buildings and monuments of other religions). Available at <https://www.icrc.org/eng/resources/documents/article/other/65shtj.htm>. See also, Gerte Reichelt, *Study on The Protection of Cultural Property* (UNIDROIT) (cultural heritage law linked to the rules of war and was found in custom and practice of nations; the Hague Convention was first international treaty on heritage and introduced the term, “cultural property”) at pp. 2–4; also available on the UNIDROIT website at <https://www.unidroit.org/english/documents/1986/study70/s-70-01-e.pdf>.

¹²Convention for the Protection of Cultural Property in the Event of Armed Conflict (“The 1954 Hague Convention”), May 14, 1954, 249 U.N.T.S. 240. Available at <http://unesdoc.unesco.org/images/0015/001585/158587EB.pdf>.

¹³UCH Law Study *supra* note 1 at 19.

¹⁴The 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 10 I.L.M. 289.

¹⁵Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, available at <http://whc.unesco.org/en/convention/>.

¹⁶The idea of combining conservation of cultural sites with those of nature came from the U.S. Nixon Administration White House Conference calling for a “‘World Heritage Trust’ to stimulate international cooperation to protect ‘the world’s superb

importance of the preservation of the natural and cultural heritage to the world. With 193 State parties, it is the one of the most widely accepted conservation treaties promoting cooperation for the preservation of natural and cultural heritage.¹⁷ The focus started with recognizing terrestrial sites and traditional cultural structures. It has since evolved to recognize heritage in the Exclusive Economic Zone (“EEZ”) and continental shelf such as the Papahânaumokuâkea Marine National Monument in the northwestern islands of Hawai’i that was inscribed on the World Heritage “mixed list” for its “outstanding universal value” as both a natural and cultural heritage site.¹⁸ There are now calls for recognition of heritage in the high seas,¹⁹ including the wreck sites of *Titanic* and *Lusitania*.²⁰ The challenges involve moving seaward in a manner that ensures consistency with the international legal framework of the Law of the Sea Convention.

B. UNCLOS I, II and III International Legal Framework: Law of the Sea

1. The Law of the Sea, the 1958 Conventions, and the 1982 LOSC

As the law regarding cultural heritage developed on land as a result of destruction from war, and later from other activities, the rights and jurisdiction of coastal nations or States, and the high seas rights of maritime nations and flag State jurisdiction were

natural and scenic areas and historic sites for the present and the future of the entire world citizenry.” Id.

¹⁷UCH Law Study, fn 1 at p. 20 and WHC Parties webpage <https://whc.unesco.org/en/statesparties/>.

¹⁸O. Varmer and T. Beuttler, *Papahânaumokuâkea inscribed as a World Heritage site*, 14 ABA MARINE RESOURCES NEWSLETTER No.1 (March, 2011) (coral reefs recognized as both cultural and natural heritage). Available online at https://www.americanbar.org/content/dam/aba/publications/nr_newsletters/mr/201105_mr_authcheckdam.pdf.

¹⁹D. Freestone, D. Laffoley, F. Douvere, and T. Badman, *World Heritage in the High Seas: An Idea Whose Time Has Come*, (UNESCO, July 2016).

²⁰J.B. Martin, *Protecting Outstanding Underwater Cultural Heritage through the World Heritage Convention: The Titanic and Lusitania as World Heritage Sites*, 33 INT’L J. ESTUARINE & COASTAL L., pp. 116–65 (2018).

also being developed. This evolution of law was also due to centuries of trade and colonization in the age of exploration. Conflicts over traditional fishing grounds outside the 3 nm territorial sea, and the seaward movement of oil and gas development²¹ onto the continental shelf, heightened the need for a treaty.

The United Nations held its first Conference on the Law of the Sea (UNCLOS I) in 1956, which resulted in the 1958 Conventions on the Territorial Sea and Contiguous Zone, the Continental Shelf, the High Seas, and the Fishing and Conservation of Living Resources of the High Seas. Disputes continued and the UN held a second conference in 1960 (UNCLOS II) with no resulting agreement. A third UN conference was called in 1973 (UNCLOS III), which concluded in Montego Bay, Jamaica in 1982, and resulted in the 1982 Law of the Sea Convention (LOSC). The LOSC came into force in 1994 upon receiving the necessary number of signatories. The LOSC provides the legal framework for all human activities conducted in the various maritime zones and codified the balance of rights and jurisdiction among flag States and coastal States. There was no reference to cultural heritage in the 1958 Conventions; however there were two very general articles in the 1982 LOSC that are applicable: Articles 149 and 303 provide the general framework for the legal protection of underwater cultural heritage (“UCH”).

