

A Non-State Party's Experience Implementing the UCH Convention: Taiwan's Perspective

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ABSTRACT

This paper pertains to *Session 26* and aims to provide an account of regime complex concerning underwater cultural heritage protection beyond the 2001 UNESCO *Convention on the Protection of the Underwater Cultural Heritage*. The study involves some case studies, including Taiwan's incorporation of the Convention, surveys of shipwrecks in Taiwan's waters, and the author's research findings. Given that Taiwan is not a State Party to the Convention, this investigation seeks to determine whether non-States Parties can engage in pragmatic collaborations with adjacent or other States to enhance UCH protection. The author proposes that a regime complex comprising different international regimes with overlapping objectives, anchored by the Convention as the core instrument and complemented by various international, regional, and bilateral instruments, mechanisms, and arrangements, could be employed to strengthen UCH protection in conjunction with the Convention. Moreover, diverse stakeholders, including States, international organizations, non-governmental organizations, multinational corporations, institutions, and individuals, may have a significant role to play in facilitating international cooperation to safeguard UCH.

Keywords: Convention on the Protection of the Underwater Cultural Heritage, international regime, regime complex, underwater cultural heritage, Taiwan

List of figures

Figure 1. The international regime complex for UCH protection

1. INTRODUCTION

This paper is most appropriately categorized within *Session 26 (General session)*, as it aims to introduce the intellectual developments on international cooperation for the protection of underwater cultural heritage (UCH) in Taiwan from the perspective of regime complex.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) *Convention on the Protection of the Underwater Cultural Heritage* (UCH Convention) is widely recognized as the core legally binding international convention for UCH governance. Its expressed norms on international cooperation, encompassing diverse areas, including the Coordinating State mechanism, sanctions, protection of State vessels and aircraft, training, and bilateral, regional, or multilateral agreements (UNESCO, accessed 25 Dec. 2022). Its Preamble explicitly emphasizes the crucial role of cooperation among States, international organizations, scientific institutions, professional organizations, archaeologists, divers, other stakeholders, and the general public (UNESCO, accessed 25 Dec. 2022).

Despite the significant contribution of the *UCH Convention*, certain intrinsic and extrinsic factors limit its efficacy. Notably, the precondition of UCH being under water for 100 years, a limited number of States Parties, and persistent challenges in ocean governance may compromise the Convention's influence. While efforts should be made to reinforce the *UCH Convention*, exploring alternative regimes that are widely recognized and endorsed beyond it may offer a more flexible approach to safeguarding UCH.

In scenarios where sunken ships originating from States Parties sink in non-States Parties' waters, or

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sunken ships originating from non-States Parties sink in States Parties' waters, the application of the *UCH Convention* may not be straightforward. Thus, the identification of supplementary policy or legal instruments beyond could serve to bridge these gaps and complement the *UCH Convention*.

Non-States Parties to the *UCH Convention* are not bound by its provisions. Nevertheless, they may serve as resource States, transit States, or market States in the trade of looted UCH. Hence, it is significant to identify alternative policy or legal tools to complement the *UCH Convention* in combating transboundary crimes. In recent decades, some States of origin have claimed sovereign immunity over their military vessels that sank in coastal States' waters by entering into bilateral agreements, even if some of them are not States Parties to the *UCH Convention*.

The engagement of a wide range of stakeholders is paramount to safeguarding UCH against both natural and anthropogenic disturbances. While UCH is often vulnerable to these threats, it can also provide valuable information on marine scientific research (MSR), such as climate change. UCH may pose a threat to the marine environment and navigational safety. Thus, the identification of stakeholders and tools beyond the *UCH Convention* is necessary to address these protection gaps.

