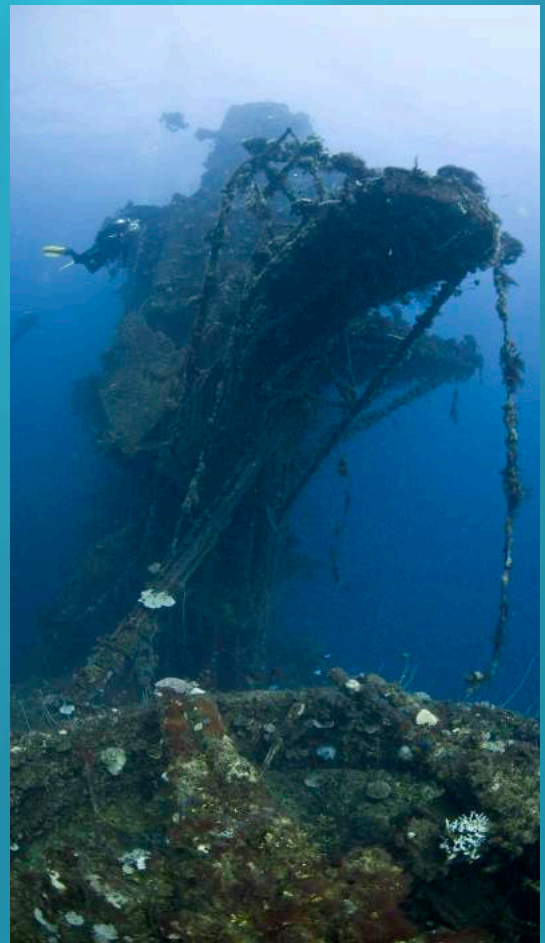


# UNESCO 2018

## Technical Report on UNDERWATER CULTURAL HERITAGE - related legislation and programme review in the five countries in Micronesia



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Authors:

Craig Forrest  
Director, Marine and Shipping Law Unit  
TC Beirne School of Law  
University of Queensland

Bill Jeffery  
Assistant Professor, Anthropology Programme  
College of Liberal Arts and Social Sciences  
University of Guam

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# Underwater Cultural Heritage (UCH)-related legislation and programme review in the five countries in Micronesia

Final Report

3 December 2018

Professor Craig Forrest  
Director  
Marine and Shipping Law Unit  
TC Beirne School of Law  
University of Queensland

AND

Dr. Bill Jeffery  
Assistant Professor  
Anthropology Programme  
College of Liberal Arts and Social Sciences  
University of Guam

## I. UNESCO TERMS OF REFERENCE

### **Research Project Objectives:**

Under the overall goal to enhance the capacity for the UCH safeguarding, the objectives of this consultancy are to support the national process towards ratification (or implementation) of the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (UCH Convention) by developing recommendations based on analysis on the two aspects; i) UCH-related policies/laws/legislation and ii) UCH-related programmes/initiatives, in the five states (Federated States of Micronesia, Kiribati, Nauru, Palau and Republic of the Marshall Islands) in Micronesia.

The Assignment involves the following;

- To map the current UCH-related policies/laws/legislation in the five states in Micronesia;
- To map the current UCH safeguarding programme/projects both in the public and civil society sectors in the five countries in Micronesia;
- To identify gaps to be addressed in order to strengthen the UCH safeguarding for sustainable development and to join (or implement) the UCH Convention; and
- To provide recommendations as a way forward.

In drafting the report, the following consideration were taken into account:

- The diversity of types of UCH that exist in the countries concerned and their tangible and intangible aspects;
- The policies/laws/legislation and Programmes/Initiatives pertaining to UCH safeguarding for sustainable development beyond the culture/heritage sector (eg. fishery, education, ocean transportation, environment, tourism, customs, climate change, etc.)
- The programmes/initiatives both in the government and civil society sectors;
- Linkage of UCH safeguarding to national sustainable development plan.

### **Legal review**

The above is subject to the scope of this project, limited by both time and the maximum report length. While the Constitution and laws of each of the five states (and in some cases those of their component states) were reviewed, this report does not address or review all these laws in detail. To do so amounts to a complete review of the Legal Code of each State – a monumental undertaking. Instead, the key issues raised by the implementation of the UCH Convention - sovereignty and territoriality, legal pluralism, the competent authority and the scope of maritime law - are addressed through a review of the key legislative instruments that match these issues. This then provides a starting point for each state to review comprehensively its Legal Code for the purpose of implementing the UCH Convention.

The Report is based upon the laws of the five states obtained primarily through material available on the internet. Where possible, this has been through the relevant government's own website<sup>1</sup>, supplemented by that obtainable through the Pacific Islands Legal Information Institute (PACLI<sup>2</sup>) and for FSM through the Legal Information System for the Federated States of Micronesia<sup>3</sup>. It is not always clear whether these sources have the up to date legislative changes made to each National Code or applicable law and obtaining these is difficult. Indeed, the difficulties of obtaining an accurate account of the laws of any of these states considered here are well known. This is reflected, for example, in a SPREP review on the environmental laws of Nauru where the reviewer noted:

This Review was greatly facilitated by the willing cooperation of the officers of Nauru's Department of Justice. This is a key repository of Nauru's written laws, although it cannot be confidently said that even the Justice Department has access to all of Nauru's laws.<sup>4</sup>

Reflected on the availability of these laws on PACLI<sup>2</sup>, the review noted

It must be noted that the available laws [on PACLI<sup>2</sup>] are not nearly exhaustive, or even representative of the major laws that should be readily accessible. And they lack the necessary authority as to their validity and accuracy that is an important outcome from an official comprehensive statutory revision.<sup>5</sup>

As such, whilst every endeavour has been made to base this Report on the current law of each state, it cannot be certain that all relevant primary material has been included, nor that the Acts, ordinances and other legislative instrument relied upon are indeed the most recent version. Only research undertaken in each State, with full access to all Departmental materials is likely to reveal anything like an accurate account of that state's laws.

### **UCH safeguarding programmes**

There is a vast literature of an historical, anthropological, and archaeology nature for this region and many have a connection to the highly significant maritime cultural landscape and maritime cultural identity of which UCH is a part, but it has in the limited time for this report only been possible to refer to a small number in these studies.<sup>6</sup> There is only a small amount of literature

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<sup>1</sup> This include the Marshall Islands (<https://rmiparliament.org/cms/>) and Nauru ([http://ronlaw.gov.nr/nauru\\_lpms/index.php](http://ronlaw.gov.nr/nauru_lpms/index.php)).

<sup>2</sup> <http://www.paclii.org/>

<sup>3</sup> <http://fsmlaw.org/>

<sup>4</sup> Graham Bruce Powell *Nauru: Review of Environment Related Laws* (2007 SPREP) 8, available at <https://www.sprep.org/members/nauru>

<sup>5</sup> Graham Bruce Powell *Nauru: Review of Environment Related Laws* (2007 SPREP) 9, available at <https://www.sprep.org/members/nauru>

<sup>6</sup> Denfeld 1970, 1980; Gladwin 1970; Hanlon 1998; Hezel 1979, 1985, 2016; Irwin 1994; Kiste and Marshall 1999; King 2006, 2018; Krämer 1917-1929; Poyer et al. 2001, 2004; Price 1936; Rainbird 2004; Peattie 1988

specifically related to UCH programmes or UCH archaeological investigations, primarily because not much has been done.<sup>7</sup> A broad Asia-Pacific summary of the WWII-related UCH referring to a database of all the WWII shipwrecks in this broader region has been produced,<sup>8</sup> and a large body of work on ships through Micronesia from 1521-1991.<sup>9</sup> The literature that is far more extensive in Micronesia in regard to UCH is of an historical and tourist nature and related to WWII-related UCH.<sup>10</sup>

## II. MICRONESIA REGIONAL INFORMATION

The Micronesian region is located in the western Pacific Ocean and comprises the area of between 20°N-10°S; 134°E-160°W, approximately 7.5 million km<sup>2</sup> of the Pacific Ocean. It comprises about 2,100 islands (coralline and volcanic), encompassing the independent nations of: the Federated States of Micronesia (FSM); the Republic of Palau (sometimes referred to as Belau, its traditional name), the Republic of the Marshall Islands, the Republic of Nauru; and the Republic of Kiribati.<sup>11</sup> It also includes the United States of America (US) Territories of Guam, the Commonwealth of Northern Mariana Islands (CNMI) and Wake Island.<sup>12</sup> They have not always been known by these names, and in terms of the island groups, some have only recently become united. Palau and the FSM are often referred to as the Caroline Islands and the people as Carolinians, a name given to the region by Spain in the 17<sup>th</sup> Century.

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<sup>7</sup> Carrell 1991; Delgado et al. 1991; Hezel & Graham 1997; Holly 1999; Jeffery 2007, 2010, 2014, 2017; UNESCO 2010

<sup>8</sup> Monfils et al. 2006

<sup>9</sup> Levesque 1991

<sup>10</sup> Bailey 1989, 1991, 2000; Earl & Giddings 1976; Lindemann 1992; Stewart 1989

<sup>11</sup> FSM became a member of the United Nations in 1991; Palau in 1994; Marshall Islands in 1991; Nauru and Kiribati in 1999, <https://www.un.org/en/member-states/> Accessed on 23 September 2018.

<sup>12</sup> This report only focusses on the five independent nations, not the US territories, although US ‘interests’ can be seen in some of these independent nations.



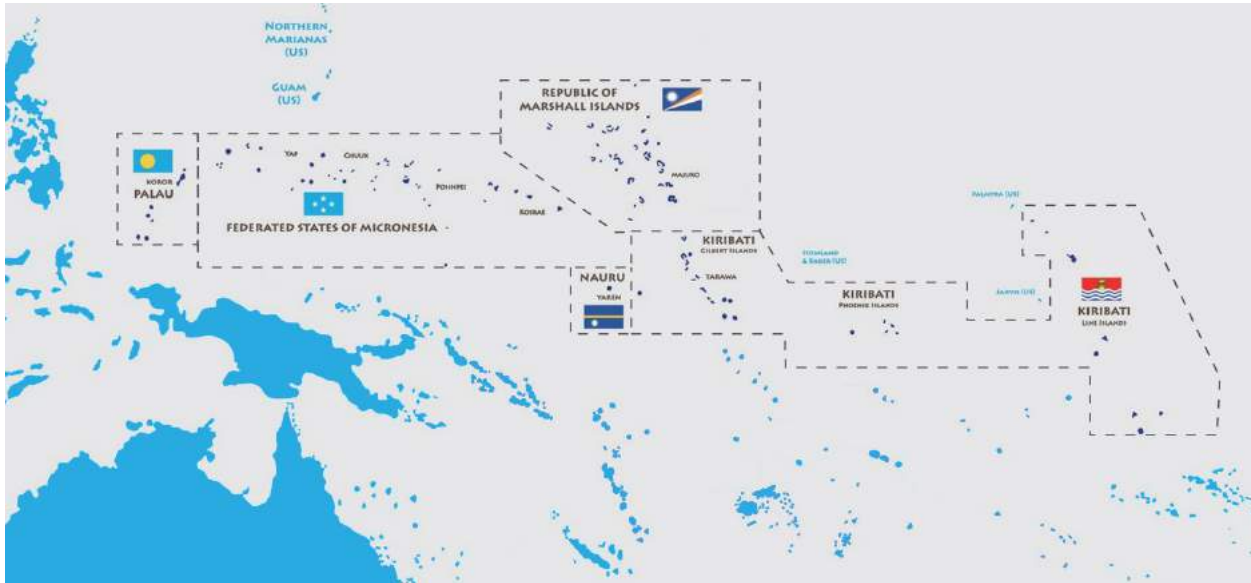


Figure 1: Map of the five countries of Micronesia. Source: UNESCO Office for the Pacific States

The name Micronesia is another colonial construct. It is a name derived from the Greek meaning ‘tiny islands’ and was first put forward by Gregoire Louis Domeny de Rienzi in 1831 when he ‘asked for and received official approval from La Société de Géographie in Paris to call these islands Micronesia.’<sup>13</sup>

Hezel<sup>14</sup> describes Micronesia as ‘broken up into perhaps ten cultural-linguistic groups [and] even before the first Western incursions into the area, they exhibited enough common features to be classified in that cultural family that came to be called Micronesia.’<sup>15</sup> Hanlon elaborated on the name Micronesia and regards it as a colonial construct in much the same manner as Rainbird.<sup>16</sup> Goodenough maintains that ‘linguistic connectedness’ that can be found throughout the region and ‘interisland voyaging’ gives the area, a ‘certain cohesiveness.’<sup>17</sup>

Two subgroups of the Austronesian language group are present in Micronesia—West Malayo-Polynesian and Oceanic.<sup>18</sup> The former is found in the western high islands of Micronesia—the Chamorro speakers in the Marianas, and Palauan speakers among the Palau group. The remainder of Micronesia is populated by ‘Nuclear Micronesian’ speaking groups, the Oceanic languages related most closely to those found in eastern Melanesia.<sup>19</sup>

<sup>13</sup> Hanlon 1998: 1

<sup>14</sup> Hezel 1992: 203

<sup>15</sup> Hanlon 1999: 76

<sup>16</sup> Kiste 1999: 43

<sup>17</sup> Kiste 1999: 434

<sup>18</sup> Rainbird 2004: 51

<sup>19</sup> Craib 1978

First settled at different periods from c. 3,500 to 2,000 years ago by arguably the world's foremost wayfinders (navigators/seafarers), some of the islands in the region were sighted by Magellan in 1521 (such as Guam) and much of it became a Spanish colony from 1668. This changed during the following 300 years in which it was ruled at different times by German, British, Japanese, Australian and US administrators. Further background history for each country can be found in this report.

Following World War II, the US was designated a United Nations (UN) trustee of FSM, Palau, the Northern Marian Islands and the Marshall Islands, which became known as the Trust Territory of the Pacific Islands (TTPI), and it was maintained up until 1986-1994. Nauru was administered jointly under a UN trusteeship by Australia, the United Kingdom (UK) and New Zealand until self-rule in 1966. Different atolls in Kiribati had UK and US interests and administrators, gaining whole of island group independence from 1979-1983.

## **Independence**

The process to independence took different forms in each of the five states, and was a gradual process that built on the existing western model of the former colonial powers, except the Marshall Islands. Though a US dependency, the Marshall Islands adopted a parliamentary system of government rather than a presidential one.<sup>20</sup> The parliamentary model was thus adopted by Kiribati and Nauru, and the presidential model by Palau and FSM.

Each state had, prior to colonization and then independence, an existing indigenous political and legal system. These however, were not suited to nation states and the adopted politic and legal systems requires integration with these indigenous systems. The subsequent constitutions adopted in these states gave differing recognition to indigenous customary law and traditional leaders. The resulting legal pluralism is a challenging feature of these states, with differing degrees of recognition of indigenous customary law as a source of law. The constitutions of these states do not always make it clear what the source of the law is. The constitutions of Kiribati, FSM and Marshall Islands are largely silent as to the source of the common law. The courts of Kiribati largely follow statutory rules for the reception of the common law while the courts of the Marshall Islands and FSM tend to fashion rules appropriate to the circumstances at the time irrespective of the source of the law. That said, the courts of FSM have tended to look to US decision for guidance.<sup>21</sup> Indeed, the approach taken by the three States that were part of the TTPI administered by the US have features in common due to this, while those of Nauru and Kiribati and somewhat different.

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<sup>20</sup> Ntummy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) xviii.

<sup>21</sup> Ntummy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) xxi.



## The former TTPI states

FSM, Palau and the Marshall Islands continue to exhibit similar legal systems and laws due to the continuation in each of some pre-independence statutes and to the continuing relationship that have with the US through the adoption of Compacts of Free Association. In the context of this report, one peculiar continuation in these three states is the application of the US National Historic Preservation Act (NHPA) and its implementation by the US National Park Service (NPS) in each State.

In 1966, the US Congress enacted the National Historic Preservation Act (NHPA), and provided a number of initiatives to support this Act: a “National Register of Historic Places” in the National Park Service (NPS); matching grants for “States” to implement preservation activities; establishment of an “Advisory Council on Historic Preservation”; and through Section 106 of the Act, the need to assess any actions of the US government on historic properties.<sup>22</sup> In 1974, the Act was amended to include the TTPIs. An Historic Preservation Officer was based in Saipan (NMI) and they created “districts” in some of the other islands and places were nominated for the National Register.<sup>23</sup> Traditional cultural properties (islands/areas/features that may not contain any man-made remains but contain traditional cultural values) were in the 1980s regarded as eligible for preservation under the NHPA. The FSM, Palau and the Marshall Islands were brought under the US National Park Service (NPS) Historic Preservation Programme, utilising US legislation and procedures, and incorporating their own country (western-style) laws and traditional indigenous cultural practices.

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<sup>22</sup> (King 2006: 505).

<sup>23</sup> King 2006: 506).

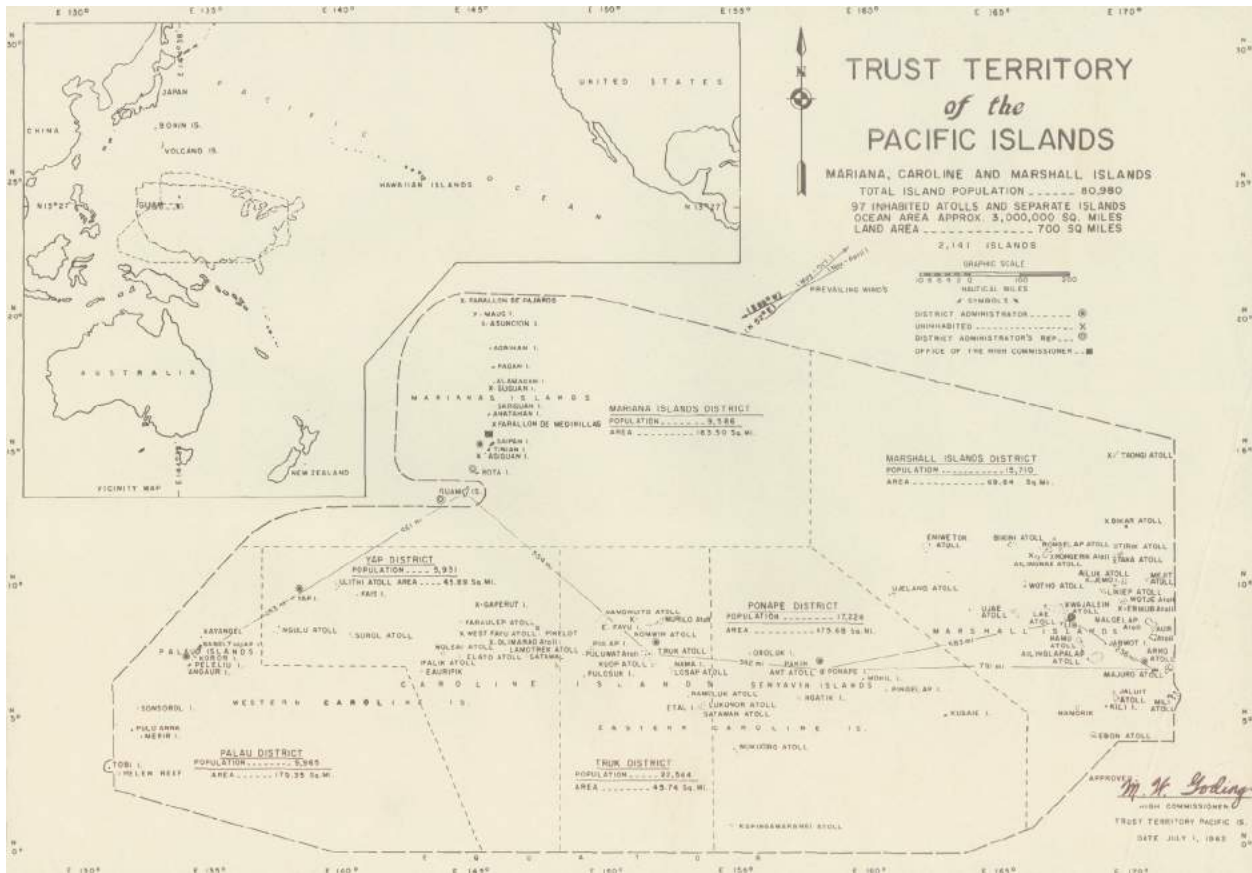


Figure 2: Map of the TTPI, US Federal Government, 1962. Source: <http://libweb.hawaii.edu/tfp/images/1962full.gif>

Today there are Historic Preservation Offices with a State Historic Preservation Officer (SHPO) in Palau, Marshall Islands, Pohnpei, Kosrea, Chuuk, Yap, and a National FSM Office in Palikir, Pohnpei with staff and contracted specialists implementing historic preservation activities. The small number of staff employed can vary between states/nations but they general include technical staff to implement reconnaissance surveys, grant managers, ethnographers and administration staff. The specialists are archaeologists and cultural anthropologists who need to meet the Secretary of the Interior Standards for employment as such.<sup>24</sup> The offices are funded by the States or National governments with matching financial support from the US NPS Historic Preservation Fund.

O'Neill & Spennemann provide a geo-political view on why the NHPA was proclaimed to apply to the TTPI:

During the curiously labelled "Cold War" period of international confrontation, American strategists commonly perceived this area [TTPI] as being critical to the defence of U.S. interests, and the doctrine of "strategic denial" became fundamental to America's management of the territory. As such, it was politically

<sup>24</sup> [https://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](https://www.nps.gov/history/local-law/arch_stnds_9.htm) Accessed 27 November 2018

expedient for the U.S. to clearly demonstrate that it considered the TTPI part of U.S. territory. One way to do so was to implement elements of U.S. legislation locally and that involving Historic Preservation was one that was imported easily and quickly. Thus, as a development of American perceptions of geo-politics in the 1950s and 1960s, formal processes of Historic Preservation were introduced to the TTPI shortly after their implementation in the U.S. itself.<sup>25</sup>

Kiribati and Nauru developed separate heritage laws and programs which are detailed in this report.

### III. UNITED NATIONS SUSTAINABLE DEVELOPMENT GOALS

In 2015, the United Nations (UN) adopted the resolution: ‘Transforming our world: the 2030 Agenda for Sustainable Development.’ A total of 17 Sustainable Development Goals (SDG) and 169 Targets were identified as key to ‘stimulating action over the next 15 years in areas of critical importance for humanity and the planet.’<sup>26</sup> A number of SDG are relevant to the management of Underwater Cultural Heritage (UCH), including: SDG 2, Zero Hunger; SDG 3, Good Health and Well-Being; SDG 4, Quality Education; SDG 8, Decent Work and Economic Growth; SDG 12, Responsible Consumption and Production; SDG 13, Climate Action; SDG 14, Life Below Water; SDG 17, Partnerships. A number of Micronesian countries have identified, and are working in partnership with other countries and a range of groups, on a number of SDG. They are further discussed within each country.