2. 1982 LOSC (*Historic Preservation and the Law of Salvage*)

Article 303 (1) recognizes a duty to protect UCH found at sea and a duty of States to cooperate for that purpose. Use of the term “sea” means that the duty applies in all of the various maritime zones under the LOSC, i.e., internal waters, territorial sea, contiguous zone, EEZ and the high seas, as well as the corresponding seabeds with which UCH is associated. While the

²¹Truman Proclamation, Exec. Order No. 9633, 10 Fed. Reg. 12,305 (1945) (United States asserted jurisdiction and control over the natural resources of the continental shelf noting it was a natural prolongation of U.S. territorial lands).

duties to protect and cooperate exist in all of these areas, coastal State jurisdiction over activities directed at UCH may only extend to the seaward limit of the 24 nm contiguous zone.²² Thus, the duty to protect UCH located in the vast majority of the sea and seabed primarily lies in the laws of the flag States of vessels, including foreign flag States on the continental shelf of coastal States.

Notably, Section 3 of Article 303 contains a saving clause that respects the rights of identifiable owners, the private international law of salvage, other rules of admiralty, and the laws and practices of nations with respect to cultural exchanges. This is recognition that States continue to have the discretionary authority to ban the application of the law of salvage, condition its application to UCH, or to use salvage law to carry out the duties to protect UCH under international law.

Under Article III of the United States Constitution, maritime law cases are to be heard in federal courts in order to ensure uniformity in such law, including that of salvage.²³ The law of salvage in the United States has developed through case law²⁴ in the context of the practice of nations—customary international law, particularly the English Admiralty system on which it was

²²Article 303(2) provides that: “In order to control traffic in such objects, the coastal State may, in applying article 303, presume that their removal from the seabed 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.” See also, O. Varmer *Closing the Gaps in Protection of Underwater Cultural Heritage on the Outer Continental Shelf*, 33 STAN. ENVTL L. J., 251 (2014).

²³U.S. CONST. art. III; see also, UCH Law Study *supra* note 1 at 5, citing W. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. OF LEGAL HIST., 117, 154 (1993) (the admiralty clause was included in the Constitution to facilitate uniformity in development of maritime law through federal jurisdiction as opposed to the jurisdiction of the several states).

²⁴See *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992), cert. denied, 507 U.S. 1000 (1993) (listing the Supreme Court’s six elements for fixing a salvage award from *THE BLACKWALL* 77 U.S. (10 Wall) 1, 13–14 (1869) and adding a seventh factor, the degree to which the salvors have worked to protect the historical and archaeological value of the wreck and items salvaged).

based.²⁵ Over time, the United States case law has evolved including modifications by the laws of the United States Congress, as well as treaties²⁶ to which the United States is a party.²⁷ A contextual reading of Article 303 and, particularly, subsections (1) and (3) together, clarifies that the duties to protect and cooperate on UCH may well be accomplished through the law of salvage. Thus, United States courts sitting in admiralty are in an important position within the United States government to protect UCH in the maritime law cases presented to them pursuant to their admiralty jurisdiction under the United States Constitution.

Representatives at UNCLOS III wanted to respect existing law and practice but also contemplated the negotiation of a specific agreement to more fully address the duty to protect UCH and cooperate for that purpose: “This article [303] is without prejudice

²⁵See, UCH Law Study *supra* note 1 at 5. Maritime cases and admiralty jurisdiction were specifically addressed and assigned to federal courts in the Constitution because of the need for uniformity of the law pertaining to shipping. To have subjected a ship sailing from Europe to the United States to different laws depending on where the ship docked would have created as much uncertainty in the early days of the nation or state as it would today.

