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The Centenary of Titanic and the Treaty Giving Legal Protection

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Abstract: As of April 15, 2012, the centennial anniversary of the sinking of RMS Titanic, this iconic wreck is protected by the United Nations Educational Science and Cultural Organization (UNESCO) Convention on the Protection of Underwater Cultural Heritage (UCH) (November 2, 2001) (hereinafter 2001 UNESCO Convention) which applies to all historic shipwrecks that remain underwater for 100 years or more. This paper discusses the application of the more important provisions of this Treaty and the implications for parties, such as Spain, and non-parties, such as the United States. It also discusses the International Agreement on Titanic that was negotiated by the United States, the United Kingdom, France and Canada. Additionally, the paper will discuss the laws in the United States to protect Titanic from looting and unwanted or unauthorized salvage, including orders protecting Titanic under the maritime law of salvage issued by Chief Judge Rebecca Smith sitting in admiralty jurisdiction in the United States Federal Court in the Eastern District of Virginia. The court orders prohibit the salvors from disturbing the two large hull portions that are the final resting place of many of those passengers who did not survive the tragedy. Court orders also protect the artifacts salvaged from the field around the two large hull portions by requiring proper conservation and curation of the collection of artifacts as a whole for the public benefit and prohibiting the sale of individual artifacts to private collectors.

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¹ The views and opinions expressed in this paper are those of the authors in their respective individual capacities and do not necessarily reflect the views, opinions or positions of their respective employers or the governments of the United States or Spain.

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INTRODUCTION AND BACKGROUND

Titanic sank a century ago on April 15, 1912. Its sinking and the tragic loss of approximately 1500 lives captivated the hearts and minds of people around the world and significantly influenced the development of related law of nations, including the U.S. Radio Act of 1912 and the International Convention for the Safety of Life at Sea (SOLAS) in 1914, among other laws regulating ship design, lifesaving equipment, distress signals, and international ice patrols. The establishment of the International Maritime Organization (IMO), an international body overseeing the safety of international shipping, is also directly attributable to the lawmaking frenzy that occurred in the aftermath of the Titanic incident. Since its sinking, the legend of Titanic continues to shape culture through songs, books, plays, and movies, which illustrate the stories of numerous heroes and heroines aboard the ill-fated ship who risked their own lives to save the lives of others.

A. Discovery of *Titanic* by Joint French-U.S. Expedition

The shipwrecked Titanic was discovered on September 1, 1985 by a joint French-U.S. expedition lead by Jean Luc Michel of the French Research Institute for Exploration of the Sea (IFREMER) and Dr. Robert Ballard of the Woods Hole Oceanographic Institution (WHOI). The expedition found the wreck approximately 350 nautical miles (nm) out on the slope of Canada’s continental shelf, at approximately two and a half miles below the ocean surface (depth of 12,500 ft or 3,800 m). In July 1986, Dr. Ballard returned and placed a plaque at the Titanic wreck site recording its discovery the previous year and calling for the wreck to be left undisturbed in memory of those who perished aboard the wreck. In 1987, Titanic Ventures Inc. and IFREMER returned to the wreck and began to salvage artifacts from the field around the two large hull portions (hereinafter artifact field). As such, the discovery of Titanic became a catalyst for two different legal initiatives reflecting the broad public interest in Titanic: 1) the enactment of legislation in the United States in 1986; and 2) the 1987 salvage of Titanic, initially controlled under the laws of France and subsequently under the laws of the United States. The enactment of the RMS Titanic Maritime Memorial Act of 1986 in the United States also influenced the orders of the court in the United States.

B. 1986 U.S. Legislation and International Agreement and Guidelines for Activities Directed at Titanic

In an effort to address threats from future activities and ensure future preservation of the site as a maritime memorial, Dr. Ballard urged legislators to enact legislation on Titanic. In 1986, President Ronald Reagan signed into law the RMS Titanic Maritime Memorial Act. The Act recognizes the wreck site as an international maritime memorial that should be preserved for present and future generations. In particular, it encourages the U.S. Department of State (DOS), in consultation with the National Oceanic and Atmospheric Administration (NOAA), to initiate negotiations with the United Kingdom, France, Canada and other foreign governments to develop an international agreement providing for additional protection of Titanic. Additionally, the Act encourages NOAA, in consultation with DOS and other governments, to develop international guidelines (NOAA Guidelines) for the exploration, research, and, if determined appropriate, salvage of Titanic. It was not until the 1990s that other countries expressed an interest developing an agreement perhaps because of salvage activities and/ the exhibition of salvaged artifacts.