The other related UN action worth noting here is the action to ‘support the Small Island Developing States (SIDS). Many of the states of Oceania are Small Islands Developing States (SIDS) that form part of the loose collective recognised in 1992 as a distinct group at the United Nations Conference on Environment and Development<sup>27</sup>, and which have morphed into specific international organisations such as the Alliance of Small Island States (AOSIS), in which 15 Oceania states are members.<sup>28</sup>

As an outcome of the Small Island Developing States (SIDS) Conference in Apia, Samoa in 2014, the ‘SIDS Accelerated Modalities of Action (SAMOA) Pathway’ in which a SIDS Partnership Network was established in order to ‘monitor progress of existing, and stimulate the launch of new, genuine and durable partnerships for the sustainable development of SIDS.’<sup>29</sup> The resolution adopted at the UN General Assembly in which it endorsed the SAMOA Pathway made many

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<sup>25</sup> O’Neill & Spennemann 2006

<sup>26</sup> [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E) Accessed 29 September 2018

<sup>27</sup> SIDS includes Kiribati, Marshall Islands, Federated States of Micronesia, Nauru and Palau. UNESCO, List of Small Island Developing States (24 October 2017) <<http://www.unesco.org/new/en/natural-sciences/priority-areas/small-island-developing-states/resources/sids-list/>> accessed 8 November 2017.

<sup>28</sup> Alliance of Small Island States <<http://aosis.org/>> 8 November 2017.

<sup>29</sup> <https://sustainabledevelopment.un.org/sids/partnershipframework>, Access 28 September 2018.

critical statements on the issues and processes for sustainable development in SIDS and a call for action in many areas, including: tourism, climate change and the ocean. Underwater Cultural Heritage (UCH) is identified:

[Paragraph 54] Recognizing that small island developing States have large maritime areas and have shown notable leadership in the conservation and sustainable use of those areas and their resources, we support their efforts to develop and implement strategies for the conservation and sustainable use of those areas and resources. We also support their efforts to conserve their valuable underwater cultural heritage.

It is also noted in the UN 2014 Resolution on the SAMOA Pathway:

[Paragraph 56] Recognizing the concern that potential oil leaks from sunken State vessels have environmental implications for the marine and coastal ecosystems of small island developing States, and taking into account the sensitivities surrounding vessels that are marine graves, we note that small island developing States and relevant vessel owners should continue to address the issue bilaterally on a case-by-case basis.<sup>30</sup>

UCH encompasses the broad interactions humans have had, and continue to have with the sea, lakes and rivers, as is identified in the UNESCO Convention on the Protection of Underwater Cultural Heritage 2001. It can include shipwrecks but it is not limited to them, and of relevance to Oceania it can include fish weirs, sunken villages, and traditional indigenous sites and objects. Given this broad understanding of what is UCH, there are a number of aspects in the SAMOA Pathway that could incorporate the management and continued use of UCH for the sustainable development of SIDS. These include:

[Paragraph 53] Sustainable fisheries and aquaculture, coastal tourism, the possible use of seabed resources and potential sources of renewable energy are among the main building blocks of a sustainable ocean-based economy in small island developing States...[Section 59] We stress the crucial role of healthy marine ecosystems, sustainable agriculture, sustainable fisheries and sustainable aquaculture for enhancing food security and access to adequate, safe and nutritious food and in providing for the livelihoods of the people of the small island developing States.<sup>31</sup>

Finally, the SAMOA Pathway includes:

[Paragraph 58.j] With this in mind, we strongly support action; ... for States that have not done so, to consider becoming parties to the 2001 UESCO Convention on the Protection of the Underwater Cultural Heritage.

A Side Event on Safeguarding UCH during the Inter-regional Meeting for the Mid-term Review of the SAMOA Pathway in Apia, Samoa from 30 October to 1 November 2018 took place to

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<sup>30</sup> [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/69/15&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/15&Lang=E) Accessed 28 September 2018.

<sup>31</sup> [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/69/15&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/69/15&Lang=E) Accessed 28 September 2018.

update SIDS delegates on the progress in the implementation of the SAMOA Pathway in terms of UCH Safeguarding.<sup>32</sup> Three speakers included: one of the authors (Jeffery) who gave examples of UCH in Micronesia and their linkages to a number of Sustainable Development Goals, and in particular the many fish weirs found throughout the Pacific and show-cased the Yap fish weirs as examples; Ms Leituala Kuniselani Teolupe Tago-Elisara, Director of the Social Development Programme at the Pacific Community (SPC) focussed on the traditional indigenous and local knowledge associated with the underwater and coastal-area in Pacific SIDS, and called for the need to strengthen investment in the culture sector; and Ms Christina Leala-Gale, Sustainable Tourism Development Manager at the South Pacific Tourism Organisation introduced the new Marine-Eco Tourism Initiative and reaffirmed their commitment to developing sustainable tourism that has a balance between the protection and promotion of heritage, and of benefit to the Pacific community.

Some pertinent outcomes for UCH from the Inter-regional Meeting for the Mid-term Review of the SAMOA Pathway includes:<sup>33</sup>

- ‘Commit to addressing the following key priority areas over the next five years...which include climate change...conservation, protection, management and sustainable use of oceans, seas and their resources...building human capacity...food security and nutrition...sustainable consumption...equitable economic growth with decent work for all... sustainable tourism [and]... an enhanced SIDS Partnership Framework’
- Section 21: ‘We reaffirm our commitment to scale up new opportunities for economic growth and diversification through investments into the marine sector and creative and cultural industries, which would also serve as a means to reduce vulnerability, build resilience, foster innovation and promote entrepreneurship, and call for support to SIDS in creating enabling environments for such investments.’
- Section 40: ‘We recognize and re-emphasize that oceans and seas, along with coastal areas...are intrinsically linked to sustainable development...and reemphasize that oceans represent an important element of identity and culture for the people of SIDS’
- Section 57: ‘We recognize that tourism is cross-cutting and multi-sectoral in nature and a main economic driver for SIDS...and if not properly planned and managed, it can significantly degrade both cultural heritage...and call for the need for integrated approaches, including linkages with SIDS cultural and creative industries, in order to achieve sustainable growth in the tourism sector.’

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<sup>32</sup> [http://www.unesco.org/new/en/apia/about-this-office/single-view/news/safeguarding\\_underwater\\_cultural\\_heritage\\_for\\_blue\\_economy/](http://www.unesco.org/new/en/apia/about-this-office/single-view/news/safeguarding_underwater_cultural_heritage_for_blue_economy/) Accessed 25 November 2018

<sup>33</sup> <https://sustainabledevelopment.un.org/sids/samoareview/inter> Accessed 30 November 2018

#### IV. MICRONESIA IN AN INTERNATIONAL AND REGIONAL CONTEXT

Generally, the States of Micronesia have not played a major, individual role in the making, implementation, or enforcement of international law. Rather, they have been notable for their failure to contribute. For example, only Kiribati and Nauru are party to the Vienna Convention on the Law of Treaties. The same can be said for a number of UNESCO’s cultural heritage conventions including the 1954 Hague Convention for the Protection of Cultural property in the Event of Armed Conflict<sup>34</sup>, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property<sup>35</sup> and the 2001 Convention on the Protection of the Underwater Cultural Heritage.<sup>36</sup> However, noticeable is the significant take-up of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage<sup>37</sup> and 2005 Convention for the Safeguarding of the Intangible Cultural Heritage.<sup>38</sup>

The limited engagement of many of these states arise because of a number of difficulties. Micronesia, covering a large geographic area, is isolated, has limited financial and human resources, skills and capacities or institutions to adequately manage the region’s cultural and natural heritage, and has restricted access to information and assistance. ‘There are also greater external challenges and threats in the Pacific than in most other regions of the world, with less capacity to respond to their impacts’.<sup>39</sup> These challenges include climate change, financial stability, technological development, commercialization, energy supply and demand and exposure to natural disasters.<sup>40</sup>

Table 1: Parties to relevant international conventions

	UNESCO UCH	UNESCO World Heritage	UNESCO Intangible Cultural Heritage	IMO Salvage	UN LOSC
FSM	✓	✓	✓	X	✓

<sup>34</sup> 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May, 1954, entered into force 7 August 1956) 249 UNTS. 215.

<sup>35</sup> 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (adopted 14 November 1970, entered into force 24 April 1972) 823 UNTS 231.

<sup>36</sup> Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 41 I.L.M. 37 (2002).

<sup>37</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 (World Heritage Convention).

<sup>38</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1 (Intangible Cultural Heritage Convention).

<sup>39</sup> Pacific World Heritage Action Plan 2016-2020, <<http://whc.unesco.org/en/events/1269/>> accessed 4 November 2017).

<sup>40</sup> Pacific World Heritage Action Plan 2016-2020, <<http://whc.unesco.org/en/events/1269/>> accessed 4 November 2017).

Marshall Islands	X	✓	✓	✓	✓
Nauru	X	X	✓	X	✓
Palau	X	✓	✓	✓	✓
Kiribati	X	✓	✓	✓	✓

## Regional Programmes

UNESCO, the principle international organization for heritage issues, has a number of important regional or thematic programmes of importance to the states of Micronesia as part of the broader grouping of Micronesia, driven primarily through the UNESCO Office for the Pacific States in Apia, Samoa.<sup>41</sup> An active and important regional programme is the Pacific World Heritage Action Plan (discussed in detail below), that addresses a range of heritage related issues throughout Micronesia that is much broader than the World Heritage its title suggests.

### *UNESCO SIDS Action Plan 2016-2021*

Some of these issues are touched on in the UNESCO SIDS Action Plan, which outlines five priorities for its member states. Priority number 4 is of relevance to protecting cultural heritage throughout the region, providing a commitment to ‘Preserving tangible and intangible cultural heritage and promoting culture for island sustainable development’. In achieving this priority, the SIDS Action Plan outlines four main objectives:

1. Encourage SIDS to ratify all 6 UNESCO Conventions and implement these conventions in a national level.
2. Assist in inventory and proposing world heritage sites.
3. Strengthen the capacity of SIDS to transmit their cultural heritage
4. Sustainable Tourism<sup>42</sup>

## Regional Organizations

The principal regional organisation for Oceania is the Pacific Islands Forum (PIF), established in 1971. Its membership comprises Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, and, since September 2016, French Polynesia and New Caledonia. PIF’s remit covers economic and political governance and security, and aims

<sup>41</sup> UNESCO Samoa <[www.unesco.org/new/en/apia/home](http://www.unesco.org/new/en/apia/home)> accessed 10 November 2017.

<sup>42</sup> UNESCO, *Small Island Developing States – Action Plan 2016-2021* (UNESCO, Paris, 2016) 26, 27. <<http://whc.unesco.org/en/sids/>> accessed 8 November 2017.



at fostering regional coordination and integration in the Pacific.<sup>43</sup> This remit is reflected in the early concerns over French nuclear testing<sup>44</sup>, security and terrorism.<sup>45</sup> This concern continues and the PIF Secretariat, known as the Forum Secretariat, has introduced the Pacific Plan for Strengthening Regional Cooperation and Integration.<sup>46</sup> The Plan supports the ratification and implementation of international and regional human rights treaties and the need for ratification was a common theme of the first and second cycles of the Universal Periodic Review process.<sup>47</sup> PIF's recent initiatives have concentrated on ocean sustainability<sup>48</sup> climate change and disaster risk.<sup>49</sup>

The other important regional organisation is the Pacific Community (SPC). Founded in 1947, the SPC is the principal scientific and technical organisation in Oceania with a current focus on 'major cross-cutting issues, such as climate change, disaster risk management, food security, gender equality, human rights, non-communicable diseases and youth employment'<sup>50</sup>. The SPC touches on a range of issues that have heritage as an underlying component under its Social Development Programme (Gender, Culture and Youth).<sup>51</sup>

The Pacific Regional Environment Programme (SPREP) also touches on a number of issues that touch on cultural heritage issues, but does not address them directly.<sup>52</sup> One area where SPREP has been active is in relation to the pollution risks posed by WWII wrecks, developing 'A regional strategy to address marine pollution from World War II wrecks' in 2002. This followed the US Navy pumping out 9.6 Million US Gallons of bunker fuel from the sunken US tanker *USS Mississinewa* in the waters of FSM.<sup>53</sup> More recently, in 2018, the US Navy removed 250,000

<sup>43</sup> Pacific Islands Forum Secretariat <<http://www.forumsec.org/pages.cfm/about-us/>> accessed 8 November 2017.

<sup>44</sup> PIF, *First Forum Communiqué* 11, 18. See further, 'Pacific Governments have committed to a nuclear free pacific' <[http://www.femlinkpacific.org.fj/images/PDF/Policy/FemLINKPACIFIC\\_ICANFlyerweb.pdf](http://www.femlinkpacific.org.fj/images/PDF/Policy/FemLINKPACIFIC_ICANFlyerweb.pdf)> accessed 21 December 2016.

<sup>45</sup> See, eg, Aitutaki Declaration on Regional Security Cooperation, PIF, *Twenty Eighth Pacific Islands Forum Communiqué Annex 2* (1997) <[www.forumsec.org.fj/](http://www.forumsec.org.fj/)> accessed 8 November 2017.

<sup>46</sup> Pacific Islands Forum Secretariat, 'The Pacific Plan for Strengthening Regional Cooperation and Integration, October 2005-7' <<http://www.forumsec.org/pages.cfm/about-us/mission-goals-roles/>> accessed 14 December 2016.

<sup>47</sup> See, eg, Human Rights Council Working Group on the Universal periodic Review, *Draft report of the Working Group on the Universal Periodic Review*, UN GAOR, 20th sess UN Doc A/HRC/WG.6/20/L.5 (27 October-7 November 2014)

<sup>48</sup> PIF, *Forty-Seventh Forum Communiqué Annex 3*, 'Pohnpei Ocean Statement – a Course to Sustainability' at 10 September 2016. See also, PIF, *Forty-Fifth Forum Communiqué Annex B*, Palau Declaration on 'The Ocean: Life and Future' Charting a course to sustainability' at 31 July 2014.

<sup>49</sup> See PIF, *Forty-Seventh Pacific Islands Forum Communiqué Annex 2*, 'Strengthening Pacific Resilience to Climate Change and Disaster Risk' at 10 September 2016. See also, PIF, *Forty-Sixth Pacific Islands Forum Communiqué Annex 1*, 'Pacific Islands Forum Leaders Declaration on Climate Change Action' at 10 September 2015.

<sup>50</sup> Pacific Community < <http://www.spc.int/>> accessed 8 November 2017.

<sup>51</sup> Pacific Community < <http://www.spc.int/>> accessed 8 November 2017.

<sup>52</sup> SPREP <<http://www.sprep.org/about-us>> accessed 8 November 2011.

<sup>53</sup> SPREP 'A regional strategy to address marine pollution from World War II wrecks' (2002) available at [https://www.sprep.org/attachments/Regional\\_Strategy\\_WWII\\_Wrecks.pdf](https://www.sprep.org/attachments/Regional_Strategy_WWII_Wrecks.pdf)

gallons of bunker fuel from the wreck of the captured German *Prinz Eugen* lying off Kwajalein Island in the Marshall Islands.<sup>54</sup> In Chuuk (FSM) Japan has also been active and in 2017 the government funded a three-year project “Risk Management of Oil Leakage from World War II wrecks in the Chuuk Lagoon” with US\$ 1 million annually.<sup>55</sup>

## World Heritage

The Islands of the Micronesia consists of a diversity of geographical landscapes. Due to the holistic philosophies of these island cultures, these landscapes encompass a significant value and symbolism to the traditional cultures.<sup>56</sup> Not surprisingly, almost all of the World Heritage sites in Micronesia are cultural sites.

With 193 State parties to the *Convention for the Protection of the World Cultural and Natural Heritage*<sup>57</sup>, Micronesia is conspicuous in having a non-States Party - Nauru. This, however, reflects the difficulties that small islands state have had in engaging with international law and the ratification or acceptance of international conventions rather than any objection to the convention itself.<sup>58</sup> Indeed, many of the other small islands states only became party to the convention relatively recently: Kiribati in 2000 and Marshall Islands, FSM and Palau all in 2002.

This difficulty was recognised by UNESCO in 2004 with the adoption of the Pacific World Heritage Action Plan 2004-2009, which in 2005 was included in the launch of the *World Heritage Programme for SIDS* (Small Island Developing States).<sup>59</sup> The Pacific Action plan is now in its third iteration (2016-2020) and provides the framework for way in which the World Heritage, and heritage in a wider sense, is addressed by many of the states of Micronesia. The Action Plan is primarily a driver for World Heritage identification and protection, providing support for new nominations to the World Heritage List, and sustainable conservation and management practices for sites already inscribed. This is particularly important as a number of Oceanic states, following ratification of the convention, had some difficulty in successfully nominating sites for listing due primarily to the lack of resources that was required to address the criteria for listing provided for in the Convention and *Operational Guidelines*. The Action Plan though is somewhat broader than merely World Heritage, and touches on a range of issues related to heritage. It also includes

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<sup>54</sup> <https://www.military.com/daily-news/2018/10/30/navy-divers-clear-250000-gallons-oil-captured-wwii-nazi-ship.html>

<sup>55</sup> [http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>56</sup> Anita Smith & Kevin Jones, *Cultural Landscapes of the Pacific Islands* (ICOMOS, 2007) 9.

<sup>57</sup> Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.

<sup>58</sup> UNESCO States Parties Ratification Status <<http://whc.unesco.org/en/statesparties/>> accessed 24 September 2017.

<sup>59</sup> UNESCO, *Small Island Developing States – Action Plan 2016-2021* (UNESCO, Paris, 2016) 26, 27. <sup>59</sup> <<http://whc.unesco.org/en/sids/>> accessed 8 November 2017.

proposed regional level activities and a summary of national level activities by member states.<sup>60</sup> With the increase in membership since 2000, and with the unrolling of UNESCO's SIDS program, a number of the States now have a single world heritage site: Kiribati and Marshall Islands in 2010, Palau in 2012, and FSM in 2016.<sup>61</sup>

The number of sites on the World Heritage List within Micronesia is as follows:

Table 2: World Heritage sites

Member State <sup>62</sup>	Number of Sites on World Heritage List
Kiribati (Phoenix Island Protected Area)	1 natural listed in 2010
Marshall Island (Bikini Atoll Nuclear Test Site)	1 cultural listed in 2010
FSM (Nan Madol: Ceremonial Centre of Eastern Micronesia)	1 cultural listed in 2016 and added to the in-danger list
Palau (Rock Island Southern Lagoon)	1 mixed listed in 2012

The scale of activity, however, is reflected not in the List, but in the development of the Tentative List of a number of these States.<sup>63</sup>

Table 3: Tentative list

Member State	Number of Sites on Tentative List & Date Listed
Marshall Islands <sup>64</sup>	<ul style="list-style-type: none"> <li>• Likiep Village Historic District (24/10/2005)</li> <li>• Mili Atoll Nature Conservancy (and Nadrikdrik) (24/10/2005)</li> <li>• Northern Marshall Islands Atolls (24/10/2005)</li> </ul>
Federated States of Micronesia <sup>65</sup>	<ul style="list-style-type: none"> <li>• Yapese Disk Money Regional Sites (29/12/2004)</li> </ul>
Palau <sup>66</sup>	<ul style="list-style-type: none"> <li>• Imeong Conservation Area (26/08/2004)</li> <li>• Ouballang ra Ngebedech (Ngebedech Terraces) (26/08/2004)</li> <li>• Tet el Bad (Stone Coffin) (26/08/2004)</li> <li>• Yapease Quarry Sites (26/08/2004)</li> </ul>

<sup>60</sup> UNESCO, *Pacific Action Plan 2016-2020*, Suva, Fiji, 1-4 December 2015 12-17.

<sup>61</sup> World Heritage Committee, *Taonga Pasifika; World Heritage in the Pacific*, WHC Doc, 31<sup>st</sup> sess (2 July 2007) 42, 43.

<sup>62</sup> UNESCO, *World Heritage List* <<http://whc.unesco.org/en/list/>> accessed 10 September 2017.

<sup>63</sup> UNESCO, *Tentative List* <<http://whc.unesco.org/en/list/>> accessed 10 September 2017.

<sup>64</sup> UNESCO, *Tentative List* <<http://whc.unesco.org/en/list/>> accessed 10 September 2017

<sup>65</sup> UNESCO, *Tentative List* <<http://whc.unesco.org/en/list/>> accessed 10 September 2017

<sup>66</sup> UNESCO, *Tentative List* <<http://whc.unesco.org/en/list/>> accessed 10 September 2017

## Intangible Cultural Heritage

Indigenous and traditional knowledge and cultural expression underscores the deep connections among people, culture, knowledge and the natural environment in Micronesia.<sup>67</sup> The intangible heritage of the region embodies traditional knowledge and is often expressed in an artistic form such as songs, dances and ceremonies.<sup>68</sup> The protection of intangible cultural heritage is crucial in ensuring that this cultural heritage continues to be practiced by future generations whilst also ensuring the intangible cultural heritage is not published or expressed outside its traditional context without free, prior and informed consent of intangible cultural heritage practitioners and knowledge holders. Traditional knowledge is the bedrock of many societies in Micronesia and remains crucial to leadership status, agricultural practices, fishing, navigation, rights to land, spiritual beliefs, social organisation and exchange networks.<sup>69</sup> Therefore, safeguarding intangible cultural heritage is of paramount importance for the island states in Micronesia.

The extent to which the cultural heritage in Micronesia is intangible underscores the difficulty in addressing issues of protection and conservation. It does, however, provide a mechanism to further other pressing issues. For example, this intangible heritage:

can meaningfully advance sustainable development and social cohesion, strongly supporting the efforts of SIDS to promote cultural diversity, intercultural dialogue and international cooperation in the cultural field in line with applicable international conventions, in particular those of UNESCO and to develop and strengthen national and regional cultural activities and infrastructures, including through the network of World Heritage sites, which reinforce local capacities, promote awareness in SIDS, enhance tangible and intangible cultural heritage, including local and indigenous knowledge, and involve local people for the benefit of present and future generations.<sup>70</sup>

The *Convention for the Safeguarding of the Intangible Cultural Heritage*<sup>71</sup> has been adopted by all five states of Micronesia.<sup>72</sup> Despite the general acceptance of the convention in Micronesia, no listing has come from these States.

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<sup>67</sup> Pacific World Heritage Action Plan 2016-2020, <<http://whc.unesco.org/en/events/1269/>> accessed 4 November 2017.

<sup>68</sup> Synexe Consulting Ltd, *Valuing Culture in Oceania; Methodology and indicators for valuing culture, including traditional knowledge, in Oceania* (Report, Secretariat of the Pacific Community, 2010) 18.

<sup>69</sup> Miranda Forsyth, 'The traditional knowledge movement in the Pacific Island countries: the challenge of localism' (2011) 29 *Prometheus* 269, 271.

<sup>70</sup> Pacific World Heritage Action Plan 2016-2020, <<http://whc.unesco.org/en/events/1269/>> accessed 4 November 2017.

<sup>71</sup> Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 20 April 2006) 2368 UNTS 1.

<sup>72</sup> UNESCO, *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage* (2003) (25 October 2017) <<https://ich.unesco.org/en/states-parties-00024>> accessed 9 November 2017.

This report does not address the issue of intangible cultural heritage directly. However, its importance in Micronesia is acknowledged and its relevance to the underwater cultural heritage in particular is recognized. It is an important element of the notion of underwater cultural heritage addressed in the UNESCO Convention on the Protection of Underwater Cultural Heritage, and is addressed in that context.

## V. UNESCO CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE 2001

The Convention on the Protection of the Underwater Cultural Heritage (UCH Convention)<sup>73</sup> was adopted in 2001 and came into force in 2009.<sup>74</sup> None of the five Micronesian states participated in these negotiations or were present to vote when the Convention was adopted by vote in 2001.<sup>75</sup> In the ‘Second World Heritage Global Strategy Meeting for the Pacific Island region’ in Vanuatu 1999 (attended by FSM and Kiribati from the five nations from Micronesia), the Pacific Island Nations noted the preparation of the UCH Convention; ‘recommended that underwater heritage of international and regional significance in the Pacific be recognized and mechanisms for its protection be developed’; and noted that underwater wrecks from WWII seems to be the focus, but ‘urged the protection of sacred cultural sites existing in many areas of the Pacific...The meeting urged that the effects of global warming and sea level rises must be taken into account with regard to the protection of underwater heritage.’<sup>76</sup>

It is beyond the scope of this report to address the convention in detail. However, following a consideration of the scope of the convention, those issues which the states of Micronesia will have to consider in terms of adoption of the convention and its implementation at a national level are set out here.