²⁶See, 1910 Salvage Convention, 37 Stat. 1658, T.I.A.S. No. 576. Note that there was no reference to historic shipwrecks in the 1910 Salvage Convention. This was replaced by the 1989 International Convention on Salvage with provisions allowing enhanced rewards for protecting the environment and others clarifying how each State party is to decide whether to apply the law of salvage to historic shipwrecks or sovereign immune wrecks. See, International Convention on Salvage, Apr. 28, 1989, 1953 U.N.T.S.165 (entered into force July 14, 1996). See, DR. SARAH DROMGOOLE, UNDERWATER CULTURAL HERITAGE AND INTERNATIONAL LAW (Cambridge: CUP 2013) at pp. 9–10 for a history of the debates during the formation of the London Salvage Convention on whether sunken property could be salvaged and the rights of treaty nations to define marine peril or danger restrictively in order to exclude UCH from the Convention’s scope.

²⁷While many of the traditional concepts of maritime law have remained, courts have held that substantive maritime law as well as admiralty law can be modified and supplemented. See, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386 (1924). In *Panama*, the Supreme Court recognized Congress’ authority to alter, qualify or supplement the substantive law applied by federal courts sitting in admiralty cases. In *Lathrop v. Unidentified, Wrecked and Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993), the federal district court cited *Panama* in recognizing that Congress may constitutionally alter, qualify, or supplement the maritime law of salvage which in that case was modified by historic preservation laws passed by Congress.

to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.”²⁸

3. *The UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001*²⁹

In response to the continued threats to UCH from looting and unscientific salvage, the need for more specific provisions regarding the duty to protect UCH, the duty to cooperate in protection and, particularly, the perceived gap in the protection of UCH on the continental shelf and EEZ under the LOSC, nations came together to the Paris headquarters of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to develop a more specific agreement to protect UCH in a manner consistent with the framework and delicate balancing of interests under the LOSC.³⁰ The result was the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage.³¹

Adopted in 2001 by the UNESCO General Conference, the 2001 UNESCO UCH Convention represents an international response to the concern of looting and the destruction of UCH by unscientific salvage.³² The 2001 UNESCO UCH Convention is based on four main principles: 1) the obligation to preserve UCH (similar to the duty to protect under LOSC Art. 303(1); 2) the preferred first policy or option of *in situ* preservation, and the imposition of scientific rules for when salvage or recovery is determined to be in the public interest (i.e., consistent with rest of

²⁸LOSC, Art. 303(4).

²⁹UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40 [hereinafter 2001 UNESCO UCH Convention]; text and other information about the 2001 UNESCO UCH Convention is available at: <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/2001-convention/official-text/#EntryIntoForce>.

³⁰P.J. O'KEEFE, SHIPWRECKED HERITAGE: A COMMENTARY ON THE 2001 UNESCO CONVENTION ON UNDERWATER CULTURAL HERITAGE, (Inst. Art Law, Great Britain, 2002) (summarizing the need, purpose and negotiation of the 2001 UNESCO UCH Convention).

³¹*Supra* note 29.

³²*Id.*

Convention); 3) no commercial exploitation³³ of UCH; and 4) cooperation among States to protect UCH, particularly for training, education and outreach (similar to duty in LOSC Art. 303(1)).

“Commercial exploitation” is not defined but is more specifically addressed in Rule 2 which provides that:

The commercial exploitation of underwater cultural heritage or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as *commercial goods*.

In response to concerns raised about a broad interpretation of the term “commercial,” the rule has a couple of provisions clarifying what is not commercial exploitation. Under Rule 2(a), the provision of professional archaeological or other services necessary or incidental to activities being carried out in conformity with the Convention is not considered to be commercial exploitation. For example, the commercial contracting of private, for-profit companies to conduct, surveys, research, conservation and curation of UCH is not commercial exploitation. There needs to be an element of harm to the UCH from the commercial activity for it to constitute exploitation. Therefore, the exploitation of a UCH through for-profit sale of films and photographs is not “commercial exploitation” as the UCH site is not harmed by the activity.³⁴

Rule 2 (b) clarifies that the “deposition” of UCH that is recovered [or salvaged] from a site in the course of a research project in conformity with the Convention is also not considered to be commercial exploitation. Taking UCH from a site for sale in the antiquities market is clearly, commercial exploitation.

³³Annex Rule 2 states that “commercial exploitation” of UCH is incompatible, but the term is not expressly defined. Rule 2 does, however, include the terms “traded, sold, bought or bartered,” and, presumably, those terms refer to an exchange for private commercial gain as opposed to a cultural exchange.