Despite not being a State Party to the *UCH Convention*, Taiwan's role in UCH protection in East Asia should not be overlooked. Numerous shipwrecks of foreign origin, including those of the United States, Japan, the United Kingdom, and the Netherlands, have been discovered or suggested in Taiwan's waters or located on land (BOCH, accessed 10 Nov. 2022). This shared heritage presents opportunities for mutual interests to be pursued. Nevertheless, with the exception of Cambodia and Micronesia, no other East Asian countries have ratified, accepted, approved or acceded to the *UCH Convention* (UNESCO, accessed 20 Apr. 2023), leaving the rich legacy of UCH in the region vulnerable to clandestine excavation, looting, or trafficking.

The objective of this paper is to discern alternative policy and legal mechanisms, as well as stakeholders beyond the purview of the *UCH Convention*, to complement the existing legal framework and enhance the protection of UCH.

2. CASE STUDIES

In the context of underwater archaeological surveys, the Taiwanese government has commissioned Professor Cheng-hwa Tsang to conduct UCH surveys in the surrounding waters for an extended period. A considerable number of sites or shipwrecks have been discovered or are yet to be discovered. Notable among these are the *S.S. Bokhara* and *Sobraon* from the UK, *SS President Hoover* from the US, Warship *Guang Bing*, *Yamafuji Maru*, *Nanshin Maru 23*, *Gotsugetsu Maru*, *Asaka Maru*, and *Mansei Maru* from Japan (BOCH, accessed 10 Nov. 2022). Of particular significance is the fact that some of the States of origin, such as Japan and the United States, are not States Parties to the *UCH Convention*, which underscores the need for international cooperation beyond the framework of that Convention.

With regards to domestic legislation, UCH was initially subject to the *Cultural Heritage Preservation Act* (CHPA). Due to its limitations, Taiwan incorporated the *UCH Convention* into domestic law through the enactment of the 2015 *Underwater Cultural Heritage Preservation Act* (UCHPA). The author of this article has been extensively involved in the research, drafting, and consultation pertaining to the UCHPA over the last decade. The incorporation was motivated by Taiwan's commitment to fulfill its international responsibility in safeguarding UCH, particularly in light of the rich legacy of UCH in the surrounding waters of Taiwan. As such, Taiwan is the first non-State Party to incorporate the *UCH Convention* into domestic legislation in the region.

3. RESOURCES

The resources utilized in this study were mainly obtained from a four-year research project commissioned by the National Science and Technology Council (NSTC) of Taiwan. The author conducted a preliminary examination of international regimes concerning UCH protection beyond the *UCH Convention*. This study represents part of the intellectual efforts in Taiwan.

4. FRAMEWORK

The research question addressed is whether there exist international regimes concerning UCH protection beyond the *UCH Convention* that can be implemented alongside it. Raustiala and Victor (2004, 279) introduced the concept of regime complex as “an array of partially overlapping and nonhierarchical institutions governing a particular issue-area.” Generally, the primary features of a regime complex are as follows: first, the overlapping aspects of regimes can be diverse, covering various aspects such as scope, subjects, and targets. Second, there is no clear hierarchical relationship among the regimes involved. Third, the regimes may include formal and informal, as well as legally and non-legally binding mechanisms. Fourth, functional overlapping is addressed in addition to the names of these regimes. Finally, diverse public or private entities should also be considered (Gehring & Faude 2013, 471-498; Orsini 2013, 35-42; Green & Auld 2017, 259-284).

In brief, the regime complex concerning UCH beyond the *UCH Convention* can be characterized including but not limited to cultural heritage, ocean governance, and human rights.