### Scope of the UCH Convention

<sup>73</sup> Convention on the Protection of the Underwater Cultural Heritage (adopted 2 November 2001, entered into force 2 January 2009), 41 I.L.M. 37 (2002). <<http://www.unesco.org/eri/la/convention.asp?KO=13520&language=E>> accessed 9 November 2017.

<sup>74</sup> For an article by article analysis of the Convention see Patrick J O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2<sup>nd</sup> ed Institute of Art and Law, 2014). On the Convention more generally see Sarah Dromgoole

<sup>75</sup> 87 States voted in favour of the Convention, four states (The Russian Federation, Norway, Turkey and Venezuela) voted against adoption while 15 States abstained (including Brazil, Columbia, France, Germany, Greece, Israel, the Netherlands, Paraguay, Sweden, Switzerland, United Kingdom and Uruguay. The United States, not being a member of UNESCO at the time, had no right to vote. For a comprehensive discussion of the negotiating history of each article of the Convention, see R. Garabello, ‘The Negotiating History of the Convention on the Protection of the Underwater Cultural heritage’ in R. Garabello and T. Scovazzi (eds) *The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage: Before and After the 2001 UCH Convention*, Leiden: Martinus Nijhoff Publishers, 2003, p. 89.

<sup>76</sup> World Heritage Centre 1999, <https://whc.unesco.org/archive/vanuatu99.htm> Accessed 25 November 2018

The term shipwreck is not used in the UCH Convention. A more generic term that encompasses all types of cultural heritage located underwater (either partially or wholly) is used, being Underwater Cultural Heritage (UCH), defined in the Convention as:

all traces of human existence having a cultural, historical or archaeological character which have been partially or totally underwater, periodically or continuously, for at least 100 years such as:

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (iii) objects of prehistoric character.

Micronesia has a significant body of underwater cultural heritage, yet only FSM has ratified the UCH Convention. For the small islands states of Micronesia, seafaring is at the heart of many of their cultures, but little of their maritime heritage remains. This is primarily due to the nature of the craft used, comprising highly organic material that is unlikely to survive very long in the mostly tropical conditions of Micronesia. Moreover, much of the underwater cultural heritage that exists from World War II, and some from World War I, may be perceived as being the heritage of Europe and or of major powers such as Japan, with little to do with the cultures of Micronesia other than, at best, as a tourist resource. Since none of the belligerent States of World War II that have wrecks in these waters are party to the convention, little regulation of this heritage exists.

It is important to note that while the UCH Convention applies blanket protection for all UCH over 100 years old, it does not prevent States from protecting historically, archaeologically or culturally important UCH younger than 100 years old. Adopting legislation, for example, that protects a specific wreck less than 100 years old, or all World War II wrecks, is not inconsistent with the Convention and States party to the Convention are free to continue to provide such protection.

### **UCH and Salvage law**

A key component to the protection regime is the removal of salvage law to UCH. Article 4 of the UCH Convention provides that:

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 authorised 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.

Similarly, Rule 2 of the Annex provides that:

The commercial exploitation of underwater cultural heritage for trade or speculation 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.<sup>77</sup>

Subject to State oversight, salvage law (and the law of finds in some jurisdictions) is not to apply to UCH. This requires State parties to amend their maritime laws to that effect. For States that are party to the salvage Convention, this may give rise to some inconsistency. However, the salvage Convention does allow States to enter a reservation so that the salvage Convention will not apply to maritime cultural property of pre-historic, archaeological or historic interest situated on the seabed'.<sup>78</sup> States will therefore need to make such a reservation to ensure that their Salvage Convention obligations are consistent with their UCH Convention obligations.

### **Conventional duties by Micronesian states**

By becoming a party to the UCH Convention, a Micronesian state will be under an international duty to do a number of things.

1. Each state will have to regulate 'activities directed at underwater cultural heritage'. This means 'activities having underwater cultural heritage as their primary object and which may, directly or indirectly, physically disturb or otherwise damage underwater cultural heritage'.<sup>79</sup> Effectively this means ensuring that these activities are regulated so that the law of salvage or law of finds does not apply<sup>80</sup> and that UCH is thus not commercially exploited<sup>81</sup>. It also requires the state to ensure that the principles contained in the Annex of good archaeological practice are implemented. This would ensure that the UCH is, preferably, preserved in situ<sup>82</sup> and deposited, conserved and managed in a manner that ensures its long-term preservation<sup>83</sup>, for the benefit of humanity<sup>84</sup>.

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<sup>77</sup> See further Forrest C, 2010. *International Law and the Protection of Cultural Heritage* (Routledge); Dromgoole, S. 2013 *Underwater Cultural Heritage and International Law* (Cambridge University Press).

<sup>78</sup> Salvage Convention Art 30(1)(d).

<sup>79</sup> UCH Convention article 1(6).

<sup>80</sup> UCH Convention article 4. An exception allows for the application of salvage law only when it is (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.

<sup>81</sup> UCH Convention article 2(7). See also Annex, Rule 2.

<sup>82</sup> UCH Convention article 2(5)

<sup>83</sup> UCH Convention article 2(6)

<sup>84</sup> UCH Convention article 2(3)



2. These measures would be implemented in the territorial sea and contiguous zone and, in cooperation with other states, on the continental shelf, exclusive economic zone and the deep seabed.<sup>85</sup> This requires both cooperation between states and information-sharing obligations.<sup>86</sup> The UCH Convention is consistent with the UN Convention on the Law of the Sea and states party to the UCH Convention will implement the UCH Convention in accordance with the provisions of the UN Convention on the Law of the Sea.<sup>87</sup>

3. To achieve this, each state will have to ‘establish competent authorities or reinforce the existing ones where appropriate’ to implement the convention<sup>88</sup>. The primary task of this competent authority is to ensure that the rules in the annex on sound archaeological practice are implemented. This will require some form of oversight and possible permitting system that ensures the protection, conservation, presentation and management of UCH, including in accordance with the rules in the Annex.<sup>89</sup> The specific tasks of the competent authority are addressed in the convention or in the rules in the annex, and include, but may not be limited to, the following:

- the establishment, maintenance and updating of an inventory of UCH;
- ensuring research, education and training<sup>90</sup>;
- raising public awareness in regards to the UCH<sup>91</sup>;
- review (including peer review) of the project design for any activity directed at UCH<sup>92</sup>, including reviewing the adequacy of the methodology and techniques to be employed; the project funding, timetable, personnel, post-fieldwork analysis, conservation, site management, documentation program and archive management, safety and environmental policy and report and publication program<sup>93</sup>;
- System of permitting to allow the project to proceed subject to continued review and the ability to amend, revoke and transfer appropriate licenses.

4. Each state will need to adopt legislation, or amend existing legislation, giving effect to the above, as well as to a number of additional requirements set out in the convention. This includes having legislative requirements that:

- prevent the entry into its territory, the dealing in, or the possession of UCH illicitly exported or recovered contrary to the Convention<sup>94</sup>;

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<sup>85</sup> UCH Convention articles 7-12.

<sup>86</sup> UCH Convention articles 2(2), 2(4) and 19.

<sup>87</sup> UCH Convention article 3.

<sup>88</sup> UCH Convention article 22.

<sup>89</sup> UCH Convention article 22.

<sup>90</sup> UCH Convention articles 21 and 22.

<sup>91</sup> UCH Convention article 20.

<sup>92</sup> UCH Convention annex rule 9.

<sup>93</sup> UCH Convention annex rules 10-36.

<sup>94</sup> UCH Convention article 14.

- prohibit the use of its territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at UCH which is not in conformity with this Convention<sup>95</sup>;
- take all practicable measures to ensure that its nationals and vessels flying their flag do not engage in any activity directed at UCH a manner not in conformity with this Convention<sup>96</sup>;
- take measures providing for the seizure of UCH in its territory that has been recovered in a manner not in conformity with this Convention, and
- imposes sanctions for violations of measures it has taken to implement this Convention<sup>97</sup>.

5. Each State is also required to use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage.<sup>98</sup> These activities are those that do not have UCH as the primary object or one of their objects, but which may physically disturb or otherwise damage UCH, such as construction works, pipeline laying, fishing etc.

## VI. THE LEGISLATIVE CAPACITY OF THE MICRONESIAN STATES TO IMPLEMENT THE UCH CONVENTION

The states of Micronesia – except FSM – have similar legal issues in relation to the capacity to give effect to the UCH Convention. None have specific legislation that addresses UCH<sup>99</sup>, though all have some legislation that addresses cultural heritage, and which might provide a basis for the establishment of the competent national authority capable of implementing the duties required of it under the UCH Convention. All also have Constitutions that establish the necessary sovereignty and maritime zones that underpin the UCH Convention. All address, in some way, the issue of legal pluralism. And all address, in some way, the regulation of wrecks as well as the areas in which wrecks occur and subject to marine environment governance.

The National Maritime Acts of a number of the Micronesian states are very similar given the extent of the international uniformity of much of this law, but particularly, for FSM, Palau and Marshall Islands, because all their Admiralty and Maritime legislative is derived, it appears, from same source – the 1966 Trust Territories of the Pacific Islands Code (Trust Territory Code). Moreover, the Trust Territory Code provided that US common law, as expressed in the American Law Institute's Restatements, or as generally understood and applied in the US, would be the common law of the TTPI.<sup>100</sup> The applicable law in Kiribati and Nauru are somewhat different to those of

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<sup>95</sup> UCH Convention article 15.

<sup>96</sup> UCH Convention article 16.

<sup>97</sup> UCH Convention article 17.

<sup>98</sup> UCH Convention article 5.

<sup>99</sup> Though Palau does protect some UCH within the Palau Lagoon Monument (see detail below).

<sup>100</sup> 1980 1 TTC 103; Zorn, Jean G., 'The Republic of the Marshall Islands' in Ntomy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 105.

FSM, Palau and Marshall Islands only in their British origins. As all are fundamentally common law jurisdictions, a degree of similarity is evident in all five states.

FSM is the only Micronesian state party to the UCH Convention and while it does not have any legislation that addresses UCH specifically, it does have legislation that deals specifically with one aspect of UCH – the WWII wrecks in Chuuk Lagoon. FSM is also, in terms of its legal structure, the most complex of the five Micronesian states being considered in his report, as it consists of four component states (Chuuk, Yap, Kosrae and Pohnpei) with considerable autonomy and a federal government.<sup>101</sup> For this reason, FSM is considered first, followed by the two states with a similar legal structure and background to FSM given their earlier governance as part of the TTPI administered by the US. Kiribati and Nauru then follow.

For each state then, the legal structure will be considered under five general headings:

1. Sovereignty and territoriality
2. Legal Pluralism
3. Cultural heritage and the competent authority
4. Maritime Law
5. Environmental law

At this stage of the report it is worth briefly addressing the issues that arise under each of these headings, especially when there is a degree of commonality between the states considered.

### **1. Sovereignty and territoriality**

Under this heading, the sovereignty of each state is considered with reference to its maritime zones. All five states are party to the UN Convention on the Law of the Sea and give effect to it. This is relatively straight forward, including the compatibility between the Law of the Sea Convention and the UCH Convention, but does become more complicated for those states that have a federal structure such as FSM and Palau.

### **2. Legal Pluralism**

Legal pluralism is essentially the existence of two or more separate legal systems operating in the same social sphere.<sup>102</sup> In the five Micronesian states, the two legal systems are: customary law, which predates colonisation but which continues to develop, and the western system of law

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<sup>101</sup> Palau is also a federation of sorts consisting of 16 states. The individual state laws for Palau, however, are not considered in this report.

<sup>102</sup> Craig Forrest and Jennifer Corrin, “Legal Pluralism in the Pacific: Solomon Island’s World War II Heritage” (2013) 20 *International Journal of Cultural Property* 1-21. See also generally Jennifer Corrin and Don Patterson *Introduction to South Pacific Law* (4<sup>th</sup> ed intersentia 2017) 13-76.

imported by the colonisers of each state (or its component parts). The ‘imported law’ would have consisted of statutes (legislation) as well as the common law – that which is imported from the colonizing state as its common law. One of the key issues then is identifying the common law for each state and its relationship with customary law. Customary law may include property rights that extend into maritime zones, and might subject UCH found in those zones to either jurisdiction or ownership under customary law, or both.

The common law of the states may be derived from, or heavily influenced by those of its former colonizers, or from a range of other foreign influences. FSM, the Marshall Islands and Palau, former parts of the Trust Territories of the Pacific Islands, have a significant US influence. This may, to differing degrees, import US salvage law and law of finds to aspects of its law; and which may be incompatible with the UCH Convention. Palau and Nauru also reflect a continuation not only of pre-independence statutes but also the common law of Britain.

### 3. Cultural heritage and the competent authority

The cultural heritage laws of the states do exhibit a similar basic structure, especially in the establishment of some form of competent authority within government to implement the cultural heritage law, together with some form of advisory body. These are consistent, at least in a broad sense, to those required of the competent authority in the UCH Convention. With Nauru adopting a *National Heritage Act* in 2017, there is evidence of development in the area and a recognition of the importance of the protecting this valuable resource.

A particular feature of the cultural heritage law of FSM, the Marshall Islands, and Palau, is the continued application of the United States *National Historic Preservation Act*<sup>103</sup> administered by the National Park Service through state based Historic Preservation Offices (as discussion above). The Act defines ‘States’ to include FSM, the Marshall Islands and Palau – at the time all subject to US administration as part of the Trust Territories of the Pacific Islands. On independence each of these states entered into a Compact of Free Association with the US that provides, amongst many things, for the continuation of certain services to those states. Those explicitly mentioned in the Compacts included those of the US Weather Service, Emergency Management Agency, Postal Reorganization and Federal Aviation Administration.<sup>104</sup> The National Parks Service is not specifically mentioned. Nevertheless, the Compacts generally allow for the continuation of serviced subject to subsequent agreement. For example, section 224 of the Compact of Free Association between Palau and the US provides that:

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<sup>103</sup> See King 2008

<sup>104</sup> See Compact of Free Association between US and FSM s 221.

The Government of the United States and the Government of Palau may agree from time to time to the extension to Palau of additional United States grant assistance and of United States services and programs as provided by the laws of the United States.

The National Park Service and its support of the State Historic Preservation Offices in these three states and their associated programmes is thus a continuation of the services first started in 1966. Importantly, this does not make the *National Historic Preservation Act* a law applicable in any of the three States – though the effects of the law are certainly felt in those three states as a service provided through the National Park Service.

#### **4. Maritime Law**

The maritime laws of the five states are substantially similar in terms of those provisions that addresses jurisdiction over national vessels and over foreign vessels in the territorial sea. These are derived primarily from international law – particularly the UN Convention on the Law of the Sea and are thus neither controversial nor difficult to implement.

The wreck and salvage law of FSM, the Marshall Islands and Palau are almost identical, all being derived from the Trust Territory Code. All are outdated and inconsistent with the UCH Convention. Similarly, the wreck and salvage law of Kiribati and Nauru is based on the British Merchant Shipping Act 1894, and are outdated and incompatible with the UCH Convention.

#### **5. Environmental law**

All states have a considerable body of environmental laws. These protect aspects of the environment in a manner not dissimilar to the manner in which the UCH Convention seeks to protect UCH beyond the territorial sea (articles 8-12 UCH Convention). While it is beyond the scope of this report to consider this body of environmental law in any depth, those that appear, at first sight, to offer some analogous structures or principles that might more easily aid the implementation of the UCH Convention in that states are briefly considered.

The extent of the compatibility between the environmental laws and that required to implement the UCH Convention will require careful consideration in each state.

#### **6. Historical background**

The historical background of each of the five states is addressed in this report but only briefly. It has been included for the purpose of providing important context on the range of UCH in each country as well as the political and legal history that is pertinent to the adoption and implementation of the UCH Convention.



# 1. THE FEDERATED STATES OF MICRONESIA (FSM)

## 1.1 LOCATION/GEOGRAPHICAL INFORMATION

The FSM is the largest and most diverse part of the greater Micronesian region and is comprised of four States, which are, in geographic sequence from west to east, Yap, Chuuk, Pohnpei and Kosrae. All but Kosrae State include more than one island and each state has considerable autonomy within the federation.

The total landmass of the FSM is 702 square kilometers, with a declared Exclusive Economic Zone (EEZ) covering over 1.6 million square kilometers. The FSM is comprised of 607 islands with land elevation ranging from sea level to the highest elevation of about 760 m. The archipelago lies in a broad east-west swath across 1.6 million square kilometers of the western Pacific Ocean above the equator between 1.0-9.9° N and 138.2-162.6° E. FSM has a tropical climate and few mineral resources other than phosphate.

The population of the FSM is about 106,000.

## 1.2 HISTORICAL BACKGROUND

Marck argues for a distinct east to west population movement across FSM beginning at or towards the extreme eastern end of Micronesia.<sup>105</sup> He identifies the internal relationship of Nuclear Micronesia as follows: ‘a rather rapid settlement of Eastern Micronesia (Pohnpei, Marshalls, Kiribati) between 2,800-2,400 BP, by 2,000 BP Truk (Chuuk) was settled and as the movement continued west, all the western atolls were inhabited by 100 BP. He nominates Kosrae as the probable ‘homeland’. Blust has argued that by 3,200 BP people had left the south-east Solomons area, moving into the atolls of Kiribati and that ‘the rest of Micronesia, apart from Palau, Yap and the Marianas, was settled by a gradual south to north and east to west movement’.<sup>106</sup> Rainbird elaborates further on the movement of people across Micronesia and expands on the use of linguistics and current archaeological and anthropological findings.<sup>107</sup> He suggests that based on ‘pottery characteristics, other material culture and linguistics’, people are thought to have come from the south.<sup>108</sup> He also states that the initial inhabitants were coastal dwellers living in stilt houses.<sup>109</sup>

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<sup>105</sup> Marck 1975: 46-47

<sup>106</sup> Blust 1976: 29

<sup>107</sup> Rainbird 2004: 51-69

<sup>108</sup> Rainbird 2004: 92

<sup>109</sup> Rainbird 1993



‘Archaeological excavations on three high islands in central Micronesia, namely, Chuuk, Pohnpei, and Kosrae, have revealed sand-tempered plainware potsherds relating to the period 2,000 BP. Their attributes bear a resemblance in form and technology to the late Lapita Plain Ware pottery tradition that extended from the Bismarks westward as far as the Reef-Santa Cruz Islands eastward after 2,500 years BP’<sup>110</sup> Yap, the fourth state in present day FSM has a language distinct from the other three states and closer to that of the islands in Melanesia. The small amount of archaeological research in Yap so far, has provided a date of c. 2,400 BP for a shell adze and its cultural contexts.<sup>111</sup>

The first foreign contact with FSM varies across the region: in Yap it was the Portuguese in 1526, and Spanish in 1528; for Chuuk it was the Spanish in 1565; and in Pohnpei and Kosrae, it was the Spanish in 1529. Further Spanish, as well as British, Russian, Dutch, Australian, American, and German explorers, traders, whalers and missionaries followed. These foreign contacts were deadly for many indigenous inhabitants—from the introduced diseases—and many died.

In 1885, Spain countered Germany’s plans in wanting to acquire the Caroline Islands through gaining a Papal agreement in which Spanish sovereignty over the Caroline Islands was granted, and Germany ruled over the Marshall Islands. Spain’s impact in the Caroline Islands was limited to Yap where they established a colonial administrative centre, and in Pohnpei. Following the Spanish-American War, Germany, for the cost of 25 million pesetas acquired the Caroline Islands and the Northern Mariana Islands in 1899, with the US holding onto Guam.<sup>112</sup> German administration was much more ‘hands-on’ across the FSM, reflected in some examples, such as a rebellion of Pohnpeians against German rule in 1910/11 known as the ‘Sokehs rebellion’ where 15 Pohnpeians were executed and 426 banished to Palau; and in Chuuk where a number of Japanese were expelled, hundreds of guns were confiscated, and a German warship used its guns to totally destroy a small islet as a show of strength.<sup>113</sup>

With the outbreak of war in Europe in the summer of 1914, Britain requested Japan’s help to counter the German navy in the East China Sea. Within another 11 days, Japanese forces occupied all of the major Micronesian islands, except Guam and the Gilbert Islands, and the navy ‘made it plain that it did not welcome the entry of any other ships into Micronesian waters, even those of its allies’<sup>114</sup> After the war Japan ruled over Micronesia under a Class C Mandate under conditions from the League of Nations until it withdrew in 1933. This was a time of great upheaval for all Micronesians. Japan wanted economic development of the islands but also to ‘Japanize the islanders through education, propaganda, intermarriage, and in general the promotion of cultural

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<sup>110</sup> Yamaguchi, et al., 2009: 550-552

<sup>111</sup> Napolitano, et al. 2017

<sup>112</sup> Hezel 1995: 95.

<sup>113</sup> Jeffery 2007: 79-82

<sup>114</sup> Peattie 1988: 44

changes’<sup>115</sup> They also saw the islands as stepping stones to the important natural resources in Indonesia, New Guinea and Borneo.<sup>116</sup>

Japan occupied FSM until 1945, establishing many military fortifications and facilities, particularly in Chuuk, where Japan established one of its four regional offices. Chuuk was the Fourth Fleet Headquarters, and the base for Imperial Japanese Navy Combined Fleet for two years from 1942. The Japanese military established over 1,200 buildings on one island alone, Tonoas; many of the lagoon islands were heavily fortified and four airfields had been established. In February 1944, the US commenced a massive aerial bombing campaign in Chuuk, sinking over 50 large ships and destroying over 400 aircraft. The US publicized it as a pay-back to Pearl Harbor.<sup>117</sup>

In July 1947, the newly formed United Nations awarded a strategic trusteeship of Micronesia, the Trust Territory of the Pacific Islands (TTPI) to the US, which allowed them to establish military bases in the islands as well as providing them with a licence to develop and influence every major aspect of life of the Micronesians.<sup>118</sup> In 1965, the Congress of Micronesia was established, slowly guiding the states to greater autonomy. In 1978 the Federated States of Micronesia (FSM)—incorporating Yap, Chuuk, Kosrae, and Pohnpei as capital—was established with its own Constitution. In 1979, the FSM national and state governments commenced administering the country, assisted by US bureaucrats. An agreement (a Compact of Free Association) between the FSM and the US was executed in 1982 and in 1986 it came into being—with the US controlling the FSM security and foreign affairs. This first compact ran out in 2002, and in 2004 a new 15-year compact commenced.<sup>119</sup>

### 1.3 UCH-RELATED LAWS

Because the federation is made up of four relatively independent states, the FSM legal system is both complex and volumous. At the same time, it is the Federal Government with the capacity to enter into international conventions, such as the UCH Convention, and is then tasked with the implementation of the convention in all of FSM.<sup>120</sup> This then requires a considerable degree of duplication throughout the federal and state level, which would also require considerable amendment to federal and states laws. This report addresses the laws that are most likely to be applicable and/or may need amendment to ensure consistency with the terms of the UCH Convention. These include:

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<sup>115</sup> *Mirror* 1971: 23.