³⁴O’KEEFE, *supra* note 30, at 158.

However, “if objects were raised from a wreck site according to the Rules and placed in a museum, even one run on a ‘for profit’ basis, this would not infringe on Rule 2.”³⁵ For example, to date, the for-profit commercial salvage of RMS Titanic has not been considered to be “commercial exploitation” because the salvaged artifacts have been recovered in a scientific manner, professionally conserved and curated, and made available to the public.³⁶

The relationship to the law of salvage and law of finds is set forth in 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.

The duty to protect UCH under LOSC Art. 303(1) may still be carried out using the maritime law of salvage, provided that it is consistent with the public interest as reflected in the scientific rules of recovery and the international standards of conservation and curation, which have become the practice of nations such as the United States.³⁷ In the United States, the practice and policy in regard to UCH is found in both domestic historic preservation

³⁵*Id.*

³⁶*Id.*, at 51 and 158. As discussed in more detail below, the collection of artifacts is subject to admiralty court orders and other laws requiring that it be kept together in the public interest consistent with the *Titanic* Agreement and Annex Rules, which are similar to those embodied in the 2001 UNESCO Convention. It remains to be seen whether the bankruptcy proceeding of the Premier Exhibitions/RMS Titanic Inc. will somehow undermine the orders of the United States District Court for the Eastern District of Virginia, which have integrated the historic preservation law and policies into the maritime law of salvage in that litigation.

³⁷See, DROMGOOLE, *supra* note 16 (Great Britain, Ireland, the United States and other nations with a longstanding practice of exercising admiralty jurisdiction asserted that parties should have the discretion to implement the Convention through salvage law even if the Civil Code nations like Italy, Spain, France and others preferred to implement it otherwise).

laws as well as in the cases adjudicated by federal courts exercising their Admiralty jurisdiction.

IV

UNITED STATES DOMESTIC LAW RECOGNIZES THE IMPORTANCE OF PRESERVING UNDERWATER CULTURAL HERITAGE

A. Management of UCH

UCH sites are time capsules that have unique characteristics and present an important distinction from heritage resource sites on dry land. Terrestrial heritage sites have generally been subject to generations of human use and intervention. As a result, terrestrial sites may include a mix of time capsules combining artifacts from several different time periods. In contrast, UCH sites are time capsules that are more likely to be from a single period of time and, due to the lack of human use and intervention impacting those sites, they often provide a more pristine representation of the time period during which they sank.³⁸ This is one important reason why *in situ* preservation, or preservation in place, of UCH sites is the preferred management approach.³⁹

In situ preservation also benefits present-day research. By permitting only non-intrusive research, UCH sites are available to multiple research projects, as opposed to just one research and recovery project that would forever destroy the site. Artifacts generally are lost in salvage operations even when conducted

³⁸This aspect of UCH sites can often help explain the mix of time periods contained in a terrestrial site. For example, a historic shipwreck site in Virginia's James River has proved very helpful in sorting out the puzzle of artifacts being recovered at archaeological digs in the historically-significant Jamestown Settlement.

³⁹M. Aznar, *In Situ Preservation of Underwater Cultural Heritage as an International Legal Principle*, 13 J. of Mar. Archaeology. 67–81 (2018) (noting the 2001 UNESCO UCH Convention provision on *in situ* preservation being the “first option” as opposed to the “preferred option” is intentional to prevent misunderstanding that it is the only option or that other options may be in the public interest); *see also* J. HALL, *Things, Inc.: A Case for in situ Application*, MARITIME LAW: ISSUES, CHALLENGES AND IMPLICATIONS, ch. 3 (J.W. Harris ed., Nova, 2010).

pursuant to archaeological guidelines. As the artifacts are uncovered from a stable environment in the seabed they become exposed to oxygen, water, and other changes which put them in a less stable environment. If such artifacts are not recovered and preserved through a conservation process, or at least returned to the more stable seabed environment, they will be lost much more quickly than if they had never been uncovered in the first place. Accordingly, by prohibiting intrusive research and unscientific salvage, the site remains available for education, recreation, and tourism.