C. 1993 Salvage Award by France to Titanic Ventures (RMST) of 1987 Salvage Artifacts

In 1987, France's IFREMER returned to the wreck site with the U.S. company Titanic Ventures Limited Partnership (hereinafter Titanic Ventures), now known as RMS Titanic Inc. or RMST. The expedition recovered approximately 1800 artifacts. IFREMER's charter agreement with the salvors included conditions that the salvor would keep all of the salvaged artifacts together as an intact collection for the public benefit and would not sell individual artifacts. They did not immediately file a claim under salvage law or return to the site for additional salvage as might be required in order to exercise "due diligence" under the maritime law of salvage. In 1992 the Marex company filed for rights to salvage Titanic in the United States. This is likely to have been a factor in RMST requesting a salvage award in France.

In a letter from Titanic Ventures to the Office of Maritime Affairs for France (Ministry of Equipment, Transportation, and Tourism) on September 22, 1993, Titanic Ventures stated that the search for the 1987 recovered artifacts' heirs was complete and requested title of the unclaimed 1987 artifacts. Titanic Ventures committed to the "respectful use of the artifacts recovered," stating "that the artifacts will only be used [for] a cultural purpose and will not, therefore, be part of any operations which would lead to their dispersion, but to the exception of exhibition purposes, and none of the artifacts will be sold." These conditions, as set forth in the charter agreement and reaffirmed by Titanic Ventures in its request for ownership, are in the public interest of all nations.

France subsequently awarded the unclaimed 1987 salvaged artifacts to Titanic Ventures (RMS Titanic, Inc.) pursuant to the same conditions. In a response letter dated October 12, 1993, a chief administrator in the French Office of Maritime Affairs stated that unclaimed recovered objects "shall be delivered to the company Titanic Ventures." The Administrator incorporated Titanic Ventures' assurances from the company's September 1993 letter in stating,

"Concerning the delivery of ownership, I have duly noted your intention, entered in the letter of 9/22/93, by which you agreed to make use of such objects in conformity with the respect due to the memory of their initial owners and to not carry out any commercial transactions concerning such objects nor any sale of any one of them nor any transaction entailing their dispersion, if not for the purpose of an exhibition."

On October 20, 1993, the Administrator declared in formal minutes (a "procès-verbal") that he delivered the 1987 recovered artifacts from the *Titanic* wreck to Titanic Ventures and attached an exhibit of "the letter of intent of Titanic Ventures Limited Partnership dated September 22, 1993." The salvaged

objects were conserved and curated by Electricite de France("EDF"), the French government-owned utility. In addition to the recovery of historic objects, the Company's 1987 expedition also produced approximately 140 hours of videotape footage and an estimated 7,000 still photographs from the wreck site which are also part of this *Titanic* collection that was awarded by the French government in 1993 after the 1992 filing in U.S. and Admiralty court.

D. 1992 Filing of Salvage Rights by in U.S. I Court Eastern District of Virginia

In 1992, Marex Titanic, Inc. (Marex) sought rights to salvage *Titanic* in the U.S. District Court for the Eastern District of Virginia, Norfolk Division.² On August 12, 1992, the Court asserted jurisdiction over the *Titanic* and issued a warrant to "arrest" the shipwreck. However, it was subsequently determined that Marex never performed any salvage operations at the *Titanic* site, much less brought salvaged artifacts within the territorial jurisdiction of the Court for a proper *in rem* salvage claim. When *Titanic* Ventures (RMST) learned of the salvage claim, the company filed a complaint to challenge Marex's claims and assert its own claim to exclusive rights to salvage based on its 1987 salvage expeditions and plans for future salvage.