<sup>116</sup> Peattie 1988: 52.

<sup>117</sup> *Naval Aviation News* October 1, 1945: 10

<sup>118</sup> Hanlon 1998: 52.

<sup>119</sup> Zorn, Jean G., ‘The Federated States of Micronesia’ in Ntunmy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 462-465.

<sup>120</sup> Federal Constitution of FSM article IX(2) and X(2).

**FEDERAL LAW**

Constitution of the Federated States of Micronesia

Federal Law Code (2014)

Title 10: Foreign Relations Chapter 4 Amendments to Compact of Free Association

Title 18 Territory, Economic Zones and Ports of Entry. Chapter 1: Territorial Boundaries and Economic Zones

Title 18 Territory, Economic Zones and Ports of Entry. Chapter 3: Regulation of Foreign Vessels

Title 19: Admiralty and Maritime

Title 24: Marine Resources

Title 25 Environmental protection

Title 26: Historical Sites and Antiquities

**US Law**

National Historic Preservation Act 1966

**STATE LAW****Chuuk**

Chuuk Constitution

Title 24. Land Management, Chapter 1. Tidelands

Title 25: Maritime & Marine Resources, Chapter 8. Chuuk Lagoon Monument

**Pohnpei**

Pohnpei Constitution

Title 22 Customs, Traditions, and Historic Preservation

Title 26 Conservation and Resources

**Kosrae**

Kosrae Constitution

Title 11: Land & Environment: Chapter 13. Protection of Environment

Title 11: Land & Environment: Chapter 14. Antiquities

Title 14: The Sea & Transportation: Chapter 11. State and Territorial Waters

Title 14: The Sea & Transportation: Chapter 13. The Marine Space

Title 19: Marine Resources: Chapter 8. Forfeiture of Property

**Yap**

Yap Constitution

Title 5: Traditional Leaders & Traditions: Chapter 4: Historic Preservation

Title 18: Conservation & Resources: Division 4: Environmental Protection

## FEDERAL LAW

The federal law addresses a range of issue indirectly relevant to the protection of UCH as cultural heritage, but it is not specifically addressed in the Federal Constitution or in any federal law, and it appears that it falls to each of the states to deal with. This, however, is problematic since FSM is a party to the UCH Convention.

### 1. Sovereignty and territoriality

The Federal Constitution of FSM provides, in article I(1)<sup>121</sup>, that the territory of FSM comprises ‘the Districts of the Micronesian archipelago that ratify this Constitution’, being Chuuk, Kosrae, Yap and Pohnpei. Each State of FSM comprises the islands of each District as defined by laws in effect immediately prior to the effective date of the Constitution. Within the archipelago of FSM, the marine boundary between adjacent states is determined by applying the principle of equidistance. State boundaries may be changed by Congress with the consent of the state legislatures involved.<sup>122</sup> From an international perspective, the waters connecting the islands of the archipelago are internal waters regardless of dimensions; subject however to limitation by international treaty obligations assumed by the FSM or by a federal act.<sup>123</sup>

The Constitution also provides that:

The jurisdiction of FSM also extends to a marine space of 200 miles measured outward from appropriate baselines, the seabed, subsoil, water column, insular or continental shelves, airspace over land and water, and any other territory or waters belonging to Micronesia by historic right, custom, or legal title.<sup>124</sup>

The maritime zones themselves are provided for in title 18: *Territory, Economic Zones and Ports of Entry, Chapter 1 Territorial Boundaries and Economic Zones*.<sup>125</sup> This sets out the extent of the maritime zones claimed in accordance with the UN Convention on the Law of the Sea, except, it appears, for the contiguous zone or continental shelf. While relatively straight forward, at an international level, and providing the basis for the implementation of articles 7-12 of the UCH Convention, the internal jurisdictional complexity over UCH requires careful consideration.

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<sup>121</sup> <http://fsmlaw.org/fsm/constitution/article1.htm>

<sup>122</sup> Federal Constitution of FSM article 1(2).

<sup>123</sup> Federal Constitution of FSM article I(1).

<sup>124</sup> Federal Constitution of FSM article I(1).

<sup>125</sup> *Territory, Economic Zones and Ports of Entry* 18 FSMC 1.

## 2. Legal Pluralism

Article V of the Federal Constitution addresses the relationship between the constitution and traditional rights providing that:

nothing in this Constitution takes away a role or function of a traditional leader as recognized by custom and tradition, or prevents a traditional leader from being recognized, honored, and given formal or functional roles at any level of government as may be prescribed by this Constitution or by statute'.<sup>126</sup>

This addresses not just the recognition of the traditional leaders, but also their role, which may extend to both law making, adjudication and enforcement. However, the extent to which custom is, somehow, a separate body of law within FSM is unclear.<sup>127</sup> Section 2 provides that 'the traditions of the people of the Federated States of Micronesia may be protected by statute' and it appears that a particular customary law then must either be protected by statute or as part of the common law.<sup>128</sup> Moreover, courts are required to ensure that its decision are 'consistent with this Constitution, Micronesian customs and traditions, and the social and geographical configuration of Micronesia'.<sup>129</sup> The common law of FSM is developed by the court by considering the constitution and custom, and only if neither are applicable, is the common law of other jurisdictions, including the US, considered.<sup>130</sup> The common law of other jurisdictions is not, however, binding, and of persuasive value only. Indeed, the FSM Supreme Court declared, in *Nix v Ehmes* that:

This court is not bound by the decision of courts in the United States. Nevertheless, we do agree .... that we should give careful consideration to the thinking of courts in the United States in determining our own policy.<sup>131</sup>

Customary law is therefore of considerable importance in FSM, and is then subject to that which might exist in each of the four constituent states, again, making FSM a legally complex jurisdiction. It is clear from a federal perspective that customary law, including those pertinent to maritime zones, is very relevant as it may impact of UCH management, particularly the closer the UCH is to shore.<sup>132</sup>

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<sup>126</sup> Federal Constitution of FSM article V(1).

<sup>127</sup> Jean Zorn 'Federated States of Micronesia' in M Ntomy *South Pacific Legal Systems* (University of Hawaii Press 1993) 469.

<sup>128</sup> Bob Hughes and Philip Tagini 'Micronesia' in Herbert M. Kritzer *Legal Systems of the World* (ABC-Clio, 2002) Vol 3) 1025, 1026.

<sup>129</sup> Federal Constitution of FSM article 11(11).

<sup>130</sup> Jean Zorn 'Federated States of Micronesia' in M Ntomy *South Pacific Legal Systems* (University of Hawaii Press 1993) 470.

<sup>131</sup> *Nix v Ehmes* 1 FSM Intrm. 114, 119 (Pon.1982). See Edwards, Sam, 'Protecting Culture and Marine Ecosystems under the Law in Micronesia' (2012) 19 *International Journal of Cultural Property* 197.

<sup>132</sup> *Pohnpei v KSVI No.3* 10 FSM Intrm. 53, 66 (Pon.2001); *Rosokow v Bob* 11 FSM Intrm. 210, 217 (Chk. S. Ct. App. 2002).

### 3. Cultural heritage and the competent authority

Title 26 of the FSM Federal Code<sup>133</sup>, entitled *Historical Sites and Antiquities* provides that:

It is the policy of the Federated States of Micronesia to protect and preserve the diverse cultural heritage of the peoples of Micronesia and, in furtherance of that policy, to assist in the identification and maintenance of those areas, sites, and objects of historical significance within the Federated States of Micronesia.<sup>134</sup>

While ‘cultural heritage of the peoples of Micronesia’ may narrowly be thought of as the inherent culture of the different peoples that are now part of FSM, it can, in a wider sense, be regarded as that cultural heritage that the peoples of FSM may regard as cultural heritage and wish to preserve. For example, the Japanese wrecks of Chuuk lagoon may not be inherently part of the cultural heritage of Chuuk, but its place in the broader history of Chuuk is recognized.

‘Historic property’ is defined as ‘sites, structures, buildings, objects, and areas of significance in local history, archaeology, or culture.’<sup>135</sup> ‘Historical artifact is defined as ‘an object produced by human beings thirty or more years previously’.<sup>136</sup> (This is a rolling period, which means that all objects produced more than 30 years ago – that is before 1988 – are included). This definition is broad enough to include UCH as defined in the UCH Convention.

The basic protection regime provided for is that ‘[n]o person shall willfully deface, disfigure, disturb, or destroy any historic property within the control and jurisdiction of the National Government of the Federated States of Micronesia without the express permission of the President’.<sup>137</sup> It also provides that no person shall willfully transport any historical artifacts in interstate or foreign commerce without the express written permission of the Governor and legislature of the State in which such artifacts were found.<sup>138</sup> These two provisions reflect the federal nature of FSM. That’s is, historic properties are essentially subject to State jurisdiction and that the relevant state, through the Governor and legislature, will determine whether an historic object can be exported. On the other hand, the broad protective measures provided for in section 401(2) are limited to historic properties ‘within the control and jurisdiction’ of the federal government. This may be rather limited, the more so if territorial waters fall within state jurisdiction and control. That said, these provisions are consistent with the intent of the UCH Convention with respect to permitting required by the rules in the Annex, such as rule 9 and article 22.

While permission to undertake any of these activities appears to lie with the President or Governor of each State - or both if excavation and export is applied for - rather than the Institute (read Director of

<sup>133</sup> Annotated Code 2014. <http://fsmlaw.org/fsm/code/code2014/FMCode2014TabCont.html>

<sup>134</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 101.

<sup>135</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 102(2).

<sup>136</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 102(3)

<sup>137</sup> *Historical Sites and Antiquities* 26 FSMC 4 section s401(2).

<sup>138</sup> *Historical Sites and Antiquities* 26 FSMC 4 section s401(1).

Administrative Services – or more specifically the National Historic Preservation Officer), the legislation provides that [u]pon receiving a request for permission to export, deface, disfigure, disturb, or destroy any historic property or artifact within the control and jurisdiction of the National Government of the Federated States of Micronesia, the President shall consult with the Institute [Institute for Micronesian History and Culture] to determine the appropriateness of granting such permission.<sup>139</sup>

The legislation provides that the Director of Administrative Services shall oversee the identification, conservation, and protection of historic properties and cultural attributes within FSM ‘through the effective administration of funds from various sources.’<sup>140</sup> It is thus a coordinating function and might be an appropriate body to act as the competent authority required by the UCH Convention. The institute is granted broad functions consistent with those that a competent authority might require to give effect to the UCH Convention. These include:

- (1) to provide professional assistance to historic and cultural preservation programs in the several states;
- (2) to provide professional guidance regarding historic and cultural affairs and recommendations to all levels of Government and the agencies thereof, as well as to foreign governments and private businesses operating in Micronesia;
- (3) to advise the executive and legislative branches of the National Government concerning public and private actions which may affect historic properties or cultural attributes;
- (4) to secure and administer grants and private contracts for research and other activities promoting the preservation of Micronesian historic properties and cultural attributes; ...
- (6) to establish facilities and acquire equipment and supplies as may be necessary for the effective implementation of its mandate ...
- (7) to establish and maintain a National Archives for the Federated States of Micronesia at the Community College of Micronesia<sup>141</sup>, to be a depository for documents and other articles of historic or cultural significance ...
- (8) to monitor the activities of the National Government and its agencies and private individuals or groups of individuals which could have an impact on historic properties or cultural attributes;
- (9) to prepare and promulgate rules, regulations, and guidelines necessary to the effective implementation of this section; and
- (10) to engage in such other activities as are not inconsistent with the purposes of this title

The ‘institute’ is assimilated with the Director of Administrative Services<sup>142</sup> and the Division of Archives and Historic Preservation within the Office of Administration Services (located in the national capital of Palikir, Pohnpei). It is responsible for implementing a program to protect and preserve the FSM’s intangible and tangible cultural heritage, primarily through the activities of the State governments<sup>143</sup>. Importantly the Institute is empowered to enter into

<sup>139</sup> *Historical Sites and Antiquities* 26 FSMC 4 section 401(3).

<sup>140</sup> *Historical Sites and Antiquities* 26 FSMC 2 section 201.

<sup>141</sup> <http://www.comfsm.fm/>

<sup>142</sup> *Historical Sites and Antiquities* 26 FSMC 1 section Title 26: Historical Sites and antiquities s201 provides that ‘[a]s used herein, “Institute” means the Director of Administrative Services or his designee’.

<sup>143</sup> See further *Historical Sites and Antiquities* 26 FSMC 2 section 203.



cooperative agreements from a range of sources including foreign governments.<sup>144</sup> This has enabled close cooperation with the US and the continued application of the *National Historic Preservation Act*. As such, the National Historic Preservation Officer<sup>145</sup> advises the national government on relevant issues as well as coordinating funding and program activities of the State Historic Preservation Offices in the four states, particularly with the US Department of Interior (National Park Service). Funding for the program is from the US Department of Interior and the FSM national and state governments.

The Institute also has a role that is similar to that which might arise in relation to activities incidentally affected UCH as provided for in the UCH Convention.<sup>146</sup> The Institute's role extends to reviewing possible impacts on historic properties or objects that may arise from government activities or those from other entities, public or private, with either government permission or using government funds.<sup>147</sup> The extent of this, however, is unclear, as it appears to be narrowed by the requirement that it must be an activity that has either government funding or government permission. If it requires neither and performed by a private individual or company, it appears that this falls outside this function.

It requires that 'plans and proposals' for any undertaking be submitted 'as early as is possible to the Institute for its review and shall conduct such studies or assist the Institute and the appropriate State preservation program in conducting such studies as may be necessary to determine the effects of their undertakings on historic properties and cultural attributes'.<sup>148</sup> The legislation then puts an onerous burden on the Institute in requiring that 'Whenever the Institute is notified or learns of any activity or proposed activity of the National Government of the Federated States of Micronesia and its agencies, as well as agencies or other parties, public or private, foreign or domestic, operating with the financial assistance or permission of the National Government which may have an impact on historic properties or cultural attributes, it shall take all steps reasonable and necessary to determine the nature and magnitude of the impact such activities are likely to have on the historic property or cultural attribute'.<sup>149</sup>

This appears to reverse the obligations set up in s. 301 such that should an entity fail to fulfil its obligations, they then fall on the Institute. This may be tempered somewhat by the fact that the extent of the institute's obligations is to take 'reasonable' steps. Nevertheless, the primary obligations ought to remain with the entity whose activities do affect the cultural heritage. This

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<sup>144</sup> *Historical Sites and Antiquities* 26 FSMC 2 section 203.

<sup>145</sup> Currently Mr Augustine Kohler.

<sup>146</sup> UCH Convention article 5.

<sup>147</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 302.

<sup>148</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 301.

<sup>149</sup> *Historical Sites and Antiquities* 26 FSMC 1 section 303(2).

issue is pertinent to activities that might incidentally affect UCH in terms of article 5 of the UCH Convention.

Where in either case, the ‘Institute’ determines that significant effects are likely, the Institute shall initiate consultations with the relevant party, as well as the public, to clearly identify the historic properties or cultural attributes subject to impact<sup>150</sup>, and to the extent of that impact<sup>151</sup> with the possibility of the activities being suspended if there is a threat of immediate and irreparable harm to an historic property or artifact.<sup>152</sup> Any undertaking so suspended shall not be resumed until approval of the undertaking has been given by the President.<sup>153</sup> Indeed, the president has a role in resolving any difference in opinion between the Institute and the relevant party, and in reaching a decision as to the resolution of any dispute, must ‘take into account the value of the undertaking in question to the economic and general development of the Federated States of Micronesia or to its defense and the value of the historic property or cultural attribute involved to the maintenance of Micronesia’s cultural integrity and to the scientific and humanistic understanding of Micronesia’s cultures and history’. This provision might mean, for example, that a foreign wreck with a commercially valuable cargo, that has little if any connection with the people of Micronesia other than that it is found within the archipelago or indeed within its EEZ, may be subject to a decision that weights up the cultural value of the cargo and its commercial value to Micronesia – with the latter prevailing.

Sanction are provided for in that ‘Any person violating any provision of section 401 of this chapter or the rules and regulations issued pursuant to authority vested by this chapter shall be punished by a fine of no less than \$300 nor more than \$1,000 for each violation’.<sup>154</sup>

While FSM is a party to the UCH Convention, this is not reflected in the *Historical Sites and Antiquities Law*. The basic structure for implementing the UCH Convention exists within this part of the FSM Code, and appropriate amendments are capable of providing a national law that is consistent with FSM’s obligations under the UCH Convention. That said, a self-standing implementing legislative addition to the Code might also achieve the necessary result, though the *Historical Sites and Antiquities Law* might still require some amendment to clearly differentiate its scope from that of the implementing legislation.

The implementation of the existing legislation and any future legislation will need to take into account the fact that the State Historic Preservation Office of the US National Park Service

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<sup>150</sup> *Historical Sites and Antiquities* 26 FSMC 3 section 303(1).

<sup>151</sup> *Historical Sites and Antiquities* 26 FSMC 3 section 303(3).

<sup>152</sup> *Historical Sites and Antiquities* 26 FSMC 3 section 303(4).

<sup>153</sup> *Historical Sites and Antiquities* 26 FSMC 3 section 303(4).

<sup>154</sup> *Historical Sites and Antiquities* 26 FSMC 4 section 401(4)

operated in this space. Chuuk lagoon and Nan Madol are listed on the US National Register of Historic Places<sup>155</sup> and each of the four states have a State Historic Preservation Officer.

#### 4. Maritime law

Amongst the power expressly delegated to the Federal Congress in the FSM Constitution is the regulation of navigation and shipping in the maritime zones.<sup>156</sup> The *National Maritime Act* of FSM is similar to that of the other states, such as Palau and Marshall Islands, given that they derived their legislative from the Trust Territory Code. FSM did, however, repeal and replace the entire Maritime code in 1998 – though many of the provision will be substantial the same as those of the earlier Trust Territory Code.

Admiralty law not addressed in the *National Maritime Act* is to be determined be reference to the ‘general maritime law of seafaring nations of the world, and to the law of nations’.<sup>157</sup> Moreover, it was expressly stated that the Admiralty law should not be determined by reference to US cases and statutes, though these are likely to be persuasive in FSM. This could be problematic for the application of the UCH Convention given the scope of salvage law, and some legislative amendment would need to be introduced.

While dealing with a range of Admiralty and maritime issues, the provisions that are of importance for the implementation of the UCH Convention are those that address the jurisdictional capacity over nationals and FSM ships as well as that over foreign ships; and the provisions that address wreck and salvage.

The jurisdiction capacity required to give effect to the UCH Convention, especially article 16 in relation to jurisdiction over FSM flagged vessels, is provided for in the *National Maritime Act*.<sup>158</sup> It also address a number of issues pertinent to jurisdiction over foreign vessels in FSM waters that could be used to underpin those required of the UCH Convention, including articles 14 and 15. For example, section 315 allows for boarding and examination of vessels found to be ‘hovering’ within the territorial waters of FSM.<sup>159</sup> It is unlawful for a foreign vessel to enter or remain within the territorial waters of FSM without permission unless due to stress of weather or force majeure.<sup>160</sup> It is also unlawful for any vessel to engage within the territorial waters of FSM to, amongst other things, removal of scrap iron without authorization.<sup>161</sup> Penalties of violations include finds,

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<sup>155</sup> <https://npgallery.nps.gov>

<sup>156</sup> Federal Constitution of FSM article IX.

<sup>157</sup> *Federal Business Development Bank v SS Thornfin* 4 FSM R.367, 374 (App.1990).

<sup>158</sup> *National Maritime Act* 19 FSMC.

<sup>159</sup> *National Maritime Act* 19 FSMC 3 section 315.

<sup>160</sup> *National Maritime Act* 19 FSMC 3 section 312.

<sup>161</sup> *National Maritime Act* 19 FSMC 3 section 316.

imprisonment and seizure of all vessels and requirement use din the commission of the offence.<sup>162</sup> Furthermore, the *Territory, Economic Zones and Ports of Entry*<sup>163</sup> regulates entry into ports<sup>164</sup> and the regulation of foreign vessels<sup>165</sup> allowing for an implementation for the relevant provision of the UCH Convention.

The Wreck and Salvage chapter of the *National Maritime Act* is substantially different to that which had applied before 1998 and imports into FSM a regime based substantially on the United Kingdom regime, particularly in the establishment of a receiver of wreck<sup>166</sup> (which is the Secretary of the Department of Transportation and Communications)<sup>167</sup>. Wreck is defined as:

a vessel or any portion thereof which has sustained a casualty causing damage to the vessel to the extent that the seaworthiness of the vessel is threatened or destroyed, and also includes the vessel's cargo, and any jetsam, flotsam, lagan and derelict.<sup>168</sup>

Historic wrecks or any other form of UCH is not addressed in this regime, though on its terms this chapter will apply to historic wrecks to the extent that these are regarded as derelict. FSM is not a party to the Salvage Convention, though surprisingly, section 917(4) allows the Receiver of Wreck to promulgate regulations relating to salvage, taking into account the provisions of the Salvage Convention.<sup>169</sup> Should FSM become a party to the Salvage Convention is will need to enter a reservation in accordance with article 30(1)(d) providing that the Convention will not apply to UCH, and thus avoid conflict between the Salvage Convention's implementation and that of the UCH Convention. Moreover, and more importantly, since FSM is a party to the UCH Convention, legislative amendment is needed to take UCH out of the scope of the *National Maritime Act*.

## 5. Environmental Law

The *Environmental Protection Act*<sup>170</sup> provides a basic framework for environmental protection with, as one of its aims, to use all practicable means to improve and coordinate governmental plans, functions, programs, and resources to preserve important historic, cultural, and natural aspects of Micronesian heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice.<sup>171</sup> The FSM Environmental Protection Office is established to

<sup>162</sup> *National Maritime Act* 19 FSMC 3 sections 317, 321- 330. See also *Pohnpei v MV Hai Hsiang* 6 FSM R.594 (Pon.1994).

<sup>163</sup> *Territory, Economic Zones and Ports of Entry* 18 FSMC.

<sup>164</sup> *Territory, Economic Zones and Ports of Entry* 18 FSMC 2.

<sup>165</sup> *Territory, Economic Zones and Ports of Entry* 18 FSMC 3.

<sup>166</sup> *National Maritime Act* 19 FSMC 19.

<sup>167</sup> *National Maritime Act* 19 FSMC 1 section 106(33).

<sup>168</sup> *National Maritime Act* 19 FSMC 1 section 106(42).

<sup>169</sup> *National Maritime Act* 19 FSMC 19 section 917(4).

<sup>170</sup> *Environmental Protection Act* 25 FSM.

<sup>171</sup> *Environmental Protection Act* 25 FSM 1 section 102(1)(d).

give effect to this.<sup>172</sup> However, the Act does not contain much detail in terms of the protection regime, though some will be relevant to, and useful for, the implementation of the UCH Convention. For example, the FSM constitution vests in Congress the power to regulate the ownership, exploration, and exploitation of natural resources within the marine space of the Federated States of Micronesia beyond 12 miles from island baselines.<sup>173</sup> The *Environmental Protection Act* gives effect to this by requiring that

Any person, prior to taking any action that may significantly affect the quality of the environment within the Exclusive Economic Zone of the Federated States of Micronesia, or within the boundaries of the National Capital Complex at Palikir, must submit an environmental impact statement to the Director, in accordance with regulations established by the Director.

This form of regulation in the exclusive economic zone is similar to that which may be required for UCH in that zone and the continental shelf in accordance with articles 9 and 10 of the UCH Convention.