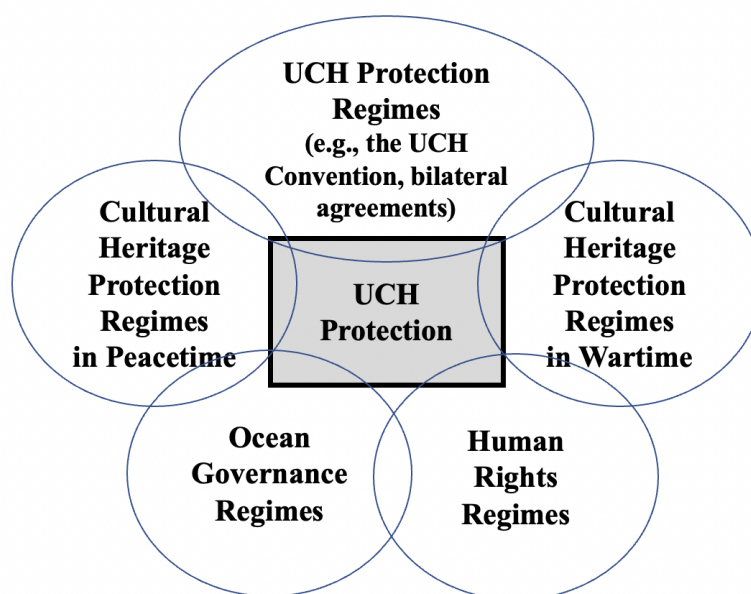


Figure 1. The international regime complex for UCH protection

(1) Soft laws concerning UCH protection

Prior to the adoption of the *UCH Convention*, the *1956 Recommendation on International Principles Applicable to Archaeological Excavations* and the *1978 Recommendation for the Protection of Movable Cultural Property* adopted by the UNESCO encompass cultural heritage under water. Thus, the pertinent components of the two Recommendations could be employed as complementary tools for UCH protection.

(2) The World Heritage Convention (WHC)

Although the definition of sites in the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (WHC) does not explicitly refer to UCH, UCH is implied in the *WHC* because the Preamble of the *UCH Convention* refers to the *WHC*. Furthermore, four of the fifty Marine World Heritage Sites on the World Heritage List on UNESCO's website are mixed cultural and natural World Heritage sites. The General Assembly of the *UCH Convention* adopted a resolution to encourage States to apply the Rules of the Annex of the *UCH Convention* as best practice for any activities directed at submerged parts of World Heritage. A joint mission group consisting of experts of the Scientific and Technical Advisory Body (STAB) of the *UCH Convention* and the ICOMOS visited Bulgaria to examine the conservation of Nessebar and its underwater remains. The World Heritage Committee also recommends the inclusion of UCH in many of its reviews of proposals or projects pertaining to UCH (UNESCO, accessed 30 Dec. 2022). Overall, the *WHC* encompasses UCH both normatively and practically.

(3) Cultural heritage crimes and protection in peacetime and in the event of armed conflict

The *UCH Convention* does not provide explicit provisions for protecting UCH in the context of armed conflicts. The *1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* (1970 Convention) does not regulate UCH explicitly. Nonetheless, these norms do not preclude UCH protection. Mr. Alejandro Palma Cerna (UNESCO, 2016), President of the Conference of the States Parties to the *UCH Convention*, has addressed that “conflict, political turmoil, adverse geopolitical and economic situations, and rapid and unsustainable urban development in coastal areas, damage underwater cultural heritage...[e]choing the call to encourage the exchange of information and synergies among the Culture Conventions,...called for greater cooperation and monitoring to prevent the pillaging and illicit trafficking of underwater cultural heritage.” The STAB of the *UCH Convention* (UNESCO, 2018) has recommended that the States Parties monitor the involvement of their nationals or vessels in plundering shipwrecks that originated from non-States Parties and has called for cooperation with the International Criminal Police Organization (INTERPOL). The INTERPOL (INTERPOL, accessed 3 Jan. 2023) has expressed concerns about such crimes and cooperates with UNESCO to discuss best practices in response to such issues. Therefore, the instruments referred to by the aforementioned developments can be interpreted to implied to UCH protection, including the 1995 International Institute for the Unification of Private Law *Convention on Stolen or Illegally Exported Cultural Objects*, the *Convention against Transnational Organized Crime*, the *United Nations Convention against Corruption*, and the *Declaration concerning the Intentional Destruction of Cultural Heritage*.