E. 1994 RMST Award of Exclusive Salvage

On August 26, 1993, RMST, the successor in interest to *Titanic* Ventures, brought a wine decanter which it had salvaged from the wreck site within the territorial jurisdiction of the Court to assert *in rem* jurisdiction and pleaded with the Court that it should be recognized as the exclusive salvor-in-possession of *Titanic*. U.S. District Judge J. Calvitt Clarke, Jr. asserted *in rem* jurisdiction over the artifact as well as jurisdiction over the salvage of the *Titanic* wreck site. The Court recognized the U.S. Marshal as custodian of the *Titanic* and appointed RMST as substitute custodian of the salvaged artifacts and the *Titanic* wreck site. In a court order dated June 7, 1994, the Court granted RMST exclusive salvage rights to *Titanic*.³ RMST and IFREMER returned to *Titanic* for salvage expeditions in 1993 and 1994. RMST's efforts to bring a collection of *Titanic* up for display in museums with public access, such as the British National Maritime Museum, was appreciated by some. On the other hand, the fact that the collection was the subject of a commercial expedition by a private company trying to profit from its salvage raised questions of ethics in the professional archaeological community. The 1994 salvage award and public display of artifacts was also a catalyst for discussions on the need for laws to protect *Titanic* and other underwater cultural heritage (UCH).

F. 1995 Exhibition of Artifacts in United Kingdom and the Greenwich Conference

The British National Maritime Museum convened an international conference in Greenwich, England, in February of 1995 to discuss *Titanic* and, more importantly, other UCH that was vulnerable to looting and unscientific salvage. Participants agreed that there was a need to protect UCH from looting and unwanted salvage and reviewed the International Law Association's draft Convention to protect UCH. However, there were questions as to which international organization, such as UNESCO or the International Maritime Organization (IMO), would be the best forum for further discussions, including

² While there were no particular connections to Virginia or the United States mentioned in the filing of the case, this was the same court that asserted admiralty jurisdiction in year-over salvage of the Columbus America shipwreck more than 100 nautical miles off the coast of Virginia on the continental shelf of the United States pursuant to a filing by the salvors in that case.

³ In response to subsequent pleadings that RMST owned *Titanic* under the law of finds, the Court held that while RMST continued to have the rights under the law of salvage, RMST does not own *Titanic* under the law of finds. Like the French Administrative Tribunal, the Court ordered that the artifacts salvaged from *Titanic* be kept intact as a collection for the public benefit and prohibited the sale of individual artifacts. The Court also prohibited any piercing or penetration of the wreck's hull or salvage of artifacts from within the hull. Salvage is limited to the field of artifacts around the large hull portions.

UNESCO. A second international conference took place at the IMO in January of 1996 and resulted in an official international statement, known as the Greenwich Declaration, concerning the management of UCH. It became clear at these meetings that the IMO was not interested in expanding its scope from international shipping activities and that UNESCO was the most appropriate international forum for negotiating an agreement on historic shipwrecks and other underwater cultural heritage. Thus, these two conferences appear to have been a catalyst for the subsequent meeting of experts convened by UNESCO that resulted in the UNESCO Convention on UCH, agreed to on November 2, 2001. These meetings sponsored by the British National Maritime Museum also facilitated the development of an international agreement on *Titanic*.

G. International Agreement on *Titanic*

At these two UCH conferences, the United States, United Kingdom, France, and Canada held informal sidebar meetings to discuss the purpose, scope, outline, and contents of a potential international agreement on *Titanic*. Following up on a sidebar discussion at the 1996 London conference, national delegations from Canada, France, the United Kingdom, and the United States convened for official negotiations between 1997 and 2000. The objective of these negotiations was to combine their individual efforts and governmental capacity for the joint purpose of preserving the *Titanic* wreck site and salvaged artifacts. Negotiations concluded on January 5, 2000. Shortly thereafter RMST filed a suit against U.S. negotiators, Bob Blumberg and Ole Varmer, and ultimately the government agencies they work for, the U.S. Departments of State and Commerce respectively, to prevent the implementation of an international agreement on *Titanic*. RMST argued that the international agreement and NOAA Guidelines were unconstitutional and an infringement of their rights to salvage *Titanic*. The suit was dismissed on the grounds that the agreement and guidelines were not final and not in force. Thus, the action was not ripe for judicial review. The NOAA Guidelines on the Exploration, Research and Salvage were published in final form on April 12, 2001 without further litigation. Finally, on November 6, 2003, the International Agreement Concerning the Shipwrecked Vessel RMS *Titanic* (hereafter "International Agreement") was signed by the United Kingdom and open for signature by the other parties. The United States signed the Agreement on June 18, 2004; however, at the signing, the United States indicated that before it could be bound in international law, congressional enactment of legislation authorizing the control over activities directed at *Titanic* and enforcement of the agreement over those persons over which the U.S. has jurisdiction under international law was needed. As called for in the RMS *Titanic* Maritime Memorial Act of 1986, the U.S. Department of State submitted to Congress draft legislation to implement the agreement a number of times. While the U.S. Congress has not yet enacted such legislation, it is hoped that the centenary will be a catalyst for the enactment of such legislation or other actions clarifying the existence of legal authority for the United States to carry out the obligations under the Agreement.