## STATE LAW

The FSM legal regime is complicated by its federal nature, and each of its four constituent states has its own legal system, including its own constitution. While there is significant similarity between the Codes of each state, they are not identical and to give effect to the UCH Convention in FSM, each state legal system requires detailed consideration. Unfortunately, it is beyond the scope of this research project to do so. At least for each state, those laws that are most likely to be relevant and most probably require amendment, are listed. Two areas, though, will be expanded upon. First, given Chuuk has the only legislation directed at an aspect of UCH, this will be considered in some depth, including the problem of maritime jurisdiction. Secondly, the *Pohnpei Historic and Cultural Preservation Act* will be considered as an example of the scope of the state law and its suitability in terms of implementing the UCH convention, subject to appropriate amendment.

### A. CHUUK

The Constitution of Chuuk begins with a claim to territory. Article 1 provides:

The territory of the State of Chuuk includes the islands, reefs, shoals, banks, sands, oceans, and other natural landmarks bearing names or identities known in any of the dialects of the State, and any other territory or water belonging to the State by history right, custom, or legal title. Unless limited by law, this territory shall also include a marine space of 200 nautical miles measured outward from appropriate baselines, as well as related seabed, subsoil, and water column, insular and continental shelves, and airspace over land and water.

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<sup>172</sup> *Environmental Protection Act* 25 FSM 2.

<sup>173</sup> FSM Constitution article IX(2)(m).

This broad claim to jurisdiction clearly overlaps with that of the federal government, and while it is arguably subject to the federal claim, it may give rise to jurisdictional complexities, especially when dealing with UCH given that the UN Convention on the Law of the Sea does not effectively address the issue.<sup>174</sup>

These jurisdictional issues are further complicated by customary law claims in different maritime zones. For example, the people of Chuuk have always claimed ownership and control rights over tidelands<sup>175</sup>; a right recognized in the Chuuk Constitution<sup>176</sup> and in the *Land Management Act*.<sup>177</sup> This will certainly impact the management of UCH found in such tidelands.

The management of Marine Resources is addressed in the *Marine and Marine Resources* Title of the Chuuk Code.<sup>178</sup> Chapter 8 of that Title establishes the Chuuk Lagoon Monument.<sup>179</sup> This is arguably the most important state law as it is the only law within FSM that deals directly with an aspect of UCH. There at least 53 known World War II wrecks in the Chuuk Lagoon and a number of the 453 aircraft known to have been lost over Chuuk.<sup>180</sup> These are addressed in Section 702:

All ships, vessels and aircraft, and any and all parts thereof and all other objects, including non-military items, which formerly belonged to or were part of the armed forces of Japan and were sunk to or otherwise deposited in the Chuuk Lagoon prior to December 31, 1945 shall be, and hereby are, designated as State monuments, which shall be collectively called the "Chuuk Lagoon State Monument". For purposes of this Section the Chuuk Lagoon is defined as all marine areas below the ordinary high water mark which are enclosed by the Chuuk barrier reef.<sup>181</sup>

Further,

All persons who dive to or by any other means seek and obtain access to the aforesaid ships, other vessels and aircraft, or any and all parts thereof, for the purpose of examination shall first obtain a permit therefor from the managers of the duly licensed diving shops in the State, and no person may dive to or by any other means seek and obtain access to the aforesaid ships, other vessels and aircraft, or any and all parts thereof for the purpose of examination without first obtaining a certified diving guide from the duly licensed diving shops in the State. The

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<sup>174</sup> *UN Convention on the Law of the Sea*, articles 149 and 303.

<sup>175</sup> *Nimeisa v Department of Public Works* 6 FSM Intm 205, 208 (Chk.S.Ct.Tr 1993).

<sup>176</sup> Chuuk Constitution article IV(4) provides that 'Traditional rights over all reefs, tidelands, and other submerged lands, including their water columns, and successors rights thereto, are recognized. The Legislature may regulate their reasonable use'.

<sup>177</sup> *Land Management Act* 24 CSC 1.

<sup>178</sup> *Marine and Marine Resources* 25 CSC.

<sup>179</sup> *Marine and Marine Resources* 25 CSC 8.

<sup>180</sup> National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk

[http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>181</sup> *Marine and Marine Resources* 25 CSC 8 section 1702 excluding amendments changing name from Truk Lagoon District Monument.

managers of the duly licensed diving shops are authorized to issue such permits to those persons whom they deem qualified to conduct such examination subject to such rules and regulations as the Governor may prescribe.<sup>182</sup>

The administration, including adoption of rule and regulations, and imposing the penalties provided for<sup>183</sup>, fall to the Chuuk Government. The Chuuk Lagoon Monument has, since the addition of the UCH Convention by FSM, been the subject of discussion including a recent National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk with UNESCO assistance.<sup>184</sup> An important outcome of the workshop was identifying the need to improve management of UCH, which will require considerable legislative amendment.

Furthermore, at the United Nations (UN) Our Oceans Conference held at the UN in New York in 2017 convened to support the implementation of Sustainable Development Goal 14<sup>185</sup>, the FSM National Archives, Historic Preservation and Culture Office at the FSM Government registered the voluntary commitments to:

assist Pacific SIDS, in particular Federated States of Micronesia (FSM), in the preservation of their underwater cultural heritage in an Emergency Situation. It also addresses urgent and serious risks related to environmental hazards emanating from certain World War II shipwreck sites in the Pacific, taking Chuuk Lagoon as an example case for the region.<sup>186</sup>

The action plan deliverables also include support:

To conduct a scientific research and pilot intervention project addressing an emergency situation in a particular important underwater cultural heritage site, Chuuk Lagoon; education and policy outreach accompany the activities

To incorporate the scientific research findings and project deliverables of Chuuk Lagoon into a scientific publication on emergency issues concerning the underwater cultural heritage of the Pacific region

These were due to be completed in December 2018. It us thus anticipated that proposals will emerge as to the best manner to implement the UCH Convention in Chuuk.

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<sup>182</sup> *Marine and Marine Resources* 25 CSC 8 section 1705(1).

<sup>183</sup> *Marine and Marine Resources* 25 CSC 8 section 1707, which provides that ‘Any person who, without the written permission of the Governor, removes, appropriates, damages, or destroys the aforesaid ships, other vessels or aircraft, or any or all parts thereof, or who violates any provisions of this act, any rules and regulations issued pursuant to the act shall, upon conviction, be fined a sum not more than \$1,000 or be imprisoned for a period of not more than six months, or both.’

<sup>184</sup> [http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>185</sup> <https://oceanconference.un.org/about>

<sup>186</sup> Chuuk Lagoon Pacific Ocean Emergency Response - Safeguarding Underwater Cultural Heritage (FSM National Archives, Historic Preservation & Culture Office) <https://oceanconference.un.org/commitments/?id=16691>

## **B. POHNPEI<sup>187</sup>**

The recently inscribed FSM World Heritage site of Nan Madol, which includes elements of UCH, is in Pohnpei.<sup>188</sup> The importance of heritage such as this is recognized in the Pohnpei Constitution<sup>189</sup> and addressed in some detail in the *Historic and Cultural Preservation Act*.<sup>190</sup>

The *Historic and Cultural Preservation Act* acknowledges that Pohnpei contains a wealth of historic, archaeological, and cultural properties and that their preservation and protection presents a unique challenge because of the nature of these resources, which form a fragile, finite, non-renewable, and irreplaceable resource subject to damage, loss, and destruction by neglect, oversight, uncontrolled development and land use, foreign impact, and patterns of modern land use.<sup>191</sup> The definition of ‘Historic property’ or ‘historic resource, being any site, structure, object, building or area of significance in the history, archaeology or culture of Pohnpei State<sup>192</sup>, is broad enough to encompass UCH. The Act established the Historic and Cultural Preservation Review Board, that, amongst a number of functions, determines what heritage resources are subject to the protective regime.<sup>193</sup> The Division of Historic Preservation is established within the Department of Land and Natural Resources, with the responsibility for the implementation of the historic preservation program. The Act sets out a relatively comprehensive and detail set of duties and responsibilities of the Division of Historic Preservation such that it would be capable and consistent with those required of a competent authority in the UCH Convention. Nevertheless, it would require some amendment to include UCH in this Act. Given that the UCH Convention requires the blanket protection of all UCH of at least 100 years old, rather than designation of each historic property as require in this Act, it is likely to be easier to establish a self-standing chapter within this title to implement the UCH Convention. UCH that is less than 100 years old can then be added individually after its historical, archaeological or culture importance has been ascertained.

Pohnpei, like Chuuk, has a complex jurisdictional relationship with the federal claim to jurisdiction, especially in the maritime space, and would also require consideration.<sup>194</sup> Within

<sup>187</sup> Sources <http://psl.fm/index.php/pohnpei-code>;  
<http://www.vanuatu.usp.ac.fj/library/Paclaw/FSM/Code%20of%20the%20State%20of%20Pohnpei/Digital%20Code/Common/Table%20of%20Chapters.html>; <http://fsmLaw.org/fsm/constitution/index.htm>

<sup>188</sup> National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk  
[http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>189</sup> Pohnpei Constitution preamble recognises the need to ‘protect and maintain the heritage and traditions of each of our islands’. See also article 7(5).

<sup>190</sup> *Historic and Cultural Preservation Act* 22 PC.

<sup>191</sup> *Historic and Cultural Preservation Act* 22 PC 1 section 102(1).

<sup>192</sup> *Historic and Cultural Preservation Act* 22 PC 1 section 104(3).

<sup>193</sup> *Historic and Cultural Preservation Act* 22 PC 11 section 104(3).

<sup>194</sup> See Pohnpei Constitution article 1,



Pohnpei's jurisdictional competency, the *Conservation and Resources Act*<sup>195</sup> may provide some basis for implementation of the UCH Convention. This includes the *Marine and Sanctuary and Wildlife Refuge System*.<sup>196</sup>

### C. KOSRAE

Kosrae contains a range of UCH, including wrecks from whaling or World War II in the harbors of Lelu, Utwe, and Okat, and PMB plane wreck in Lelu Harbor.<sup>197</sup> Like the majority of FSM states, it has no legislative provisions specifically addressing UCH. The *Land and Environment Title* of the Kosrae Code includes a chapter on antiquities.<sup>198</sup> It consists of only two provisions. The first provides that:

Before the Government begins to undertake, assist, participate in, or license action that might affect ... State waters the Department of Agriculture, Land and Fisheries considers the impact of the action on antiquities and traditional culture, reporting its findings to the Governor, the Legislature, and components of Government involved in the proposed action.

The second provides that:

By regulation the Director of the Department of Agriculture, Land and Fisheries states the classes of structures, artifacts, or other objects which constitute State antiquities, and provides for authorization of the use of antiquities for scholarly research, museum display or educational purposes.

While basic, both of these provisions are consistent with the approach needed to be taken to implement the UCH Convention.

The implementation of this regime is by the government agency, Kosrae Island Resource Management Authority (KIRMA), which has five internal units dealing with Historic, Marine, Forestry, Permitting, and Education aspects.<sup>199</sup>

The other Titles in the Kosrae Code that might be applicable and will require review and possible amendment include:

<sup>195</sup> *Conservation and Resources Act* 26 PC.

<sup>196</sup> *Conservation and Resources Act* 26 PC 5. See Establishment of Oroluk Marine Sanctuary, Reef Marine Sanctuary, Kehpera Marine Sanctuary, Enipein Marine Park, Pwudoi Marine Sanctuary, Nahmw en Nangih Stingray Sanctuary, Nahtik Marine Sanctuary, Dekehos Marine Sanctuary, Palipohn Depehk Marine Sanctuary and the Sapwitik Marine Sanctuary.

<sup>197</sup> National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk [http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>198</sup> *Land and Environment* 11 KSC 14.

<sup>199</sup> National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk [http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

Land and Environment 11 KSC13. Protection of Environment  
 The Sea and Transportation 14 KSC 11. State and Territorial Waters  
 The Sea and Transportation 14 KSC 13. The Marine Space  
 Marine Resources 19 KSC 8. Forfeiture of Property

#### **D. YAP<sup>200</sup>**

A major feature of the Yap UCH landscape is its historic tidal stone-walled fish weirs called *aech* (which are at times partially or fully submerged).<sup>201 202</sup>

Yap does not have any legislation particular to UCH, and its Constitution and Code are not dissimilar to that of Chuuk and Pohnpei giving rise to the same consideration for implementation of the UCH Convention. Besides the Constitutional structure that addresses the issues of jurisdiction in the maritime space, the Yap Code contains a number of Titles that are pertinent and which would require review and amendment to bring them into conformity with the UCH Convention. These include the *Historic Preservation Act*<sup>203</sup> and the *Environmental Protection Act*.<sup>204</sup>

Yap provides a good illustration as to the interaction between these formal laws and customary laws. In Yap, there are cultural and traditional non-written regulations, sanctions, taboos, seasons, and other traditional means, methods, punishments for the control and sustainability of marine natural resources such as fish, shells, imbedded into Yapese socio-traditional culture.<sup>205</sup> Today, these are fall broadly into intangible cultural heritage including associated artefacts and sites and would apply to fishing using UCH, notably the *aech*.

### **1.4 UCH-RELATED PROGRAMMES AND INITIATIVES**

Prepared questionnaires were distributed to all of the National and State HPOs, but only the National FSM and Yap State HPOs provided feedback. This feedback has been incorporated in the details that follow, in addition to the authors' research (see Appendices 1-3 for the information sought in the questionnaires).

<sup>200</sup> <http://www.fsmlaw.org/yap/code/index.htm> accessed 5 September 2018.

<sup>201</sup> National Consultation on the Underwater Cultural Heritage Safeguarding held in Chuuk [http://www.unesco.org/new/en/member-states/single-view/news/national\\_consultation\\_on\\_the\\_underwater\\_cultural\\_heritage\\_sa/](http://www.unesco.org/new/en/member-states/single-view/news/national_consultation_on_the_underwater_cultural_heritage_sa/)

<sup>202</sup> Jeffery & Pitmag 2010

<sup>203</sup> *Historic Preservation Act* 5 YSC 4. As amended by YSL 2-56.

<sup>204</sup> *Environmental Protection Act* 18 YSC 4

<sup>205</sup> Reg 2018, pers.comm.

### 1.4.1 Types of UCH

The FSM contains an extensive range of tangible and intangible cultural heritage related to UCH.<sup>206</sup> Being a sea of islands, FSM as in other parts of Micronesia has its roots in the marine environment, e.g. the first inhabitants of Chuuk came from Pohnpei or Kosrae, ‘the first woman arrived pregnant, sailing on a coconut frond’.<sup>207</sup> People from FSM, particularly the outer islanders are world-renowned wayfinders. Mau Piailung, the Micronesian wayfinder who resurrected traditional wayfinding in 1976 with the voyage of the *Hōkūle‘a* (a replica double-hull Hawaiian canoe) from Hawaii to Tahiti is from Satawal in the outer islands of Yap State. Canoe building, wayfinding and using a canoe for fishing or travelling to other islands, particularly in the outer islands of FSM are very important ongoing activities/cultural practices.<sup>208</sup> One example of the connections across the region can be seen in the *Sawei*, being visits by Outer Islanders to villages in Gagil (in ‘Yap Proper’ being the high islands) for ‘tribute offerings, gift exchange and disaster relief’.<sup>209</sup>

Cultural practices, objects and sites related to fishing is another important and maintained traditional marine activity. Over 430 stone-walled fish weirs (*aech*) can be found in Yap State (which potentially have 700-800), with some still in use, and other states contain a smaller number of traditional fish weirs/traps.<sup>210</sup> Other styles of fish traps, called *ulung* (small piles of stones) can be found in Yap. Nan Madol in Pohnpei and Lelu in Kosrae each contain 90-100 monumental stone structures/enclosures located in the inter-tidal region of the islands, and were important political, ritual and residential centres. Stone money (called *rai* and *fei*) quarried in Palau and transported to Yap initially by canoe, can be found underwater and these underwater *rai* are still remembered and valued by the original owners’ descendants. Their antiquity is considered to be from 500-1000AD up until the last *rai* was quarried in the 1930s, and an inventory in the 1930s found 13,281 *rai* in Yap, many in association with the stone money banks.<sup>211</sup>

FSM also contains a broad range of shipwreck sites related to the various colonial activities of different nationalities, including traders, explorers, pirates, whalers (four were sunk by an American Confederate vessel), and hundreds of Japanese World War II vessels and aircraft. The World War II UCH in Chuuk Lagoon are world-renowned, of which many are known and dived by tourist divers, but there are other smaller vessels and many aircraft that have not been located.<sup>212</sup> A similar number of WWII shipwrecks and aircraft are located outside the lagoon, and still within the territorial sea of FSM of which the majority have not been located.<sup>213</sup> A full list of Japanese

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<sup>206</sup> Jeffery 2014

<sup>207</sup> Gladwin 1970: 4

<sup>208</sup> Gladwin 1995

<sup>209</sup> Hunter-Anderson & Zan 1996

<sup>210</sup> Jeffery 2013

<sup>211</sup> Gilliland 1975; Beauclair 1963

<sup>212</sup> Jeffery 2007; Jeffery 2012; Jeffery 2004a

<sup>213</sup> Jeffery 2007

ships lost during WWII can be found in report compiled by the US government immediately after the war.



Figure 3: A traditional canoe from the Yap Outer Islands and the technique of standing on the rudder when sailing. Source: Bill Jeffery, 2008



Figure 4: Fish weirs (*aech*) located in Rikeen, Yap. Source: Bill Jeffery, 2018





Figure 5: One of the most impressive islets at Nan Madol in Pohnpei is Nandowas. Source: Bill Jeffery, 2004



Figure 6: The 7,000-ton aircraft transport vessel *Fujikawa Maru* laying on the seabed in Chuuk Lagoon. Source: Greg Adams, 2002

## 1.4.2 Programmes related to tangible and intangible UCH

The government office that has responsibility in implementing archaeological and heritage related programmes, including UCH programmes is the FSM National Historic Preservation Office (HPO) based in Pohnpei, in coordination with the State Historic Preservation Offices located in the four states. The FSM National HPO oversee and coordinate the work of the States but the States have a degree of autonomy in implementing their own programmes.

Neither the FSM National government, nor the four State governments implement programmes in surveying or preserving UCH. One of the authors (Jeffery) was employed with the National HPO as a maritime archaeologist from 2001-2009 working with Chuuk State HPO on the WWII UCH, and with Yap State HPO on the Yapese fish weirs (*aech*).<sup>214</sup> The Chuuk Lagoon WWII UCH survey combined an anthropological and cultural heritage management approach to investigate the multi-vocal value of UCH sites and their histories, and it included the survey of 20 of the more than 50 shipwrecks sunk in the lagoon.<sup>215</sup> <sup>216</sup> The Chuuk WWII UCH is on the US National Register of Historic Places and the Truk (Chuuk) Lagoon Underwater Fleet, Truk Atoll is one of only two sites in FSM that have been designated as a US National Historic Landmark (NHL, with the other site being Nan Madol).<sup>217</sup> At the time of the NHL designation of the Chuuk Lagoon Underwater Fleet in 1985, US NPS developed a ‘master plan’ to see if it would also meet the criteria for designation as an Historical Park within the US NPS system. The report found the UCH sites ‘are utterly unique’ and ‘for the sunken wrecks, the establishment of a historical park or reserve seems to be particularly appropriate in light of the long-standing concerns over looting and vandalism.’<sup>218</sup> No further action has been taken place in regard to the development of an Historical Park.

Enforcement of the Chuuk (*Marine and Marine Resources* Title of the Chuuk Code, Chapter 8: Chuuk Lagoon Monument) and US legislation (*Historic and Cultural Preservation Act*) has been a thorn in the side of the Chuukese government for many years. Without an active and well-resourced programme (with staff and equipment), it has had to rely on the Dive Operators (and guides) to police the no recovery of artefacts policy, and the baggage handling staff at the Chuuk airport to check bags for the souvenirs many divers sought after. Many artefacts were seized that had no conservation treatment and were handed over to the Chuuk government. For a number of years, Chuuk had a museum where this, and traditional ethnographic material was stored and displayed. About 2004, the museum closed and some of the artefacts were given to the HPO, generally in poor condition.

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<sup>214</sup> Jeffery 2004b; Jeffery & Pitmag 2010

<sup>215</sup> Jeffery 2004b

<sup>216</sup> Jeffery 2007

<sup>217</sup> <https://home1.nps.gov/nhl/find/statelists/micronesia.htm> Accessed 30 November 2018

<sup>218</sup> U.S. NPS 1989: 61

In 2002, a diver recovered a bell from the vessel *Sapporo Maru*, one of the last remaining unknown shipwrecks in Chuuk Lagoon, which was found by a team associated with the author, Jeffery.<sup>219</sup> Investigations by the Department of Public Safety found a dive guide recovered and hid the bell so as foreign divers would not take it out of Chuuk. It was deemed the diver had not broken the law as it was still on the shipwreck site (but hidden). In 2018, the bell was seen on display at a museum at the Blue Lagoon Dive Resort.

A significant issue in the management and conservation of the Chuuk Lagoon shipwrecks is dynamite fishing. Divers recover munitions from the shipwrecks in order to make dynamite bombs. They throw the bombs back onto the ships to kill the fish, and the explosions have a detrimental impact on the iron structures of the shipwrecks. Since 2002, corrosion studies have been carried out on a number of the shipwrecks and in addition to the corrosion—from the iron sitting in corrosive environment—and the dynamite fishing impacts, it has been concluded in 2002 that the shipwrecks could start collapse in 10-15 years.<sup>220</sup> A number of shipwrecks have in the last six years begun to collapse.<sup>221</sup> Another cause that has accelerated the collapse has been the poor mooring practices carried out by the large live-aboard dive boats, where there large anchors would be dropped onto the sites, but in recent years they have installed their own moorings.

In 2018, a cannon (thought to be Spanish) was recovered from the sea off Yap, without any formal consent. The matter was brought to the attention Yap State Historic Preservation Office, ‘who brought the matter to the attention of the traditional leadership of the villages/communities having traditional authority and ownership of the water where it was found.’<sup>222</sup> Further discussions with the Yap Visitors Bureau, the Yap Attorney General, the FSM National government, and the US Navy (it was found by Navy divers), concluded the appropriate action and permits that were required to take it off island for conservation. This occurred not long after FSM ratified the UNESCO UCH Convention and it was considered any further work on the cannon should be consistent with the Convention, and in particular the “Project Design” contained therein. As at the time of writing this report, the matter has not been resolved.