As explained above, recovery destroys a site forever and, therefore, it is critical that there be a good reason to justify the recovery. UCH sites include artifacts and their associated contextual information, which should be kept intact so that present and future generations can continue to learn about our history and culture through non-intrusive research. Based on the advancements in technology available to access UCH sites over the past fifty years, there can be little doubt that future generations will have the ability to glean more information from these irreplaceable resources. This is one of the primary reasons for treating UCH sites as time capsules that, in contrast to salvage, should be preserved in place for present and future generations.

There are additional, practical, reasons why in situ preservation may be preferred. Recovery of artifacts in the marine environment is, itself, expensive. Furthermore, once artifacts are recovered, they must be properly conserved and curated, which is, likewise, quite costly. Moreover, aside from cost concerns, UCH sites may include hazards, such as unexploded ordinance, which can present both a human and environmental risk. UCH sites might also be gravesites and, as such, should be given respect by being free from disturbance. In situ preservation principles are embodied in the historic preservation laws of the United States, which reflect the public interest in protecting UCH.

B. United States Legal Authorities Pertaining to UCH

The United States Congress has codified the public's interest in preserving cultural heritage, both terrestrial and underwater, in a number of federal laws. The applicability of each law is largely dependent upon where the resource is located, whether there is an owner of the resource, and whether the resource is considered

historically significant under each statute. A brief summary of the relevant authorities is provided below.

1. Abandoned Shipwreck Act of 1987

The Abandoned Shipwreck Act (ASA)⁴⁰ was passed to protect abandoned historic shipwrecks within state waters from damage suffered by treasure hunting. The ASA expressly provides that the maritime law of salvage and the common law of finds do not apply to the category of shipwrecks covered by the Act (abandoned shipwrecks embedded in the seabed that are eligible for listing or listed in the National Register of Historic Places (NRHP)).⁴¹ Although there is no reference to *in situ* preservation in the Act, it is implicit as a resource management option. Under the ASA and its Guidelines, states are to determine how to manage the abandoned shipwrecks within their waters, and, while some states support *in situ* preservation, others allow for recovery.⁴² Such recovery, however, is permitted by the ASA, which “allow[s] for appropriate public and private sector recovery of shipwrecks consistent with the protection of historical values and environmental integrity of the shipwrecks and the sites.”⁴³

2. The National Marine Sanctuaries Act

Another law that implicitly supports *in situ* preservation is the National Marine Sanctuaries Act (NMSA).⁴⁴ Under the NMSA,

⁴⁰ 43 U.S.C. §§ 2101-2106.

⁴¹ *Id.*

⁴² Some have argued that the ASA ban on the application of the law of salvage and finds was an unconstitutional violation of Art. III of the United States Constitution. In *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), the Supreme Court interpreted the ASA in a manner that addressed that issue and did so by ruling that cases involving historic shipwrecks on state submerged lands must first be heard by an Article III court which would determine whether the ASA applies; if it does apply, then the wreck would, in accordance with the ASA, be owned by the state and the law of salvage and finds would not apply.

⁴³ 43 U.S.C. § 2103(a)(2)(C).

⁴⁴ 16 U.S.C. §§ 1431-1455c-1 (while the NMSA does not expressly use the term, *in situ* preservation, it is implicit in the goals and provisions involving the long-term

discrete areas of the marine environment are set aside in designated sanctuaries for in situ preservation of our natural and cultural heritage.⁴⁵ The first national marine sanctuary to be designated was the Civil War-era shipwreck, *U.S.S. Monitor*. The designation, which occurred in 1975, was made out of a concern that the wreck would be subject to looting and unwanted salvage.⁴⁶

The NMSA, which extends out to the 200-mile EEZ, includes strong enforcement tools to protect sanctuary resources, including UCH. In some circumstances, and subject to a lawful permit, research and recovery activities may occur, albeit within very limited circumstances and in a manner that is consistent with professional scientific standards.⁴⁷

3. *Sunken Military Craft Act*

The Sunken Military Craft Act (SMCA)⁴⁸ is a strong legal tool to protect sunken United States military ships, other government shipwrecks, and military aircraft wherever located around the world. Recognizing that such government craft remain the property of the United States unless formally abandoned, it prohibits unauthorized activities directed at sunken United States craft and bans the trade in illegally obtained artifacts. It leaves traditional uses of the sea (such as fishing, recreational diving, laying of submarine cable and pipelines) unaffected, and expressly states that the law of finds does not apply to United States craft.

conservation of natural and cultural resources in a discrete area of the marine environment).