In sum, the purpose of the International Agreement and draft implementing legislation was to protect *Titanic* from looting and unwanted salvage and ensure adherence to the scientific rules for research, recovery or salvage to help preserve *Titanic* for present and future generations. To fulfill this purpose, the International Agreement and draft legislation would prohibit potentially harmful activities directed at *Titanic* and establish a permit system to manage the research, exploration, recovery, and salvage of *Titanic*. The Annex Rules would require the application of the current professional standards of scientific and archaeological resource management so that *Titanic* is properly preserved and conserved for present and future generations. The scientific standards in the Annex Rules are similar to the NOAA *Titanic* Guidelines and the 1996 Charter on the Protection and Management of Underwater Cultural Heritage on which they are both based. However, the Annex Rules would be mandatory and clearly enforceable in court. Thus, while court orders under the maritime law of salvage afford some protection to *Titanic*, particularly through control of the activities of the salvor in possession over which the Court has *in*

personam jurisdiction, additional legislation or authority is needed to enforce the agreement against looters and unauthorized salvage.

One of the questions that congressional staffers and others have raised is how U.S. legislation or even an international agreement between the United States and the United Kingdom will actually protect Titanic from looters or unwanted, unscientific salvage by those who are not from the United States or the United Kingdom. Part of the response is that the United States and United Kingdom can use international law concepts such as flag State jurisdiction and jurisdiction over nationals and other persons in their respective nations to control activities of foreign persons directed at the wreck site. The United States and United Kingdom could also apply their domestic trafficking laws to artifacts looted from *Titanic* by foreign persons and vessels, provided the trafficking is within the territorial jurisdiction of the United States or United Kingdom.

Of course, the more nations that become parties to the International Agreement, the better its protection will be. Perhaps the most important potential signatory is Canada as *Titanic* lies on Canada's extended continental shelf and most expeditions have used Canadian ports. As a result, activity at the wreck site would be subject to Canada's port State jurisdiction. While the United Kingdom waits for the United States, Canada, France, and perhaps other nations to become parties to the International Agreement, all of the parties to the 2001 UNESCO Convention will be obligated to protect *Titanic* consistent that Treaty as of April 15, 2012, when Titanic falls under the Convention's temporal requirement. In the meantime, there are existing international and U.S. laws protecting Titanic.

II. EXISTING PROTECTION FOR TITANIC UNDER INTERNATIONAL AND U.S. LAW

A. International Law of the Sea: Duty to Protect Titanic and Other UCH

The Law of the Sea Convention (LOSC) has been referred to as the constitution or framework treaty for activities, including the preservation of UCH, conducted at sea in all of the various maritime zones. While the United States is not a party to the LOSC, the United States has been a leader in its development and implementation and recognizes that much of the Convention reflects customary international law.

The United States has a good track record of cooperating with other nations, such as the United Kingdom, France, Canada, Spain, Germany, and Japan, to protect UCH. In some cases, the cooperation has involved U.S. courts sitting in admiralty jurisdiction; for example, the "Black Swan" case in which Spain successfully argued that its sunken vessel Mercedes is subject to sovereign immunity and may not be salvaged without its consent. While the U.S. pleading to the court did not express any position on the facts of the case, it did consult with Spain in the filing of its amicus brief, which, in sum, stated that if the court determined that the "Black Swan" was a sunken Spanish craft, then it would be subject to sovereign immunity and could not be salvaged without the consent of the vessel's flag state, Spain. As such, the U.S. government and particularly NOAA's Maritime Heritage Program cooperates with Spain on a Memorandum of Understanding regarding the protection and management of UCH. This cooperation is consistent with the LOSC.