‘There have been other recent instances of traditional enforcement or control of UCH resources, where violators of traditional fishing ownership, right, privilege, etc, have had their boats and fishing gear confiscated by the enforcers of certain water areas, or the owners of those areas. The violators are required to apologize by giving traditional money such as stone or shell money to those whose waters have been violated.’<sup>223</sup>

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<sup>219</sup> Jeffery 2012: 19

<sup>220</sup> MacLeod 2003

<sup>221</sup> Jeffery 2012

<sup>222</sup> Reg 2018, Personal Communication

<sup>223</sup> Reg 2018, Personal Communication

The Submerged Cultural Resources Unit (now the Submerged Resources Center) of the US National Park Service (USNPS) carried out a survey of UCH in Micronesia in addition to providing a list of shipwrecks from 1520 to 1990.<sup>224</sup> They implemented archaeological surveys in Kosrae and Chuuk in 1981. In Kosrae, from the dozen ships wrecked there that span 150 years, they investigated the *Leonora*, the ship belonging to the ‘pirate’ Bully Hayes and made some recommendations in regard to its research and management.<sup>225</sup> In regard to Chuuk, ‘SCRU visited only some of the sites briefly over a 3-day period in 1981 and cannot meaningfully add to the body of information presently available in other forms.’<sup>226</sup>

A total of eight Micronesian Resources Studies (MRS)<sup>227</sup> have been carried out in the FSM:

- ‘Truk Archaeology’<sup>228</sup> noting 31 archaeological projects<sup>229</sup> have been carried out in Chuuk, and highlighting how the coastal flats are ‘rich in archaeological deposits’;
- ‘Truk Ethnography’<sup>230</sup> providing general ethnographic background and using the island of Dublon (Tonoas) and the village Pwené;
- ‘Truk Underwater Archaeology’<sup>231</sup> providing background history on the WWII sites in Chuuk, a list of 40 shipwrecks located inside the lagoon and 20 located outside, an including issues on the conservation of the shipwrecks;
- ‘Yap Archaeology’<sup>232</sup> focussing on a survey of Gachlaw village in Gilman and highlighting the importance of marine resources and the fish traps;
- ‘Yap Ethnography’<sup>233</sup> which focused on how to address projects that could result in cultural change or impact cultural resources;
- ‘Pohnpei Archaeology’<sup>234</sup> combining archaeology and ethnography and focusing on an interior region, Salapwuk;
- ‘Kosrae Archaeology’<sup>235</sup> investigated Lela ruins, which is located in a ‘remnant coastal strand surrounded by mangrove swamps’ dated c. 1390-1720 AD
- ‘Kosrae Ethnography’<sup>236</sup> included ethnographic studies and training in visual anthropology (videography) in association with the archaeological work at Lela

<sup>224</sup> Carrell 1991

<sup>225</sup> Carrell 1991: 452-457

<sup>226</sup> Carrell 1991: 460

<sup>227</sup> A total of 16 studies have been carried out: <https://core.tdar.org/browse/creators/96832/micronesian-endowment-for-historic-preservation> Accessed 18 September 2018

<sup>228</sup> Craib 1997

<sup>229</sup> King and Parker 1984: 24

<sup>230</sup> Young, Rosenbeger & Harding 1997

<sup>231</sup> Hezel and Graham 1997

<sup>232</sup> Adams 1997

<sup>233</sup> Yap Cultural Inventory Group 1997

<sup>234</sup> Ayres & Mauricio 1997

<sup>235</sup> Swift, Harper & Athens 1997

<sup>236</sup> Burns 1997



The MRS were carried out under the direction of the Micronesian Endowment for Historic Preservation, a non-profit corporation, whose purpose is ‘to promote and conserve the cultural and historic resources found in the islands that make up the area generally known as Micronesia...and US Congress appropriated \$750,000 to conduct the Micronesian Resources Study, which was charged with making a special inventory and study of cultural resources.’<sup>237</sup> MRS have been carried out in Palau, Marshall Islands, all of the States of FSM, but with only one UCH study—being Truk (Chuuk) Underwater Archaeology. A summary of all the MRS, being ‘A Report on Cultural Resource Management Needs in the Republic of the Marshall Islands, the Federated States of Micronesia, and the Republic of Palau’ was made by Patricia Parker.<sup>238</sup>

A number of archaeological and ethnographic investigations have been conducted in various localities, including the coastal regions. Some are of an academic nature and some are related to the Section 106 requirement under the NHPA 1966 in which an archaeological assessment of the impact of US Federally funded projects is required.<sup>239</sup> One such project in Chuuk, the extension of the Chuuk airstrip, resulted in the relocation of a ‘Kate’ Japanese aircraft located offshore in 1979.<sup>240</sup> A field survey of World War II sites and artefacts in Chuuk (land and underwater) was implemented by D. Colt Denfeld and he found, amongst other things: ‘Chuuk has *insitu* as many guns as all of Europe’; 12 suicide torpedo units were based in Chuuk; and he documented a number of shipwrecks and aircraft, although he did not dive and record them.<sup>241</sup> Denfeld also implemented a similar type of field survey of WWII features in Pohnpei.<sup>242</sup>

A climate change investigation and what it means to local people was initiated by Chris Pam as her PhD study on Moch Island in the Satawal Atoll, Chuuk.<sup>243</sup> The aim of her study was to:

Rather than pursue a more conventional research approach driven by the 'effects of climate change', I examine the ways in which climate change is affected by the Mochese community; how the 'facts' of climate change are made meaningful and given force in a quest to 'make the island powerful and stay alive'.

### Gaps in implementing the UCH Convention

The gaps in being able to implement the UCH (in addition to the legislative gaps) are primarily financial, and a lack of trained personnel and appropriate equipment to implement a programme. The Historic Preservation Offices are the appropriate “Competent Authority” to conduct the work. These offices already work with the community, chiefs and traditional owners, which is an

<sup>237</sup> Krause, 1992: 197.

<sup>238</sup> Parker 1994, <https://babel.hathitrust.org/cgi/pt?id=umn.31951d01166719x;view=1up;seq=3>

<sup>239</sup> King & Parker 1984; King 2008

<sup>240</sup> King and Parker 1984: 476

<sup>241</sup> Denfeld 1980

<sup>242</sup> Denfeld 1979

<sup>243</sup> Pam 2015, <https://researchonline.jcu.edu.au/41266/> Accessed 1 December 2018

important aspect in UCH-related programmes. UCH-related programmes also need to work with scuba divers, as few local people dive given it can be an expensive activity. Foreign tourist divers should be encouraged into assisting HPO, much like the EarthWatch project, which is briefly discussed below.<sup>244</sup> This would provide them with a broader view of the significance of the heritage, and as in the EarthWatch project, they would gain from understanding the broader perspectives, as was found in the project conducted in Chuuk in 2007 where one of the volunteers provided the following feedback:

I've gained a greater understanding of the people of Chuuk, and reasons for their indifference to the wealth of WW II shipwrecks in their lagoon. I've also gained an appreciation of how difficult it may be to preserve these wrecks, given the fact that the Chuukese in general do not regard these as a resource or as treasure, but rather as reminders of a painful time during which they were innocent bystanders in a war between superpowers

An inventory on the full range of UCH should also be a priority in implementing a programme. Resources for a UCH programme should be coordinated across the nation, rather than with individual programmes in each of the four states.

There is also a perception issue that should be addressed. UCH is a poor cousin in the built heritage, archaeological heritage, and ICH world—it is a marginalized heritage. And yet in SIDS, their heritage is inexplicably linked to the coast and sea. UCH needs to be brought up to the same level, through publicly showcasing the different types of UCH—that it is not all about colonial shipwrecks—and that it is related to important contemporary heritage and linked to ICH and the other fields. This information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the significance of UCH in the cultural identity of people from SIDS in all levels of the community could assist furthering UCH-related programmes.

### 1.4.3 Civil society initiatives

There is a plethora of individual and civil society initiatives in regard to certain aspects of UCH in FSM, particularly in regard to the Chuuk Lagoon WWII UCH sites. This is mainly in the area of providing tourism related information in the form of newspaper and magazine articles, books, professional documentary films, online websites, articles, and youtube videos, numbering in the hundreds, possibly thousands.<sup>245</sup> A list of FSM's WWII-related UCH can be seen online.<sup>246</sup> Another incomplete database of WWII-related UCH in FSM, and in other areas of Micronesia can be found online, some with geographical coordinates to a degree that might provide the accuracy

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<sup>244</sup> <https://earthwatch.org> Accessed 1 December 2018

<sup>245</sup> Bailey 2000; Earle & Giddings 1976; Lindemann 1982; Jeffery 2012; Shipwreck Detectives 2002; Stewart 1989

<sup>246</sup> <https://www.pacificwrecks.com/provinces/marshall.html> Accessed 1 December 2018

to allow for people to find the site.<sup>247</sup> Given the recent issues to do with the illegal and unethical salvage of WWII shipwrecks in Indonesia and Malaysia—for the pre-radioactive metal—this information could open up these sites for similar looting.<sup>248</sup>

Other UCH sites and related ICH such as Nan Madol, the Yapese Stone Money, Wayfinding, and the revival of canoe building throughout FSM receive considerable attention from scholars, the general community and NGOs, of which some are on display in Yap's annual cultural festival, Yap Day.<sup>249</sup>

In Chuuk, the island dive shops and live-aboard dive boats issue permits and take the US\$50 annual fee for the government, in addition to providing all divers with a dive guide—part of the requirement under the legislation, *Marine and Marine Resources* 25 CSC 8. The dive guide ensures all the dives are implemented safely as well as reminding divers not to recover any artefacts.

From 2006-2008, an EarthWatch project—where volunteer divers paid to assist in a range of cultural or scientific projects—was implemented on the shipwrecks in Chuuk Lagoon. In association with three Principal Investigators (one of the authors, Jeffery from James Cook University, the University of Queensland and the Western Australian Museum and others), and Chuuk Historic Preservation Office they recorded and documented the values and health of the shipwrecks—the archaeological, ecological values, and corrosion assessments—to pass onto the Chuuk government.<sup>250</sup>

Hyperbaric chambers for treating divers suffering decompression sickness are located in Chuuk, Yap and Pohnpei. The chambers have been installed by a commercial organization that provides the chamber, installs it and teaches the operators. It has saved a number of lives in Chuuk.

#### **1.4.4 UCH safeguarding beyond the cultural sector (Sustainable Development Goals, SDG)**

The various SDG that are considered to provide a link to safeguarding different types of UCH, include: SDG 2, Zero hunger; SDG 3, Good Health and Well-being; SDG 4, Quality Education; SDG 8 Decent Work and Economic Growth; SDG 12 Responsible Consumption and Production; SDG 13 Climate Change; SDG 14 Life Below the Water; SDG 17, Partnerships.

FSM has 26 partnerships in its nine identified SDG, and 12 in SDG 14, Life Below the Water.

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<sup>247</sup> [https://en.wikipedia.org/wiki/List\\_of\\_shipwrecks\\_of\\_Oceania](https://en.wikipedia.org/wiki/List_of_shipwrecks_of_Oceania) Accessed 1 December 2018

<sup>248</sup> <https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks> Accessed 1 December 2018

<sup>249</sup> <https://www.visit Yap.com/things-to-do/yap-day/> Accessed 2 December 2018

<sup>250</sup> Jeffery 2012



Figure 7: The 17 Sustainable Development Goals

**SAMOA Pathway Partnerships each Pacific Country has aligned to the the 17 SDGs**

FICs	SUSTAINABLE DEVELOPMENT GOALS																Total No. of Partnerships per Country	
	GOAL 1	GOAL 2	GOAL 3	GOAL 4	GOAL 5	GOAL 6	GOAL 7	GOAL 8	GOAL 9	GOAL 10	GOAL 11	GOAL 12	GOAL 13	GOAL 14	GOAL 15	GOAL 16		GOAL 17
Cook Islands		1	1			1	4				2	3	7	12	2		3	27
FSM		1				1	3				1	3	7	12	2		1	26
Fiji	1	1			1	1	5	1			2	3	10	13	2		3	36
Kiribati		1	1			1	5	1	1		2	3	7	14	2		2	30
Nauru						1	4				1	3	7	11	2		1	23
Niue		1				1	3				1	3	6	8	2		1	23
Palau				1		1	4				1	3	7	14	2		1	29
PNG		1		1	1	1	4				1	3	9	15	2		2	34
RMI					1	1	5				1	3	6	12	2		1	29
Samoa	1	2	1			2	4	2	1		3	3	6	14	2		2	36
Solomon Islands	2	1			2	1	5	2	1		2	2	10	13	2		5	39
Tonga		1	1	1	1	1	4	1	1		2	3	8	11	2		3	35
Tuvalu						1	4	1	1			2	7	13	2		1	27
Vanuatu	1	1			2	1	6				1	3	8	12	2		5	34

NB: Shaded cells indicate Goals which countries do not have Partnerships under  
 The numbers in the cells indicate how many Partnerships there are under each Goal for that particular country

Figure 8: SAMOA Pathway Partnerships each Pacific Country has aligned to the 17 SDGs

Programmes pertaining to sustainable development in these areas and which take on board safeguarding UCH are rare, but include the Chuuk Lagoon Pacific Ocean Emergency project listed below. In the past, educational projects run out of Xavier College in Chuuk concentrated on the need to safeguard the WWII shipwrecks and the Instructor Clark Graham conducted field surveys with the students with excellent results. One of the authors (Jeffery) has also run an educational programme through the Nautical Archaeological Society (NAS) training in Chuuk (as recent as

March 2018) and through the University of Guam (UOG) from 2009, and a UOG course in Yap 2016, which focussed on Yap Maritime Cultural Heritage and Identity including ICH and UCH. In June 2019, FSM will partner with the University of Guam to implement a maritime archaeology and visual anthropology field school under the UNESCO Partnership Programme.

The FSM are working in partnership with others on the following (relevant to UCH safeguarding) Sustainable Development Goals, but only the Chuuk project includes tangible UCH:<sup>251</sup>

- Micronesia Challenge: a goal to conserve 30% of the near-shore marine resources;
- Chuuk Lagoon Pacific Ocean Emergency, Safeguarding UCH: to address environmental hazards emanating from some WWII shipwrecks;<sup>252</sup>
- PacSIDS Ridge to Reef Programme Partnership: develop an integrated approach to, amongst other things, coastal resource management and implement demonstration projects that address national priorities;
- Pacific Island Leaders Meeting (PALM): ‘summit-level meetings of SIDS every 3 years in which Leaders discuss various issues that Pacific Island Countries are facing;’
- Oceania 21: Oceania Conference involving many SIDS, SPREP, France...;
- PacSIDS Ridge to Reef Programme Partnership: ‘program is to maintain and enhance Pacific Island countries’ ecosystem goods and services (provisioning, regulating, supporting and cultural) through integrated approaches to land, water, forest, biodiversity and coastal resource management that contribute to poverty reduction, sustainable livelihoods and climate resilience.’

The focal Point in the FSM for Sustainable Development Goals is Mr. Marion Henry, Assistant Secretary, Department of Economic Affairs, Kolonia.

The FSM believes in the value of partnerships to secure sustainable fishing and acknowledges there are a range of fisheries but they consider tuna fishery as the most important.<sup>253</sup> In an address to the United Nations Conference to Support the Implementation of Sustainable Development Goal 14 in June 2017, the President of the FSM, Peter Christian noted that: ‘Pacific Island countries depend on the ocean’s rich resources for our sustenance and as a vital source for our nation building...and that ‘we must give special consideration to the preservation of the health and quality of the ocean’. He also spoke of ‘the damaging effects of climate change on islands and islanders.’<sup>254</sup> These are issues where UCH may be able to contribute, and which would assist in their safeguarding—notably the fish weirs. They can offer a sustainable fishing practice

<sup>251</sup> <https://sustainabledevelopment.un.org/memberstates/micronesia>

<sup>252</sup> <https://oceanconference.un.org/about>

<sup>253</sup> <https://sustainabledevelopment.un.org/content/documents/24456Micronesia.pdf>

<sup>254</sup> [https://sustainabledevelopment.un.org/content/documents/23748Micronesia Federated Sts of E.pdf](https://sustainabledevelopment.un.org/content/documents/23748Micronesia_Federated_Sts_of_E.pdf)



contributing to the health of islanders and the ocean, in addition to contributing to potential research on how islanders in the past may have dealt with sea level changes. Fish weirs are known to be areas of high biological diversity and could offer refuges for various species during climate change.<sup>255</sup>

Another important area where the continued sustainable use and safeguarding of UCH could play a role in sustainable development was noted in Section 53 of the SAMOA Pathway, namely ‘coastal tourism.’ It is very relevant to FSM, i.e. tourism related to the Chuuk Lagoon’s WWII UCH, as well as the Yap fish weirs and Nan Madol. The economic value of tourism in FSM is worth millions of dollars with currently about 10,000 tourists per year (c.5,000 for Chuuk), but it is an underutilized industry, when compared to the diving tourism industry in Guam, which in 2015 amounted to US\$56 million and attracted over 1 million tourists.<sup>256</sup>

There is considerable scope in UCH safeguarding within the implementation of projects earmarked for sustainable development beyond the cultural sector, such as in tourism and economic development as briefly stated. An example of safeguarding traditional UCH and how it can feed into sustainable development was outlined by Francis Reg (Yap State Historic Preservation Officer, YSHPO):

Following the recent surveys of fish weirs, certain traditional leaders who are members of the traditional Council of Pilung and community chiefs and individuals expressed their interest to restore some of the fish weirs. Recently YSHPO discussed the idea with certain Marine Protected Area (MPA) representatives to obtain their opinion and response/reaction to the possibility of restoring, at least one, stone fish weir within their MPA to revive the traditional fishing method and practice in using the fish weirs. There are other fishing methods related to the use of the fish weirs including small portable and hand-held nets (kef or yaraw), young coconut leaves tied to natural vines (ruwol), as well as the normal ways of fishing from the fish weirs when the tides recede to a certain level and the fish are trapped inside the weir. This idea is not to catch the fish in the weirs but to demonstrate to the school children, interested members of the public and tourists the traditional methods and types of fishing gears used in the past in relationship with catching the fish in the weirs. This will be a catch-and-release demonstration activity. It may spur the interest of others to restore their fish weirs for sustainable fishing methods which are environmentally protective and sustaining/conserving the fish or marine resources.

YSHPO believes that the traditional revival of fishing methods, as briefly stated above, will be effective both for learning UCH tangible and intangible cultural heritage of Yap and a means to provide an opportunity for the tourists and interested members of the local population including the youths and revival of an aspect of Yapese cultural heritage.

While international support would be of great benefit, the local community should take interest and ownership of these opportunities in order to sustain their UCH on a long-term basis.

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<sup>255</sup> Jeffery 2013

<sup>256</sup> Ames 2011: 200, [https://www.uog.edu/resources/files/schools-and-colleges/college-of-liberal-arts-and-social-sciences/pai\\_195-203.pdf](https://www.uog.edu/resources/files/schools-and-colleges/college-of-liberal-arts-and-social-sciences/pai_195-203.pdf) Accessed 30 November 2018; [http://www.fsmstatistics.fm/?page\\_id=257](http://www.fsmstatistics.fm/?page_id=257) Accessed 30 November 2018

YSHPO believes it is the right step forward to embark in this new area of cultural heritage protection and preservation and, hopefully, leading to the revival of the traditional use and practice of UCH. This opportunity will eventually lead to public education and awareness and the tourism industry development, a much needed area for economic development in this region.

The main benefit is the sustainable use of UCH resources in an environmentally friendly manner. Further, the transference of traditional skills, knowledge, methods, etc, from the older generations to the younger ones as well as developing traditional/cultural activities which are of interest to the tourists to entice them to visit this region.

Appropriate agencies involved should be HPOs, conservation societies, NGOs, CBOs, community-based groups such as traditional owners and leaders, MPAs owners, etc. People or groups with genuine interest in the use, protection and marketing the sustainable observation of the use of these resources such as tourists.

### **Gaps to address safeguarding UCH for Sustainable Development**

An important priority to be addressed should be the issue of perception—that safeguarding UCH can play an important role in sustainable development, and that it can be used in a number of SDGs. Information in this regard should be developed and disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households.

It is considered that raising an awareness about the role of UCH in sustainable development to all levels of the community would be beneficial. This information should also be disseminated to established partners and to emerging partners, at a local level through to regional and inter-regional level.

FSM should coordinate with other Micronesian countries and consider formulation of a coordinated strategy for safeguarding UCH in their SDGs and National Sustainable Development Strategy, and to communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others.

As part of this strategy, Micronesian-wide projects should be considered and implemented to showcase how safeguarding particular UCH can play a role in their SDGs.

## FSM Recommendations

(NOTE: the legislative recommendations for FSM are more specific than those proposed for the four states as FSM is a party to the UCH Convention and there is therefore some degree of urgency as FSM does need to make necessary amendments to its legislation to ensure that its national laws give effect to, and are consistent with, its international obligations as reflected in the UCH Convention).

RECOMMENDATION: FSM adopt a new Act to give effect to UCH Convention. While a new Act will address most of the implementation of the UCH Convention, other Acts will require amendment to ensure consistency with the new Act, and enable implementation. While new legislation should be within a new title of the Code, if it were to fall within any existing title, it would be Title 26: *Historical Sites and Antiquities*

RECOMMENDATION: FSM amend Title 18: *Territory, Economic Zones and Ports of Entry* Chapter 1: Territorial Boundaries and Economic Zones to recognize and give effect to the FSM contiguous zone and continental shelf.

RECOMMENDATION: FSM amend Title 18 *Territory, Economic Zones and Ports of Entry*. Chapter 3: Regulation of Foreign Vessels to ensure UCH Convention can be applied to foreign vessels in relevant circumstances.

RECOMMENDATION: FSM amend Title 26 *Historical Sites and Antiquities* to give effect to UCH Convention (Note: The Amendments will be substantial as it is recommended that the existing regulatory structure in the Act be used to implement the powers and duties of the competent authority in the UCH Convention and will need to be read and be consistent with a new Act adopted to give effect to other parts of the UCH Convention).

RECOMMENDATION: FSM amend Title 19: *Admiralty and Maritime* to exclude UCH from its scope.

RECOMMENDATION: Further research be undertaken to consider the jurisdictional complexities of implementing the federal legislation that gives effect to an intentional convention in the individual states of FSM, with appropriate reference to existing practice in implementing other international conventions that apply in specific maritime zones.

The following recommendations at a state level are subject to the outcomes of this report.



RECOMMENDATION: State of Chuuk adopt new legislation to give effect to the UCH Convention and amend Title 25: *Maritime & Marine Resources*, Chapter 8. Chuuk Lagoon Monument as appropriate to give effect to the UCH Convention.

RECOMMENDATION: State of Pohnpei adopt new legislation to give effect to the UCH Convention and amend *Historic and Cultural Preservation Act as appropriate*.

RECOMMENDATION: State of Kosrae adopt new legislation to give effect to the UCH Convention and amend Title 11: *Land and Environment*: Chapter 14. Antiquities, and other Acts as appropriate.

RECOMMENDATION: State of Yap adopt new legislation to give effect to the UCH Convention and amend Title 5: *Traditional Leaders and Traditions*: Chapter 4: Historic Preservation and other Acts as appropriate.

RECOMMENDATION: Raise awareness about the value of UCH and its need for safeguarding from the local level through to the heads of government.

RECOMMENDATION: Develop local human capacity and acquire resources to implement project-based UCH activities in association with other Micronesian countries and specialist partners.

RECOMMENDATION: Raise awareness about the varied career paths that could be pursued if UCH-related programmes are seen in a broader context, such as with the SDG as well as the cultural sector.

RECOMMENDATION: Resources for a UCH programme should be coordinated across the FSM nation, rather than have individual programmes in each of the four states. Project based activities should be carried out in each state in association with partners and capacity building

RECOMMENDATION: UCH site database is a very useful resource and should be pursued. However, these databases should not contain geographical coordinates to the degree that might provide the accuracy to allow for people to find the site and salvage materials illegally and unethically.

RECOMMENDATION: Raise awareness about the value of safeguarding UCH and its role in the SDG and disseminate information to the broad community, from heads of government, politicians, traditional chiefs and households.

RECOMMENDATION: Given the commitment to SDG 14: Life Below the Water and the far greater number of partnerships compared to other SDG, the development of UCH safeguarding with the current partnerships should be investigated.

RECOMMENDATION: Coordinate an awareness raising strategy (for UCH safeguarding *per se* and its role in SDGs) across the Micronesian region.