⁴⁵16 U.S.C. § 1431(a)(2).

⁴⁶While the intent remains to manage this important historic shipwreck and maritime gravesite *in situ*, recovery or salvage of the wreck's turret and a number of other artifacts were determined to be in the public interest, provided they are kept together as a collection and conserved and curated with access to the public. The Mariners Museum in Newport News, Virginia manages the collection pursuant to agreements with NOAA.

⁴⁷See, e.g., 16 C.F.R. § 922.166(c).

⁴⁸10 U.S.C. § 113 note.

Activities directed at United States and foreign sunken military craft can be authorized through the issuance of permits. Without such authorization, the SMCA provides for civil enforcement remedies, including injunctive relief, and liability for damages.

4. *R.M.S. Titanic Act*

Following the discovery of the *Titanic*, the R.M.S. Titanic Maritime Memorial Act of 1986 was passed.⁴⁹ The Act recognizes the wreck as a maritime memorial, and provides for the development of guidelines and an international agreement to control the research, exploration, and, if appropriate, salvage of the wreck. It also requests recommendations for implementing legislation.

In compliance with the Act, the National Oceanic and Atmospheric Administration (“NOAA”) issued “Guidelines for Research, Exploration and Salvage of R.M.S. *Titanic*,” which became effective on April 12, 2001. The guidelines were based on the “Rules Concerning Activities Aimed at the R.M.S. *Titanic* and/or its Artifacts” that were an annex to the “Agreement Concerning the Shipwrecked Vessel R.M.S. *Titanic*,” which was negotiated by the United States, France, Canada, and the United Kingdom. The Agreement was signed by the United Kingdom in November of 2003, and by the United States in June of 2004, subject to the enactment of implementing legislation. On May 5, 2017, the Consolidated Appropriations Act, 2017 (Public Law 115–31), which contained a section (Section 113) prohibiting activities directed at R.M.S. *Titanic* unless authorized by NOAA pursuant to the *Titanic* Agreement, was signed into law.

B. Federal Preservation Laws of General Applicability

There are several federal statutes that are applicable to both terrestrial resources and UCH. The reach of each statute, however, varies.

⁴⁹16 U.S.C. §§ 450rr-450rr-6.

The Antiquities Act of 1906⁵⁰ was the first federal statute created to protect cultural sites from destruction. It applies to cultural resources on lands owned or controlled by the federal government, and provides for criminal penalties to be applied against those who damage such resources. It also includes a provision allowing for the issuance of federal permits for the scientific excavation of cultural resources.

The Archaeological Resources Protection Act of 1979 (“ARPA”)⁵¹ is a powerful Act that also includes both a criminal provision and a permitting provision. The main difference between ARPA and the Antiquities Act, however, is that the permitting provision of ARPA only applies to activities directed against cultural resources located on lands owned by the federal government; it does not apply to activities occurring on lands controlled by the federal government.⁵²

Two additional statutes, the National Environmental Policy Act of 1969 (“NEPA”)⁵³ and the National Historic Preservation Act of 1966 (“NHPA”),⁵⁴ recognize the importance of cultural resources and require federal agencies to consider the impacts of their proposed activities on them as part of their decision-making process. These statutes, however, are procedural in nature and do not prohibit the removal or destruction of cultural resources.

⁵⁰The Antiquities Act, 16 U.S.C. §§ 431–33, has been applied to shipwrecks in federal marine protected areas, *see e.g.*, *Lathrop v. Unidentified, Wrecked & Abandoned Vessel*, 817 F. Supp. 953 (M.D. Fla. 1993), in which the Admiralty court ruled against a salvor conducting salvage activities within the Cape Canaveral National Seashore without an Antiquities Act permit and a dredge and fill permit under the Rivers and Harbors Act of 1899, 33 U.S.C §§ 401–67).

⁵¹16 U.S.C. §§ 470aa to 470mm. ARPA had been used to protect UCH in the Key Biscayne National Park in Florida (*see*, *U.S. v. Hampton*, Crim. Docket Nos. P169925, P169927, and P169928 (S.D. Fla. July 18, 1986)).

⁵²The trafficking provision set forth in ARPA § 6(c) has been applied to archaeological resources looted from private lands and even to theft of such resources abroad. *See*, *UCH Law Study*, fn 1 at p. 37.