Article 303(1) of the LOSC recognizes the duty of all states "to protect objects of an archaeological and historical nature found at sea" and to cooperate for that purpose. As the United

States, the United Kingdom, France, and Canada cooperated in the development of the International Agreement, which recognizes Titanic as a maritime memorial of historical significance, there is little or no dispute that other states have a duty to protect Titanic and cooperate for that purpose.

This duty to protect under the LOSC may be carried out in many ways, such as under the International Agreement on Titanic or the 2001 UNESCO Convention. This cooperation may be carried out under the private international law of salvage, which allows regulation of private companies, such as the commercial salvors in the case of the Mercedes (Odyssey Marine Exploration's Black Swan project) as opposed to public international law, which regulates the activities of nations. As indicated above, much of the existing protection of Titanic to date has been accomplished under the maritime law of salvage in France and recent U.S. court orders. The French Tribunal in its award of the artifacts recovered from the 1987 expedition required that the collection of artifacts be kept together as an intact collection for the public benefit, and the U.S. federal court issued similar orders requiring that the collection of artifacts salvaged be kept together as an intact collection for the benefit of the public and prohibiting penetration or harm of the hull portions. The U.S. court also recognized that the International Agreement and the NOAA Guidelines are in the public interest in Titanic. Other U.S. domestic laws, including the National Historic Preservation Act and the trafficking laws including the National Stolen Property Act and/or the Archaeological Resources Protection Act section 6(c), may be available to help enforce the International Agreement.

Under LOSC Article 303(1), the U.S. has a duty to protect objects of a historical or cultural nature like Titanic and to cooperate with other nations for that purpose. Although the U.S. may not be a party to the LOSC, it takes a leading role around the work in its implementation of many of its provisions as they reflect customary international law. For a number of reasons, the U.S. is also not a party to the 2001 UNESCO Convention. Regardless, under customary international law the U.S. has a duty to cooperate with other nations including those with the additional duty to protect and cooperate for that purpose under the 2001 UNESCO.

III. THE 2001 UNESCO CONVENTION AND ITS LEGAL PROTECTION OF TITANIC

A. 2001 UNESCO Convention Protects All Wrecks Underwater for at least 100 Years

The 2001 UNESCO Convention provides "blanket protection" to all UCH as defined under Article 1 (Definitions). Under the Convention, UCH is defined as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years" Included in this definition of UCH are "human remains," "vessels . . . or any part thereof, their cargo or other contents," and "their archaeological and natural context."

B. *Titanic* Subject to 2001 UNESCO Convention as of April 15, 2012

On the night of April 14, 1912, *Titanic* collided with an iceberg and sank in the early morning of April 15, 1912. Thus, as of April 15, 2012, the wreck site falls under the 2001 UNESCO Convention definition of UCH and is subject to the Convention's protection. Parties to the Convention will be obligated to protect the wreck site. The Titanic shipwreck has been continuously underwater since the date of its sinking and consists of the vessel, human remains, and the personal cargo and contents of those who were aboard Titanic at the time of the tragic accident. The shipwreck is of cultural and historical significance, and serves as the gravesite for over 1500 men, women, and children. Therefore, Titanic is UCH and brought within the scope of the UNESCO Convention as of April 15, 2012.

C. Summary of 2001 UNESCO Provisions Protecting UCH like Titanic

1. Article 2(5): In situ Preservation

Article 2(5) of the UNESCO Convention provides that “[t]he preservation in situ of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage.” As a precautionary management approach to protecting UCH, in situ preservation provides flexibility for UNESCO Convention State Parties to implement the duties that already exist under customary international law. These duties, as stated in LOSC Article 303(1), include the “duty to protect objects of an archaeological and historical nature found at sea” and “to cooperate for this purpose.”