RECOMMENDATION: FSM should coordinate with other Micronesian countries to formulate a coordinated strategy for safeguarding UCH in their SDGs and communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others. As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs, notably the fish weir UCH and the WWII-related UCH.

RECOMMENDATION: The value of UCH safeguarding should be identified in the National Sustainable Development Strategy (NSDS), particularly in the areas of marine resource conservation, maintaining traditional cultural practices, and tourism.

Funding opportunities exist to assist local communities through organisations and foundations that support cultural, environmental and scientific projects, and they should be pursued to support UCH in Micronesia.

RECOMMENDATION: Funding for local communities should be a priority and they should benefit from maintaining their UCH and UCH-related ICH, such as the tourism associated with the *aech*.

RECOMMENDATION: Major financial sponsorship of a UCH team to implement a UCH programme at the country and/or regional level could be investigated with an enticement being the team/programme is sponsor branded

RECOMMENDATION: As a nation and/or the region, a champion/spokesperson/ambassador of high status be appointed to raise the level of UCH with government, the media and within the community.

## 2. THE REPUBLIC OF THE MARSHALL ISLANDS

### 2.1 LOCATION/GEOGRAPHICAL INFORMATION

The Marshall Islands is spread over an area of the north Pacific, from 19° North, 160° East to 4° North and 175° East. Naone provides a good brief description of the location and geography of the Marshall Islands:<sup>257</sup>

The Marshall Islands are approximately 5000 miles [8047 km] southeast of Japan, and halfway between Hawaii and Australia. The two [roughly parallel] chains of atolls and islands that make up the Marshall Islands are traditionally referred to as the Ralik (eastern) and the Radik chain (western). The northwestern atolls were traditionally known as Kabin Meto, or the “far reaches of the sea” or “bottom of the sea” (National Biodiversity Team 2000:10-11). While the land mass of the 29 coral atolls and 5 islands totals an area of 70 square miles, the Exclusive Economic Zone that differentiates the waters surrounding the archipelago from the rest of Micronesia covers 750,000 square miles. Dry land forms less than 1% of the country’s area. There are 1,225 individual islets and islands that make up the Marshall Islands, and amongst the atolls, a total lagoon area of 4,507 square miles. Of these, Kwajalein Atoll is the largest atoll (and largest in the world) with a lagoon area of 839 square miles and a land area of about 6 square miles (National Biodiversity Team 2000:11). Due to its remote location and large lagoon, Kwajalein is leased by the United States government for use as a military base and ballistic missile testing site.

The biodiversity and climate of the Marshall Islands:

There are over 870 reef systems in the Marshall Islands with over 800 species of fish and 160 species of coral. Temperatures in the Marshall Islands range from an average of 81-89°F with an average rainfall of 12-15” per month. The year-round tropical climate makes activities like aquaculture and tourism ideal for the Marshall Islands.<sup>258</sup>

The population of the Marshall Islands is about 53,000.

### 2.2 HISTORICAL CONTEXT

Radiocarbon dates of 2,000 BP from four atolls in the Marshalls suggest these settlement dates for sections of the Marshall Islands and are compatible with the ‘earliest ages of settlement sites on high islands in Eastern Micronesia.’<sup>259</sup> Further radiocarbon dates of around 1,700-1,800 BP have been found in earth ovens.<sup>260</sup>

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<sup>257</sup> Naone 2011

<sup>258</sup> <https://sustainabledevelopment.un.org/content/documents/1230marshallislands.pdf> Accessed 4 September 2018

<sup>259</sup> Yamaguchi et al. 2009: 545

<sup>260</sup> Yamaguchi et al. 2009: 550

Reference is made again to Naone in which she describes the intimacy Marshallese had and still has with the sea: as skilled Navigators; how they include coral reef heads in storytelling; how they set aside land/lagoons for harvesting of fish, ensuring sustainability; and the use of fish traps of which some are still in use today.<sup>261</sup>

The first foreigners were the Spanish in the mid-16<sup>th</sup> Century and they sighted several of the atolls without occupying any of them. Further Spanish, British and Dutch explorers followed, with the Marshalls being recorded on charts in the late 18<sup>th</sup> and early 19<sup>th</sup> Century; its name derived from the British Captain William Marshall who sighted the islands in the vessel *Scarborough* in 1788. Whalers and explorers visited the islands and through their ill treatment of the islanders, a number of people on both sides were killed, adding to the deaths of many islanders already brought about by introduced diseases.

German traders were in the Marshall Islands from the 1870s and by 1885, they had made the Marshall Islands the richest source of Copra in Micronesia, and a major trading destination in the northern Pacific. In 1885, Spain countered Germany's plans in wanting to acquire the Caroline Islands through gaining a Papal agreement in which Spanish sovereignty over the Caroline Islands was granted, and Germany ruled over the Marshall Islands. German administration of the Marshall Islands was peaceful through the government maintaining strong commercial links and cooperation between the trading companies such as the Jaluit Company and the Marshallese Chiefs.<sup>262</sup> While plans were drawn up to change the chiefly control of land in 1914, it was never acted upon. Social reforms and upheavals were taking place, such as Marshall Islands traditional dress styles were being lost, the Marshallese stick charts were disappearing, and even drinking coconuts were hard to get in some places because of the copra industry wanting to maximize its profits.<sup>263</sup> In addition, western diseases were taking a terrible toll, a government census in 1908 gave the population as 9,200 compared to the estimated 13,000-15,000 before German annexation.<sup>264</sup>

With the outbreak of war in Europe in the summer of 1914, Britain requested Japan's help to counter the German navy in the East China Sea. Japan declared war against Germany on 23 August 1914 and began its search for the German East Asiatic Squadron in Micronesia. When Japan first visited the Marshall Islands on 29 September 1914—the German squadron had departed for Germany—the Japanese force left no personnel behind, but it was ordered to return and establish a base there on the 3 October 1914. Within another 11 days, Japanese forces occupied all of the major Micronesian islands, except Guam and the Gilbert Islands, and the navy 'made it plain that it did not welcome the entry of any other ships into Micronesian waters, even those of its allies.'<sup>265</sup>

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<sup>261</sup> Naone 2011

<sup>262</sup> Hezel 2016: 73

<sup>263</sup> Hezel 1995: 54

<sup>264</sup> Hezel 1995: 125

<sup>265</sup> Peattie 1988: 44

Japan occupied the Marshall Islands until early 1944, establishing military fortifications at Kwajalein, Jaluit, Maloelap, Mili and Wotje and relocated residents to other atolls. During WWII, the US commenced bombing of the islands in November 1943, and they launched amphibious invasions of Majuro, Kwajalein and Eniwetok where many lives were lost, and military equipment, ships and aircraft were lost.

In July 1947, the newly formed United Nations awarded a strategic trusteeship of Micronesia, the Trust Territory of the Pacific Islands (TTPI) to the U.S., which allowed them to establish military bases in the islands as well as providing them with a licence to develop and influence every major aspect of life of the Micronesians.<sup>266</sup> This included the Marshall Islands, Federated States of Micronesia, Palau, and the Northern Mariana Islands.

On 1 and 25 July 1946, two atomic detonations, under the US codename ‘Operation Crossroads’ were carried out in the lagoon of Bikini Atoll, located in the northern part of the Marshall Islands, Micronesia. The 167-islander population were all removed to make way for the tests.<sup>267</sup> 150 US, two Japanese and one German ship had been placed in the lagoon including the 43,000 ton US aircraft carrier *Saratoga* and the Japanese flagship for the Imperial Japanese Navy, *Nagato*. As a result of the atomic explosions, 21 ships were sunk and according to Delgado et al.<sup>268</sup> they ‘are the remains of a fascinating event in American history, an event with international dimensions, including implications for the restructuring of geopolitical alliances in the latter part of the 20<sup>th</sup> century.’<sup>269</sup> The collection of testing targets represents over thirty years of naval design and development of which most of the ships had prestigious roles in WWII prior to the testing.<sup>270</sup> A total of 67 nuclear tests were carried out in the Marshall Islands until 1958, of which many were hydrogen or thermonuclear bombs, each one 1000 times more powerful than the atomic bombs of Hiroshima and Nagasaki. The radioactive soil and debris was collected after the nuclear explosions and placed in a 10 metre deep crater on Runit Island in Enewetak Atoll and entombed in a concrete dome, which is reported to be leaking.<sup>271</sup>

Bikini Atoll was inscribed a World Heritage site in July 2010. The site met Criterion IV for World Heritage listing:

Bikini Atoll is an outstanding example of a nuclear site. It has many military remains and characteristic terrestrial and underwater landscape elements. It is tangible testimony of the birth of the Cold War and it

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<sup>266</sup> Hanlon 1998: 52

<sup>267</sup> Some started returning in the early 1970s

<sup>268</sup> Delgado et al. 1991: 1

<sup>269</sup> Delgado et al. 1991: 1

<sup>270</sup> Delgado et al. 1991: 143

<sup>271</sup> <https://www.dailymail.co.uk/news/article-5340465/Concrete-dome-holding-radioactive-waste-LEAKING.html>

Accessed 30 November 2018

bears testimony to the race to develop increasingly powerful nuclear weapons. In the wake of the Hiroshima and Nagasaki bombs, the Bikini Atoll site confirmed that mankind was entering a nuclear era. It also bears witness to the consequences of the nuclear tests on the civil populations of Bikini and the Marshall Islands, in terms of population displacement and public-health issues.<sup>272</sup>

Under the 1947 Trusteeship Agreement, the administration of the Trust Territory of the Marshall Islands was assigned to the Department of the US Navy, and from 1951 to the US Department of Interior. The US encouraged the Trust territories such as Marshall Islands to establish their own legislature to adopt legislation to govern internal affairs. The district legislature for the Marshall Islands was established in 1950, and enacted a number of laws. In 1965, the US formed the Congress of Micronesia which began the process of greater autonomy with the adoption of the Trust Territories of the Pacific Islands Code. In 1978 the Marshall Islands established a Constitutional Government and became self-governing, gaining full independence in 1986.<sup>273</sup> At that time, an agreement (a Compact of Free Association) between the Marshall Islands and the US was developed, in which special political, economic and defence relationships were established, including the US to be responsible for the defence of the Marshall Islands, and it allowed for Marshallese to live and work in the US. The Republic of the Marshall Islands was accepted as a full member of the United Nations in 1991.

## 2.3 UCH-RELATED LAWS

### 2.3.1 The Marshall Islands Legal Code

The district legislature for the Marshall Islands was established in 1950, and enacted a number of laws that were codified in 1975, a process authorized by District Law 22-7 and Resolution 17-15.<sup>274</sup> With the establishment of self-government in 1979, a Constitution was adopted. Article XIII of the Constitution of the Marshall Islands provided for the continuation of laws that existed in the Trust Territory Code up to May 1, 1979 to the extent not repealed or revoked by the district government of the Marshall Islands. In 1988 the subsequent legislative activity by the Nitijela was codified. As such, the Code includes laws derived from the old Trust Territory Code and provisions or District Laws of the Marshall Islands District under the Trust Territory system. The most recent recodification is that of 2014.<sup>275</sup>

The legislation reviewed includes:

Constitution of the republic of the Marshall Islands  
Marine Zones (Declaration) Act 33 MIRC 1.

<sup>272</sup> <https://whc.unesco.org/en/list/1339> Accessed 14 September 2018

<sup>273</sup> Zorn, Jean G., 'The Republic of the Marshall Islands' in Ntumy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 103.

<sup>274</sup> Introduction to the Revised Code 1988 available at <http://www.paclii.org/>

<sup>275</sup> <http://www.paclii.org/mh/legis>;

Historic Preservation Act 45 RMIC 2  
Regulation and Control of Shipping Act 34 RMIC 1  
Wrecks and Salvage Act 47 RMIC 7  
Office of Environmental Planning and Policy Coordination (OEPPC) Act 35 MIRC 4.  
National Environmental Protection Act 35 MIRC 1  
Coast Conservation Act 35 MIRC .3.  
Marshall Islands Marine Resources Act 51 MIRC 1.

## 1. Sovereignty and territoriality

The Constitution of the Republic of the Marshall Islands address issues such as jurisdiction and traditional rights that are pertinent to the protection of UCH and the adoption of the UCH Convention. The Constitution of the Marshall Islands is concerned with the system of government and says little of the issues to sovereignty and the territorial extent of the Republic. The only provision that addresses territorial jurisdiction is Article IX(1), which provides that:

(1) The people of every populated atoll or island that is not part of an atoll shall have the right to a system of local government which shall operate in accordance with any applicable law. (2) The system of local government shall in each case extend to the sea and the seabed of the internal waters of the atoll or island and to the surrounding sea and seabed to a distance of 5 miles from the baselines from which the territorial sea of that atoll or island is measured.

This then needs to be read in conjunction with the *Marine Zones (Declaration) Act*<sup>276</sup>. The act sets out the limits of the various maritime zones consistent with the UN Convention on the Law of the sea and declares that:

The sovereignty of the Republic extends beyond its land territory and internal waters, and its archipelagic waters over its territorial sea, and to the airspace over them and the seabed and subsoil under them, and the resources contained therein.<sup>277</sup>

This addresses the jurisdictional zones of the Marshall Islands and are therefore relevant to the manner in which the UCH Convention might be implemented. Section 104 provides that

The provisions of this Chapter shall be read subject to the provisions of any other treaty or international obligation which is finally accepted by or on behalf of the Republic and approved by the Nitijela by Resolution

This would thus apply to the UCH Convention should the Marshall Islands become a party, allowing for the implementation of article 7- 12 within those zones.

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<sup>276</sup> *Marine Zones (Declaration) Act* 33 MIRC 1.

<sup>277</sup> *Marine Zones (Declaration) Act* 33 MIRC 1 section 110(1).

## 2. Legal Pluralism

The Constitution not only provides for the application of customary law as a source of law, but also carves out a role for traditional leaders in the legal system.<sup>278</sup>

Customary law is defined as ‘any custom having the force of law in the Marshall Islands.’<sup>279</sup> The customary law will have the force of law if it is recognized in a court decision or enacted by the Nitijela (Parliament).<sup>280</sup> Since, at the time of the adoption of the Constitution, all law, including customary law and that contained in the TTPI Code, remains in force, so that customary law continues to have the force of law.<sup>281</sup> As such, courts are required to take customary law into account when resolving a dispute, unless the customary law is inconsistent with provisions of the Marshall Islands Code. Importantly, section X(1) provides that nothing in the Constitution’s Bill of Rights<sup>282</sup> ‘shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter in any part of the Republic of the Marshall Islands’. Since land tenure may extend into maritime zones (internal waters or territorial sea) this may be of some importance to UCH in those zones. The exact relationship between this customary land tenure and the Bill of Rights in the Constitution is not, however, entirely clear.<sup>283</sup>

The Constitution does not address the issue of the source of the common law other than customary law, and as such, the courts are free to develop an indigenous common law, with foreign law, particularly US law, merely being persuasive.<sup>284</sup> Nevertheless, the extent of US salvage law and the law of finds might find an avenue of application through this.

## 3. Cultural heritage and the competent authority

The Constitution only touches on the issue of culture and indirectly cultural heritage.<sup>285</sup> It is dealt with in more detail in the *Historic Preservation Act*.<sup>286</sup>

Importantly, an ‘historic site’ is defined as ‘cultural resources and terrestrial, intertidal and submarine sites and landscapes that were produced since the advent of written records in the

<sup>278</sup> Constitution of the Republic of the Marshall Islands Article III.

<sup>279</sup> Constitution of the Republic of the Marshall Islands Article XIII.

<sup>280</sup> Constitution of the Republic of the Marshall Islands Article X(2).

<sup>281</sup> Constitution of the Republic of the Marshall Islands Article XIII(1).

<sup>282</sup> Constitution of the Republic of the Marshall Islands Article II.

<sup>283</sup> Zorn, Jean G., ‘The Republic of the Marshall Islands’ in Ntumu, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 105.

<sup>284</sup> Zorn, Jean G., ‘The Republic of the Marshall Islands’ in Ntumu, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 105.

<sup>285</sup> Constitution of the Republic of the Marshall Islands Article V(3)(i).

<sup>286</sup> *Historic Preservation Act* 45 RMIC 2.



Marshall Islands and that are of archaeological or historical interest’.<sup>287</sup> ‘Submerged resources’ are then defined as ‘those prehistoric or historic sites and artifacts located in the intertidal or sub-tidal zone within the internal, archipelagic or territorial waters of the Republic’.<sup>288</sup> UCH is clearly covered by the Act. Indeed, while the Act only protects that which has been designated, it allows for the designation of individual properties groups of properties of classes of properties<sup>289</sup> and could thus easily be used to protect UCH as defined in the UCH Convention as a class of properties.

The Act establishes the Historic Preservation Office (HPO) within the Ministry of Internal Affairs,<sup>290</sup> and an Advisory Council for Historic Preservation<sup>291</sup>. The roles of the HPO, in conjunction with that of the Advisory Council, is such that it could fulfil many of the functions required of the competent authority under the UCH Convention. This includes for example, issue permits, conducting surveys, establishing an inventory of UCH, reviewing access plans, etc.<sup>292</sup> The HPO, importantly, is also tasked with the coordinating the implementation of historic and cultural preservation laws in the United States of America and Pacific region’.<sup>293</sup> This clearly alludes to the *National Historic Preservation Act*, but does not do so directly, and thus leaves the extent to which that law, or indeed, any other laws, are part of the law of the Marshall Islands, somewhat uncertain.

The Act also provides for the seizure of objects and implementation of sanctions in relationship to violations of the Act<sup>294</sup> in a similar way to that required of articles 17 and 18 of the UCH Convention.

The Act does have an important statement of its intent, with an underlying principle that the Act is meant to be ‘implemented in a manner that balances the preservation of cultural and historic properties against the needs of development and continuing use of land and other resources’.<sup>295</sup> As a reflection of this principle, the ‘guiding principle to be used in the implementation of this Chapter shall be to foster conditions under which modern society and prehistoric and historic resources in the Republic can exist in productive harmony and fulfil the social, economic and other requirements of present and future generations’.<sup>296</sup> Subject to this overriding principle, the Act recognises that cultural and historic properties ‘including submerged resources, form a fragile, finite and unrenewable resource of the cultural heritage of the Republic in need of preservation

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<sup>287</sup> *Historic Preservation Act* 45 RMIC 2 section 203(m).

<sup>288</sup> *Historic Preservation Act* 45 RMIC 2 section 203(ee).

<sup>289</sup> *Historic Preservation Act* 45 RMIC 2 section 213(b).

<sup>290</sup> *Historic Preservation Act* 45 RMIC 2 Part II sections 204-208.

<sup>291</sup> *Historic Preservation Act* 45 RMIC 2 Part III sections 209-213.

<sup>292</sup> *Historic Preservation Act* 45 RMIC 2 Part II sections 206.

<sup>293</sup> *Historic Preservation Act* 45 RMIC 2 section 206(o).

<sup>294</sup> *Historic Preservation Act* 45 RMIC 2 sections 219-220.

<sup>295</sup> *Historic Preservation Act* 45 RMIC 2 section 202(2).

<sup>296</sup> *Historic Preservation Act* 45 RMIC 2 section 202(3)

and proper management'<sup>297</sup> but that this preservation can 'co-exist with modern development, and preservation of such properties may involve creative activities other than static protection' such as adaptive use.<sup>298</sup> To do otherwise would 'seriously impede the wise use and development of lands in the public interest, frustrate scientific research, unduly restrict the cultural use of such properties, and allow such properties to fall into disrepair through disuse'.<sup>299</sup>

The application of this overriding principle will have some impact on UCH and require careful considerations as to how the UCH Convention, and in particular the rules in the Annex, can be implemented within this Act. This is so for both the implementation of article 5 of activities incidentally affecting UCH, but also on, for example, article 4 and the ability for a State to make salvage law applicable to UCH if it complies with the authorisation of the competent authority (here the Marshall Islands HPO) applying its national implementing law. This is made particularly stark when the definition of development in the Act is considered. It defines 'development' to include 'means of placement or erection of any solid material or structure', 'discharge or disposal of any dredged material', and 'grading, removing, dredging, mining or extraction of any material' - all activities that will have a potentially dire consequence for UCH. This is not an insurmountable concern, but one that will require careful amendment of the Act to give effect to the UCH Convention.

The implementation of the existing legislation and any future legislation will need to take into account the fact that the State Historic Preservation Office of the US National Parks Service operated in this space. Four sites in the Marshall Islands are listed on the US National Register of Historic Places; Kwajalein Island Battlefield, Roi-Namur Battlefield, Debrum House and Marshall Islands War Memorial Park.<sup>300</sup>

#### 4. Maritime Law

The *Regulation and Control of Shipping Act*<sup>301</sup> is, like that of FSM, based substantially on the 1996 TTC. It thus has substantially the same provision that regulating foreign ship entering ports of the Marshall Islands or hovering in the territorial sea.<sup>302</sup> It is also unlawful for any vessel to engage within the territorial waters of the Marshall Islands to, amongst other things, removal of scrap iron without authorization.<sup>303</sup> Penalties of violations include fines, imprisonment and seizure of all vessels and equipment used in the commission of the offence.<sup>304</sup> This Act is relevant in that is

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<sup>297</sup> *Historic Preservation Act* 45 RMIC 2 section 202(1)(c).

<sup>298</sup> *Historic Preservation Act* 45 RMIC 2 section 202(1)(d).

<sup>299</sup> *Historic Preservation Act* 45 RMIC 2 section 202(1)(e).

<sup>300</sup> <https://npgallery.nps.gov>

<sup>301</sup> *Regulation and Control of Shipping Act* 34 RMIC 1.

<sup>302</sup> *Regulation and Control of Shipping Act* 34 RMIC 1 sections 114, 116-117.

<sup>303</sup> *Regulation and Control of Shipping Act* 34 RMIC 1 sections 118.

<sup>304</sup> *Regulation and Control of Shipping Act* 34 RMIC 1 sections 119-129.

sets out enforcement power that could be used to give effect to article 14 and 14 of the UCH Convention. The following sections may be relevant.

The *Wrecks and Salvage Act*<sup>305</sup> is derived directly from the Trust Territory Code, like that of Palau. Its scope is essentially limited to addressing a number of issue snot addressed by the common Admiralty law, such as introducing time limits for salvage actions, the right to a salvage award for services rendered by government vessels and the inclusion within a salvage award for life salvage<sup>306</sup>. While Republic of the Marshall Islands (RMI) courts are not bound by the Admiralty law of other nations, it is likely that these will be persuasive, particularly that of the US. This is inconsistent with the UCH Convention, particularly article 4 and rule 2 of the Annex.

## 5. Environmental law

Environmental law issues are administered by a number of entities with the Marshall Islands government, all of which would need to be involved in, or at least, require coordination with, the Historic Preservation Office acting as the UCH Convention competent authority. Foremost of these environmental entities is the Office of Environmental Planning and Policy Coordination (OEPPC) within the executive branch of government.<sup>307</sup> The OEPPC fulfils a number of functions, including advising the President, Cabinet, the Ministries and government agencies, on matters of environmental planning and policy generally; acting as the focal point of contact in the coordination, management and implementation of all international environmental projects/programs and to ensure the successful implementation of such projects; and acting as the national focal point of contact in all negotiations with external sources and lending institutions on programs and/or projects of assistance. Where activities direct at UCH might impact the marine environment, the OEPPC may have a role to play – including in the implementation of article 10(2) of the UCH Convention where the Marshall Islands would have right to prohibit or authorize any activity directed at UCH to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.