Furthermore, the Sixth General Assembly of the States Parties to the *UCH Convention* (UNESCO 2017) lists UCH in emergency situations as one of its themes and found that such emergency situations include conflicts and natural or human-made disasters. The Assembly determined that the *Strategy for Reinforcing UNESCO's Action for the Protection of Culture and the Promotion of Cultural Diversity in Armed Conflict* should be incorporated into the implementation of the *UCH Convention*.

UNESCO (UNESCO 2015) suggested that the large-scale, systematic destruction and plundering of cultural heritage is an indicator of the strong links between the cultural, humanitarian, and security dimensions of conflict and terrorism and that an attack on cultural heritage constitutes an attack on people's race, rights, and security. The destruction of cultural heritage is considered a war crime. The *Policy on Cultural Heritage* issued by the International Criminal Court states that the policy area of the instrument includes UCH such as shipwrecks and underwater archaeological sites (ICC 2021). Therefore, any unlawful destruction of cultural heritage, including UCH, may constitute a war crime in accordance with Article 8 of the *Rome Statute of the International Criminal Court*.

Meanwhile, the UNESCO (UNESCO 2015) suggested that new and more effective measures be developed, in particular under the framework of the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954 Hague Convention) and the *1970 Convention*.

The *1954 Hague Convention* provides a definition of cultural property that applies to both terrestrial and underwater environments. If a warship is conducting a mission in water, any UCH must be identified. If anti-submarine warfare is conducted close to UCH and torpedoes are used, precautions must be taken, such as managing the torpedo depth. In the event of armed conflict, the occupying party must prohibit, avoid, or take measures to prevent the theft, depredation, or destruction of any UCH in the occupied area (O’Keefe et al. 2016, 35, 40, 55-56). These instruments all complement the *UCH Convention*.

(4) Ocean governance: UNCLOS-centered international cooperation

Articles 149 and 303 of the *UNCLOS* explicitly mention UCH. This suggests that UCH protection is no longer a matter of cultural heritage but also a concern of marine affairs. This differs from the protection of terrestrial cultural heritage, which is typically undertaken within national jurisdiction. International regimes for ocean governance may be partially or fully applicable to UCH protection. Distinct approaches can be considered in this regard.

Natural disturbance on UCH

Marine environment protection regimes may be applied to UCH protection. *Particularly Sensitive Sea Areas* (PSSAs) designated by the International Maritime Organization (IMO, accessed 30 December 2022) include some cultural and natural heritage sites in marine environments. Article 4(d) of the *1995 Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean* reads that “[t]he objective of specially protected areas is: ...(d) to safeguard sites of particular importance because of their scientific, aesthetic, cultural or educational interest.”

Human disturbance on UCH: activities directed at UCH

Such activities may warrant the application of marine environment regimes, as they could disturb UCH and its surrounding environment. The UNESCO (UNESCO, accessed 23 Oct. 2022) is currently working with the *Ocean Decade Heritage Network* under the framework of the *UN Decade of Ocean Science for Sustainable Development (2021–2030)* initiative to promote the integration and coordination of archaeology, cultural heritage management, and marine science and to strengthen communication among diverse stakeholders.

Human disturbance on UCH: activities incidentally affecting UCH

To address such impacts, international regimes governing these activities may be invoked for the protection of UCH. A prospector or contractor shall immediately notify the Secretary-General of the International Seabed Authority (ISA) regarding any archaeological or historical artifacts and their locations, and the Secretary-General in turn shall transmit such information to the Director-General of the UNESCO in accordance with ISA regulations (ISA, 2002). Such requirements indicate that international instruments that do not pertain to UCH may still be applicable to UCH protection under certain circumstances.