⁵³42 U.S.C. §§ 4321–4370m–12.

⁵⁴54 U.S.C. §§ 300101–307108.

V
**“INTEGRATED” MARRIAGE OF THE MARITIME
LAW OF SALVAGE AND HISTORIC PRESERVATION
LAW**

The public interest in historic preservation of UCH has been integrated into maritime law to where there is no longer a presumption that ship and cargo must be salvaged and sold for private gain. Instead, the maritime law of salvage has embraced historic preservation law to protect UCH by requiring it to be professionally recovered, conserved, curated, and available to the public. The preeminent example of this integrated marriage is embodied in the *in specie* salvage award to R.M.S. Titanic, Inc.

A. Protecting R.M.S. Titanic through the Maritime Law of Salvage

In the early 1990s, following the discovery of *R.M.S. Titanic* in 1985, the passage of the 1986 Act, and the salvage of the wreck, litigation ensued in the United States District Court for the Eastern District of Virginia. R.M.S. Titanic, Inc. (“RMST,” the successor-in-interest to Titanic Ventures Limited Partnership, which was the entity that first conducted salvage operations at the site through a joint venture with Institut français de recherche pour l’exploitation de la mer (“IFREMER”)), filed an *in rem* action in 1993 under the maritime law of salvage. RMST was awarded salvor-in-possession status in 1994, which was reinforced nearly two years later with the added caveat that RMST had “promised the Court that it would keep the artifacts together and preserve them for the public.”⁵⁵ Even at that very early stage of the litigation, the court recognized the importance of preserving the artifacts for the public.

Years later, in 2004, RMST filed a motion seeking ownership of the Titanic artifacts. The District Court ruled against RMST,

⁵⁵R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 924 F. Supp. 714, 723 (E.D. Va. 1996).

stating that it would be “inequitable and inconsistent” for the court to award title of the artifacts under the law of finds to the salvor-in-possession. That ruling was affirmed by the United States Court of Appeals for the Fourth Circuit, which held that the law of salvage, not the law of finds governed the case.⁵⁶ The Fourth Circuit then remanded the case to the district court to provide RMST with a salvage award.⁵⁷

In 2011, RMST was granted an *in specie* award, subject to certain covenants and conditions (“C&Cs”) designed to protect the artifacts and the public’s interest in them.⁵⁸ NOAA had significant input into the C&Cs and recommended that provisions of the Agreement, Guidelines, and historic preservation law and policy be included to protect the public interest. The C&Cs, which were finalized by the court in 2010, also referenced the seventh factor in determining a salvage award established by the Fourth Circuit: “the degree to which the salvors have worked to protect the historical and archeological value of the wreck and the items salvaged.”⁵⁹

The C&Cs ensure that the artifacts recovered from *R.M.S. Titanic* will be held in trust for the public and conserved and curated as one collection consistent with international and domestic scientific and historic preservation standards. The court articulated that,

such *in specie* salvage award shall be a **trust** for the benefit of and subject to the beneficial interest of the public in the historical, archeological, scientific, or cultural aspects of the wreck and its artifacts, and the Covenants and Conditions herein.⁶⁰

⁵⁶*R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 435 F.3d 521, 535 (4th Cir. 2006).

⁵⁷*Id.* at 538.

⁵⁸*R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 804 F. Supp.2d 508, 509 (E.D. Va. 2011).

⁵⁹*Columbus-America Discovery Group v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 468 (4th Cir. 1992).

⁶⁰*Id.*

Highlights of the C&Cs include the following: 1) the Titanic collection must be maintained as an intact collection; 2) the collection is to be managed in accordance with professional scientific and historic preservation standards recognized in the Titanic Guidelines issued by NOAA, the Titanic Agreement and Annex Rules, and the curation regulations at 36 C.F.R. Part 79; 3) NOAA shall conduct reasonable and ongoing oversight to protect the United States' interests in the site and artifacts and to ensure compliance with the C&Cs; 4) the collection is to be protected in perpetuity by ensuring that the C&Cs run with the collection such that any subsequent purchasers and/or successors in interest to RMST are bound by the C&Cs; 5) the collection shall be protected in the event of insolvency or bankruptcy by RMST; and 6) RMST is to establish a reserve account to protect the artifacts.