Similarly, the Annex Rules to the International Agreement call for in situ preservation as the preferred policy. Under the International Agreement, any activity directed toward Titanic may be authorized only if “justified by educational, scientific or cultural interests, including the need to protect the integrity of RMS Titanic and/or its artifacts from a significant threat” UNESCO Convention State Parties must implement in situ preservation unless “activities directed at underwater cultural heritage . . . [are] authorized for the purpose of making a significant contribution to protection or knowledge or enhancement of underwater cultural heritage.” The rules annexed to both the UNESCO Convention and the International Agreement require that certain scientific methodology be used for any activity directed at UCH/Titanic. As indicated above, artifacts around the two large hull portions of Titanic have been subject to salvage consistent with the charter agreement with IFREMER and NOAA Guidelines, while the hull portions continue to be preserved in situ. Without project authorization or proper justification, interested parties and the general public would be limited to non-destructive activities such as viewing, surveying, photographing, and visiting Titanic. Some critics of the UNESCO Convention and the International Agreement criticize the in situ preservation policy as actually resulting in damage to UCH that would be better protected if recovered or salvaged. However, this reflects a misunderstanding of these agreements and the in situ preservation policy. The Annex Rules of both agreements contemplate that UCH is going to be subject to intrusive research and recovery when the UCH is threatened by human activity or nature, or when it is time for the Titanic “time capsule” to be recovered. In situ preservation is consistently implemented by the UNESCO Convention and the International Agreement. However, one major issue may be whether the Parties to the 2001 UNESCO Convention will respect the treatment of Titanic under the U.S. court implementation of the law of salvage and NOAA Guidelines. The U.S. court and NOAA guidelines in turn recognize and respect the orders of the court consistent with the RMS Titanic Maritime Memorial Act of 1986, the LOSC and many provisions of the Agreement, and the 2001 UNESCO Convention Annex Rules.

2. Article 4: Prohibition Against Application of Law of Salvage and Law of Finds

Article 4 provides an express prohibition against the application of the law of salvage and the law of finds. Parties to the Convention would generally be prohibited from the unauthorized salvage of *Titanic*. In regard to the whether and how the authorizations of salvage of *Titanic* by the United States and France would be recognized and treated by parties to the 2001 UNESCO Convention, it should be noted that Article 4 includes an exception which allows nations to authorized activities through the law of salvage provided the salvage is conducted in strict accordance with the Convention and Annex Rules. More specifically, the law of salvage may only be applied if (1) the salvage is controlled or authorized, (2) the UCH will receive maximum protection, and (3) such authorization is “in full conformity with this Convention.” As there is a preference for in situ preservation and a general ban against the law of salvage and finds, none of the Parties to the Convention are likely to authorize an expedition to recover artifacts under the law of salvage or finds. The question remains as to how they will view the salvage activities previously authorized by the governments of the United States and France. However, as no

other nations have indicated that they object to these salvage awards and the salvage company is required to comply with orders that appear consistent with the Convention, the parties may continue to be silent on the matter, if not respect the orders under the circumstances. RMST is required by the orders or authorizations of the United States and France to keep the collection together for the public benefit.

3. Other Articles that Apply to Protect Titanic

The blanket protection of UCH of the Convention may also involve a number of other articles under the 2001 UNESCO Convention, including:

- Article 5: Activities incidentally affecting UCH;
- Article 14: Control of entry into the territory, dealing and possession;
- Article 15: Non-use of areas under the jurisdiction of States Parties;
- Article 16: Measures relating to nationals and vessels;
- Article 17: Sanctions;
- Article 18: Seizure and disposition of UCH;
- Article 19: Cooperation and information-sharing; and
- Article 3: Relationship to the LOSC

Also involved are the Annex Rules to the 2001 UNESCO Convention which are very similar to the Annex Rules in the *Titanic* Agreement and NOAA Guidelines.

Conclusion

On April 15, 2012, the wreck site of Titanic will have been underwater for 100 years and thus will become subject to the provisions of the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage (UCH), which provides blanket coverage to all shipwrecks and other UCH that have been underwater for at least 100 years. There are already some duties under customary international law as reflected in LOSC that apply to Titanic. Some existing U.S. laws and policies also protect Titanic, including orders of the U.S. federal court sitting in admiralty. Many of these laws and policies are consistent with the 2001 UNESCO Convention. As the wreck site of Titanic hits the temporal milestone, legal protection will increase, thus bolstering protection of the wreck site for the benefit of present and future generations. Even with this increased protection, there are many gaps and weaknesses in the current protection that would benefit from the enactment of legislation to protect Titanic and perhaps other UCH from looting and unwanted, unscientific salvage.