Human disturbance on UCH: looting or commercial exploitation of UCH

The activities are deemed as having a detrimental impact on UCH, endanger navigational safety, and constitute marine crimes that infringe upon the maritime jurisdiction of coastal States. Diverse legal claims can be employed. For instance, the right of hot pursuit stipulated in the *UNCLOS* can be invoked. International information exchange regarding maritime domain awareness (MDA) can be utilized to protect UCH.

UCH disturbance on the marine environment and/or human beings

In the context of sunken military crafts from World War II, unexploded ordnances or leaking oil can pose a significant threat to the environment and human safety. Certain regimes, such as the *Nairobi International Convention on the Removal of Wrecks*, may be applicable to UCH protection.

In conclusion, UCH protection can be achieved through various ocean governance regimes beyond the *UCH Convention*, such as marine environmental protection, marine spatial planning (MSP), marine scientific research, blue economy, navigation safety, and the exploration, exploitation, conservation, and management of living and non-living natural resources. Multiple stakeholders can be involved in this effort, such as the IMO, the ISA, the International Tribunal for the Law of the Sea, the UN Division for Ocean Affairs and the Law of the Sea (ICOMOS, accessed 1 Jan. 2023), the Intergovernmental Oceanographic Commission (IOC) (UNESCO 2019), the International Hydrographic Organization (IHO), and the World Meteorological Organization (WMO) (UNESCO 2019).

(5) Human rights

Right to work and property right

The principles of archaeology are not explicitly addressed in international human rights instruments. Nevertheless, those principles influence archaeological work, especially with respect to property rights and cultural rights. Take the *Draft Declaration on the Rights of Indigenous Peoples* for example, O’Keefe (1999, 190) suggested that archaeology affects the property rights of indigenous peoples, such as the rights over sacred sites, native land, and native artifacts and the restitution of cultural, intellectual, religious, and spiritual property.

Activities directed at UCH are usually subject to the discretion of cultural authorities. The decisions may impact the work of underwater archaeologists, divers, and those involved in tourism. Governments must also weigh the protection of UCH against the rights of those who inadvertently impact it, including their right to work and property. In such instances, the *Universal Declaration of Human Rights* (UDHR) can aid in the interpretation and implementation of the *UCH Convention*.

Cultural right

The resolution of the United Nations Human Rights Council (OHCHR, 2016) states that “...damage to cultural heritage, ...of any people constitutes damage to the cultural heritage of humanity as a whole...the destruction of or damage to cultural heritage may have a detrimental and irreversible impact on the enjoyment of cultural rights, in particular the right of everyone to take part in cultural life, including the ability to access and enjoy cultural heritage.” It is suggested that Article 27(1) of the *UDHR* is the basis for the cultural right and “States should recognize the right of everyone to...[t]he right to participate in cultural life” in accordance with Article 15 of the *International Covenant on Economic, Social and Cultural Rights*, and that cultural life is “to benefit from the cultural heritage.” (O’Keefe 1999, 187-188) Hence, it is imperative to include UCH within the norm of cultural heritage. Cultural rights regimes can provide guidance in the interpretation and application of the *UCH Convention*.

5. RESULTS

UNESCO is actively promoting global ratification and engagement of the *UCH Convention*. Despite the significant contribution of the Convention, certain intrinsic and extrinsic factors limit its efficacy. It is pragmatic to identify diverse regimes indirectly contributing to UCH protection beyond the *UCH Convention*, as well as the roles diverse stakeholders can play.

This article advocates for the adoption of a regime complex perspective to examine Taiwan's recent observations. The approach posits that multiple regimes with overlapping objectives exist simultaneously, forming a complex network of policy/legal frameworks that complement and reinforce one another. The *UCH Convention* serves as the core instrument, while other regimes addressing issues can contribute to UCH protection indirectly.

Meanwhile, diverse stakeholders, such as States, international organizations, NGOs, multinational corporations, institutions, and individuals within and beyond the *UCH Convention* can be identified and play significant roles respectively in the international cooperation of UCH protection.

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