The decision to incorporate C&Cs that require adherence to scientific and historic preservation standards embodied in international and domestic law in a salvage order was truly remarkable. This landmark decision shows a clear path forward for embracing an integrated marriage between salvage law and historic preservation.

B. Other Cases that Have Incorporated Scientific and Historic Preservation Standards into Salvage Law

Two other cases serve as examples of where a federal court sitting in admiralty incorporated scientific and historic preservation standards into a salvage order. The first case involved a Japanese midget submarine that was discovered off the coast of Hawai'i.⁶¹ It was thought to be the one sunk by the *U.S.S. Ward* minutes before the bombing of United States ships in Pearl Harbor. The Institute of Aeronautical Archaeological Research, Inc. claimed rights to salvage the wreck in admiralty court.⁶² On

⁶¹Institute of Aeronautical Archaeological Research, Inc. v. Wreck of Type A "Midget" Japanese Submarine, Civ. No. 92-0052-BMK (D. Hawai'i, July 1, 1993) reported in DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2004, 1991-99: 1619-20.

⁶²*Id.*

July 1, 1993, Magistrate Judge Barry M. Kurren entered a Consent Judgment and Permanent Injunction that had the effect of protecting the wreck:

ORDERED AND ADJUDGED that all persons and parties of any nature, unless they have obtained prior permission from the United States of America, are hereby enjoined and restrained from, directly or indirectly, taking any action of any nature in relation to defendant sunken vessel, including salvaging, attempting to salvage, moving, disturbing, removing, touching, making contact with the sunken vessel, its components, appurtenances, engines, boilers, appliances, furnishings, parts, etc., within the rectangular area encompassed by Latitudes 21°15'10"N. and 21°15'40"N. and Longitudes 157°57'50"W. and 157°58'W.⁶³

In another case, the court granted the salvor's request for exclusive rights to salvage a purported sunken Spanish Manila galleon located within the Hawaiian Humpback Whale National Marine Sanctuary.⁶⁴ Judge Mollway issued an order that would be an excellent model for all admiralty courts to consider in the future:

IT IS FURTHER ORDERED that, prior to any physical contact with the Vessel, Plaintiff is responsible for obtaining any necessary permits and authorizations from local, state or federal authorities, including but not limited to authorities whose areas of expertise and enforcement are the ocean, environment, endangered or threatened species, historic preservation, and/or cultural protection or preservation. Plaintiff shall also comply with all applicable local, state or federal statutes or regulations; ...⁶⁵

The order integrates compliance with applicable laws protecting both natural and cultural resources into the salvage award. By doing so, the court recognized a long practice of

⁶³*Id.*

⁶⁴Kohala Coast Enterprises, LLC v. Unidentified Shipwrecked Vessel, Case No. 1:12-cv-00552-SOM-RLP, Warrant Arrest Order, January 4, 2013 (D. Haw, 2012).

⁶⁵*Id.*

respecting admiralty jurisdiction under Article III of the United States Constitution, while also respecting the authority of Congress to amend the substantive maritime law of salvage. Although these cases mentioned above show how salvage law can be used to protect UCH, the case that best demonstrates how scientific standards, domestic historic preservation law, and international standards for conservation and curation can be integrated into salvage law is, clearly, the *Titanic* matter.

VI MOVING FORWARD

The evolution of salvage law addressing UCH over the past few decades reveals an integration of the public interest in domestic and international historic preservation law and policy. There is no longer a presumption that UCH can only be protected through historic preservation law. As discussed above, several courts sitting in admiralty have successfully integrated requirements to incorporate scientific and historic preservation standards into salvage awards. For years, private commercial salvors were pitted against the public and two separate and distinct camps formed, each justified by either salvage law or historic preservation law. Today, there is no need to make these two areas of law mutually exclusive. The *Titanic* case is a perfect example of how an integrated marriage between these two areas of law can co-exist and thrive. Accordingly, it would be a positive step forward for maritime law professors to incorporate this approach into their courses and for practitioners and judges to build upon it when litigation involving UCH arises. While effective international agreements and domestic legislation to protect UCH are preferable and should continue to be pursued to fill the gaps in preservation laws available to protect UCH, integrating scientific and historic preservation standards into salvage law is, in the interim, a viable approach to protecting time capsules that would otherwise be forever destroyed.