The more functional aspect of environmental protection in the Marshall Islands falls to the National Environmental Protection Authority.<sup>308</sup> This includes coastal conservation, including the development of a coastal zone management plan; the regulation and control of development activities within the coastal zone and the formulation and execution of schemes for coast conservation.<sup>309</sup> UCH in the coastal zone would need to be taken into account. Other maritime environmental legislation may also impact on the regulation of UCH, particularly in relation to

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<sup>305</sup> *Wrecks and Salvage Act* 47 RMIC 7.

<sup>306</sup> *Wrecks and Salvage Act* 47 RMIC 7 sections 706-708.

<sup>307</sup> *Office of Environmental Planning and Policy Coordination (OEPPC) Act* 35 MIRC 4.

<sup>308</sup> *National Environmental Protection Act* 35 MIRC 1

<sup>309</sup> *Coast Conservation Act* 35 MIRC 3.

activities that might incidentally affect UCH, such as fishing.<sup>310</sup> The nature of UCH will require its management by the Historic Preservation Office as the competent authority to be closely coordinated with this environmental regulation regime.

## 2.4 UCH-RELATED PROGRAMMES AND INITIATIVES

Prepared questionnaires were distributed and the Republic of the Marshall Islands Historic Preservation Office (RMIHPO) provided feedback. This feedback has been incorporated in the details that follow, in addition to the authors' research (see Appendices 1-3 for the information sought in the questionnaires).

### 2.4.1 Types of UCH

The Marshall Islands contains an extensive quantity of tangible heritage related to WWII sites (shipwrecks and aircraft), as well as post WWII sites associated with the nuclear tests, and fish weirs.<sup>311</sup> It is likely that other traditional indigenous sites, including shell artefacts and possibly features could be located underwater, as well as indigenous items of trade between islands.

Marshallese are world-renowned navigators and canoe builders. They used 'stick charts' to show the direction of the different ocean swells in association with the location of the islands. Made from the stiff part of a coconut frond and tied together, they were consulted before a voyage, but not during the voyage. Many traditionally valued sites can be found in the sea, and 'demonstrate Marshallese intimacy with the ocean and include coral reef heads featured in *bwebenwato* (story telling).'<sup>312</sup> 'The vast cultural landscape of the country includes these natural resources that have roles in *bwebenwato* (storytelling), the components of travel (swells and weather) and the basis of survival (heathy biodiversity and the coral reef).'<sup>313</sup>

Given the sea is a dominant part of the environment and has an influential cultural connection with Marshallese, much of the archaeological and cultural anthropological investigations implemented in the past, and continue to be implemented have a maritime connection, although many sites are not located underwater.

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<sup>310</sup> *Marshall Islands Marine Resources Act 51 MIRC 1.*

<sup>311</sup> Naone 2011

<sup>312</sup> Naone 2011

<sup>313</sup> Naone 2011

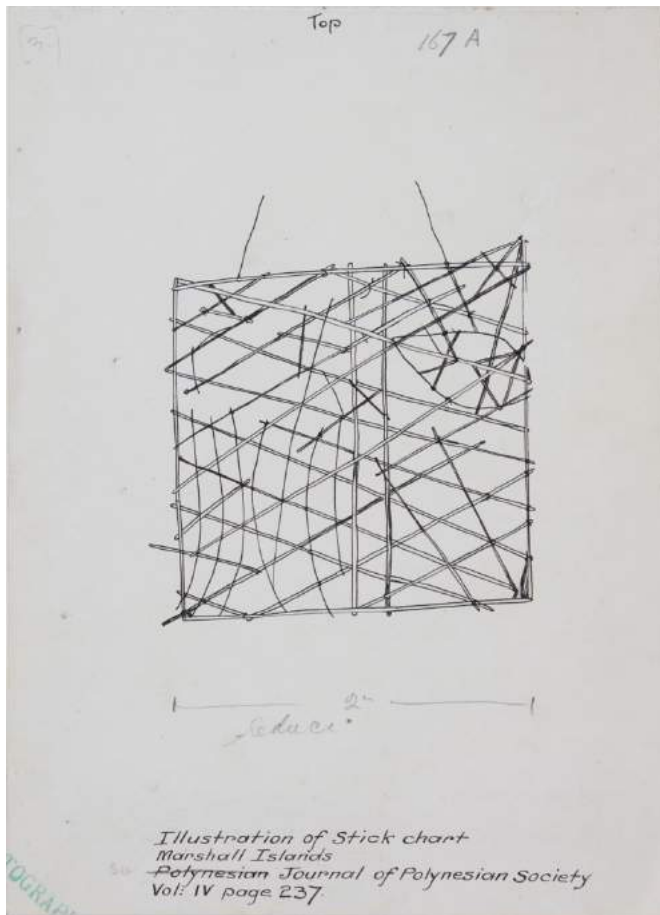


Figure 9: Illustration of stick chart, Marshall Islands, Freehand drawing by Artist, Ethel Richardson, c. 1920, 185mm width x 255mm height. Source: Museum of New Zealand, Te Papa, Tongarewa, MU000049/008/0003, <https://collections.tepapa.govt.nz/object/240379>



Figure 10: Bikini Atoll Nuclear Test Site. Source: Eric Hanauer, [whc.unesco.org/en/documents/115005](http://whc.unesco.org/en/documents/115005)

## 2.4.2 Programmes related to tangible and intangible UCH

The government office that has responsibility in implementing archaeological and heritage related programmes, including UCH programmes is the HPO located within the Ministry of Internal Affairs. They do not currently implement a programme in surveying or safeguarding UCH.

However, the HPO has assisted in a number of surveys of UCH in association with Matthew Holly, owner of Marshall Island Aquatics, a commercial diving business. These include the following atoll site surveys:

- Majuro and Kwajalein Atolls<sup>314</sup>
- Majuro Atoll<sup>315</sup>
- Wotje Atoll<sup>316</sup>
- Mili Atoll<sup>317</sup>
- Maloelap Atoll<sup>318</sup>
- The wreck of *Terushima Maru*<sup>319</sup>

The non-disturbance field surveys were implemented by Matthew Holly as the lead investigator and report compiler, and they focused on WWII remains. In many cases the surveys were carried out over many years, and included war remains on the islands, but much of the focus was on submerged sites. Holly ‘has researched virtually every known Marshall’s aviation and shipping loss during World War II, and currently has over 700 entries with stories, and a database of losses of both US and Japanese vessels, aircraft, and casualty information.’<sup>320</sup> His reports are comprehensive and include archival and oral history research, site descriptions with GPS coordinates, HPO site number, and an assessment of the site’s significance and recommendations,<sup>321</sup> and some reports include a consolidation of this information into a site database.<sup>322</sup> The reports are extremely valuable in providing good information for HPO to use in managing these sites.

From 1988-1990, the Submerged Cultural Resources Unit (now the Submerged Resources Center) US National Park Service (USNPS) carried out a survey of nine of the 21 shipwrecks sunk in

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<sup>314</sup> Holly 1999

<sup>315</sup> Holly 2000

<sup>316</sup> Holly 2001

<sup>317</sup> Holly 2002

<sup>318</sup> Holly 2005

<sup>319</sup> Holly 2017

<sup>320</sup> Holly 2001: 112

<sup>321</sup> Holly 2001: 82-85

<sup>322</sup> Holly 2000: 107



Bikini and Kwajalein Atolls as part of the nuclear bomb tests, being US, Japanese and German ships from WWII.

An MRS of the Archaeology of Taroa Island in Maloelap Atoll was carried by Dr. Williams Adams in 1989-1990. It included field surveys, collection of oral histories and historical research, and focused on the survey and documentation of the Japanese Military facilities and impacts from WWII on the island of Taroa.<sup>323</sup> No survey of UCH off Taroa was implemented in this project. A second Micronesian Resources Study was implemented as an Ethnographic Study and also carried out on Taroa, but it also included an ‘Overview of Marshall Islands Cultural attributes, an outline of Marshallese culture designed to assist research, data management, and cultural resources planning in the Republic of the Marshall Islands’.<sup>324</sup> It included many interviews with Marshallese, and the documentation of traditional history associated with the sea, fish, as well as types of fishing methods.

A number of archaeological and ethnographic investigations have been conducted in various localities, including the coastal regions. Some are of an academic nature and some are related to the Section 106 requirement under the NHPA 1966 in which an archaeological assessment of the impact of US Federally funded projects is required.

Terrestrial archaeological investigations of a number of atolls have been carried out<sup>325</sup> with an overview of Marshallese archaeology, as well as a study of a site on Majuro<sup>326</sup> and Pacific-wide synthesis.<sup>327</sup>

### **Gaps to address to join and implement the UCH Convention**

It was shown by the FSM that ratification is possible primarily through political will. Marshall Islands has a similar identity related to the coast and sea as the FSM, and a similar range and quantity of UCH and related ICH.

The gaps in being able to implement the UCH are like the FSM, primarily financial, and a lack of trained personnel and appropriate equipment to implement a programme. The Historic Preservation Office is the appropriate “Competent Authority” to conduct the work. These offices already work with the community, chiefs and traditional owners, which is an important aspect in UCH-related programmes. UCH-related programmes also need to work with scuba divers (which has already been accomplished in the collaboration with Mathew Holly), as few local people dive

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<sup>323</sup> Adams 1997.

<sup>324</sup> Poyer 1997: 1.

<sup>325</sup> Davidson 1971; Davidson 1992; Dye 1987

<sup>326</sup> Yamaguchi et al. 2009

<sup>327</sup> Kirch & Hunt 1997; Kirch & Lepofsky 1993; Kirch & Weisler, 1994



given it can be an expensive activity. Foreign tourist divers should be encouraged into assisting HPO, much like the EarthWatch project, which is briefly discussed earlier.<sup>328</sup> This would provide divers (visitors) with a broader view of the significance of the heritage, and as in the EarthWatch project, they would gain from understanding the broader perspectives.

An inventory on the full range of UCH should also be a priority in developing a programme.

There is another perception issue that should be addressed. UCH is a poor cousin in the built heritage, archaeological heritage, and the ICH world—it is a marginalized heritage. And yet in SIDS, their heritage is inexplicably linked to the coast and sea. UCH needs to be brought up to the same level, through publicly showcasing the different types of UCH—that it is not all about colonial shipwrecks—and that it is related to important contemporary heritage and linked to ICH and the other fields. Information should be developed and disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the significance of UCH in the cultural identity of people from SIDS in all levels of the community would assist furthering UCH-related programmes.

### 2.4.3 Civil society initiatives

In addition to Matthew Holly's work, an historical and diver perspective has been compiled of the WWII-related UCH in Kwajalein Atoll,<sup>329</sup> and a list of Marshall Islands' WWII-related UCH can be seen online.<sup>330</sup> Another incomplete database of the WWII sites in the Marshall Islands, and in other areas of Micronesia can be found online, some with geographical coordinates to a degree that might provide the accuracy to allow for people to find the site.<sup>331</sup> Given the recent issues to do with the illegal and unethical salvage of WWII shipwrecks in Indonesia and Malaysia—for the pre-radioactive metal—this information could open up these sites for similar looting.<sup>332</sup>

In regard to traditional UCH, a study of the marine resources in the Marshall Islands in 1992 included a cursory inclusion of fish traps and weirs, but not in terms of their cultural heritage values.<sup>333</sup>

### 2.4.4 UCH Safeguarding beyond the cultural sector (Sustainable Development Goals)

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<sup>328</sup> <https://earthwatch.org> Accessed 1 December 2018

<sup>329</sup> Bailey 1989

<sup>330</sup> <https://www.pacificwrecks.com/provinces/marshall.html> Accessed 1 December 2018

<sup>331</sup> [https://en.wikipedia.org/wiki/List\\_of\\_shipwrecks\\_of\\_Oceania](https://en.wikipedia.org/wiki/List_of_shipwrecks_of_Oceania) Accessed 1 December 2018

<sup>332</sup> <https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks> Accessed 1 December 2018

<sup>333</sup> Smith 1992, [https://www.sprep.org/att/IRC/eCOPIES/Countries/Marshall\\_Islands/62.pdf](https://www.sprep.org/att/IRC/eCOPIES/Countries/Marshall_Islands/62.pdf) Accessed 1 December 2018

The various SDG that are considered to provide a link to safeguarding different types of UCH, include: SDG 2, Zero hunger; SDG 3, Good Health and Well-being; SDG 4, Quality Education; SDG 8 Decent Work and Economic Growth; SDG 12 Responsible Consumption and Production; SDG 13 Climate Change; SDG 14 Life Below the Water; SDG 17, Partnerships.

RMI has 29 partnerships in its nine identified SDG, and 12 in SDG 14, Life Below the Water (see Figure 8).

The Marshall Islands has joined the United Nation’s post-2015 agenda and SDG, and DeBrum in a 2015 speech to the United Nations highlighted a number of important issues: ‘that we [the Marshall Islands] devise a tailored national SDG strategy in which we move forward first with our strongest and most deserving priorities’; emphasizing how ‘oceans define our identity and future.’ DeBrum also emphasized the need for ‘not only partnerships but renewed political will—in particular by distant nations—to put aside immediate economic self-interest, and make tough choices to ensure the world has a sustainable food source, and that small island nations realize a much stronger benefit and participation in our own resource.’ He stressed the need for a ‘full commitment of our close and traditional partners—as well as the genuine leadership of non-traditional sources—to match our own strong national commitment.’<sup>334</sup>

Sustainable development of coastal fisheries though is also well underway, following ecosystem based management guidelines established under the *Reimaanlok* mechanism to assist local governments to formulate fishery management plans and fisheries management ordinances, and to harmonize efforts in facilitating the implementation of community fisheries management programs.

The Marshall Islands is working in partnership with many partners on a number of Sustainable Development Goals, of which many are pertinent to UCH, including:<sup>335</sup>

- Blue Fee for Coastal and Marine Resource Sustainable Management: partner with RMI Coastal Management Advisory Council and key stakeholders;
- Micronesian Challenge: partner with 50 global partners, including other ‘US Micronesian countries and territories’ and a range of NGOs to, amongst other things, to effectively conserve at least 30% of the near-shore marine resources;
- Implementing Outcomes from RMIs 1<sup>st</sup> National Ocean Symposium: ‘...to combat climate change and other environment-related issues, whether natural or human-induced, and to mitigate their effects...’

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<sup>334</sup> Letter and speech to the United Nations from Tony DeBrum, Minister of Foreign Affairs on 26 September 2015. <https://sustainabledevelopment.un.org/content/documents/20783marshall-islands.pdf> Access 27 September 2018

<sup>335</sup> <https://sustainabledevelopment.un.org/index.php?page=view&type=6&nr=201&menu=139>

- Pacific Island Leaders Meeting (PALM): ‘summit-level meetings of SIDS every 3 years in which Leaders discuss various issues that Pacific Island Countries are facing;’
- Oceania 21: Oceania Conference involving many SIDS, SPREP, France...;
- PacSIDS Ridge to Reef Programme Partnership: ‘program is to maintain and enhance Pacific Island countries’ ecosystem goods and services (provisioning, regulating, supporting and cultural) through integrated approaches to land, water, forest, biodiversity and coastal resource management that contribute to poverty reduction, sustainable livelihoods and climate resilience.’

The Focal Point for SDG for the Marshall Islands: Mr. Carl Hacker, Director, Economic Policy Planning and Statistics, Majuro, P.O. Box 1349, Majuro, Marshall Islands 96960 AND Mr Jackeo Reland, Permanent Mission of the Marshall Islands to the United Nations.

The RMI National Report to the World Summit on Sustainable Development “RIO +10” outlined many issues in regard to the sustainable development of RMI, including the establishment of National Commission on Sustainable Development in 1999 to ‘develop a long-term planning strategy.’<sup>336</sup> The strategy saw ‘cultural and traditional system as a driving force in fostering of effective and productive partnership among all strata of the society in the achievement of the National Vision’ and regarded fisheries and tourism (amongst others) as important productive resources to develop. It placed a priority on an ‘education system that is contextually and culturally suitable’; ‘to incorporate cultural and traditional beliefs’ including areas such as ‘traditional fishing.’ It also found, ‘the capacity and capability of research programs in the ‘origins’ of RMI—environment, agriculture and fisheries—are far from being adequate and thus points to the imperative need to augment this situation.’ In regard to marine resources, the Strategic Development saw the need ‘to address the preservation and conservation of marine resources through the establishment of marine conservation areas.’

The other relevant resource that RMI wants to further develop is tourism, it had about 4000-6000 tourists per year and increasing at the time of the report, and a Mission Statement was formulated: ‘To create a policy, infrastructural and natural environment that is conducive to private sector investment in tourism and to ensure that tourism development is well planned and managed to ensure long-term economic, environmental and social sustainability.’ They see the need to promote and ‘revive Marshallese songs, skills, chants, folklore, and food preparation’ through annual cultural events’; to ‘identify, protect, and promote legendary and historical sites’; to strengthen the Alele Museum; and ‘establish sanctuaries and conservation sites.’ In addition, the Strategic Development saw the need to ‘reinvigorate the cultural and traditional conservation practices to harmonize development with environmental sustainability that will allow for conservation of biodiversity’ and particularly marine biodiversity. While the Development Strategy and RMIs

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<sup>336</sup> <https://sustainabledevelopment.un.org/content/documents/1230marshallislands.pdf> Accessed 1 December 2018

National Vision identified the National Government as a key player—the conductor of the orchestra—the strategy needs partners and stakeholders from all walks of life, the orchestra.

There is an obvious part UCH can play in the RMI National Sustainable Development Strategy (NSDS), in the development and conservation of marine resources (fish weirs), and the associated cultural practices, and in tourism (fish weirs and shipwrecks).

### **Gaps to address safeguarding UCH for Sustainable Development**

An important priority to be addressed should be the issue of perception—that safeguarding UCH can play an important role in sustainable development, and that it can be used in a number of SDGs. Information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the role of UCH in sustainable development to all levels of the community would be beneficial. This information should be disseminated to established partners and to emerging partners, at a local level through to regional and inter-regional level.

RMI should coordinate with other Micronesian countries and consider formulation of a coordinated strategy for safeguarding UCH in their SDGs and National Sustainable Development Strategy, and to communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others.

As part of this strategy, Micronesian-wide projects should be considered and implemented to showcase how safeguarding particular UCH can play a role in their SDGs.

## The Marshall Islands Recommendations

RECOMMENDATION: The Marshall Island becomes party to the UCH Convention and adopt a new Act to give effect to the UCH Convention, at the same time making consequential amendments to the *Historic Preservation Act* and *Wrecks and Salvage Act*, and others as appropriate.

RECOMMENDATION: Whether or not the Marshall Islands becomes a party to the UCH Convention, the *Historic Preservation Act* should be amended to more clearly address the protection of UCH and at the same time the *Wrecks and Salvage Act* should be amended to take UCH out of that regime.

RECOMMENDATION: Raise awareness about the value of UCH and its need for safeguarding from the local level through to the heads of government and Cabinet Members. Encourage local community to lobby Cabinet Members to ratify the Convention.

RECOMMENDATION: Develop local human capacity and acquire resources to implement project-based UCH activities in association with other Micronesian countries and specialist partners.

RECOMMENDATION: Raise and awareness about the varied career paths that could be pursued if UCH-related programmes are seen in a broader context, such as with the SDGs as well as the cultural sector.

RECOMMENDATION: A UCH site database is are a very useful resource and should be pursued. However, these databases should not contain geographical coordinates to the degree that might provide the accuracy to allow for people to find the site and salvage materials illegally and unethically.

RECOMMENDATION: Raise awareness about the value of safeguarding UCH and its role in the SDG and disseminate information to the broad community, from heads of government, politicians, traditional chiefs and households.

RECOMMENDATION: Given the commitment to SDG 14: Life Below the Water and the far greater number of partnerships compared to other SDG, the development of UCH safeguarding with the current partnerships should be investigated;

RECOMMENDATION: Coordinate the awareness raising strategies (for UCH safeguarding *per se* and its role in SDGs) across the Micronesian region.

RECOMMENDATION: RMI should coordinate with other Micronesian countries to formulate a strategy for safeguarding UCH in their SDG and communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others. As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs, notably the fish weir UCH and the WWII-related UCH.

RECOMMENDATION: The value of UCH safeguarding should be identified in NSDS, particularly in the areas of marine resource conservation, maintaining traditional cultural practices and tourism.

Funding opportunities exist to assist local communities through organisations and foundations that support cultural, environmental and scientific projects, and they should be pursued to support UCH in Micronesia.

RECOMMENDATION: Funding for local communities should be a priority and they should benefit from maintaining their UCH and UCH-related ICH.

RECOMMENDATION: Major financial sponsorship of a UCH team to implement a UCH programme at the country and/or regional level could be investigated with an enticement being the team/programme is sponsor branded

RECOMMENDATION: As a nation and/or the region, a champion/spokesperson/ambassador of high status be appointed to raise the level of UCH with government, the media and within the community.

### 3. PALAU

#### 3.1 LOCATION/GEOGRAPHICAL INFORMATION

Palau is an archipelago of over 300 islands that stretches 160 km in a north-south direction, 25 km at its widest, and is located about 900 km north of West Papua and 900 km east of the Philippines, and centred on Longitude 134.5°E; Latitude 7.5°N. Many of the islands are coralline and are ‘remnants of tectonically uplifted reef systems during the Pleistocene that have been chemically and physically weathered over the millennia and referred to as the ‘Rock Islands.’<sup>337</sup> The central volcanic island of Babeldaob contains nearly  $\frac{3}{4}$  of the total land mass of Palau (488 km<sup>2</sup>). The islands are covered with dense jungle—‘the volcanic islands contain numerous areas of savanna and a broad belt of coastal mangrove swampland’ and while there are a few sand beaches the Rock Islands rise steeply out of the water to a height of about 200 metres. A barrier reef surrounds the majority off the islands of about 1,200 km<sup>2</sup> in area.<sup>338</sup>

‘Palau possess some of the best-preserved coral reefs remaining in the Coral triangle, where much of the world’s marine biodiversity lies...it is a world leader in marine conservation and it established the world’s first shark sanctuary in 2009. Palau has placed 45% of its nearshore waters under some form of protection...Today [2014], tourists come to Palau mainly to experience its unique marine ecosystems...and tourism has contributed about  $\frac{3}{4}$  of GDP growth, more than 80% of exports of goods and services, 15% of total tax revenue, and 40% of total employment...’<sup>339</sup>

The population of Palau is about 21,700.

#### 3.2 HISTORICAL BACKGROUND

Archaeological evidence suggests Palau was settled about 3,500 BP,<sup>340</sup> possibly from Indonesia.<sup>341</sup> Some of the earliest excavated artefacts are medium-sized ceramic vessels comprising a red-slip tempered with volcanic or volcanic-limestone mineral. Large clams and inshore fishing were the focus of marine exploitation and settlements were short-term mobile camps.<sup>342</sup>

Two dominant archaeological type-sites today include step-terraces and traditional villages. These terraces were large earthworks ‘using cut and fill techniques to create step terraces with associated features such as crowns, ditches and brims, and speculation has it that the terraces were for defense

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<sup>337</sup> Fitzpatrick 2003

<sup>338</sup> Snyder & Butler 1997: 1

<sup>339</sup> Friedlander, et al. 2014: 5

<sup>340</sup> Olsudong 2006; Liston 2005

<sup>341</sup> Irwin 1994: 127

<sup>342</sup> Liston 2005

purposes, agriculture, settlement and religious purposes, and began to appear around 400 BC and ceased AD 1200. Traditional villages contain different types of stone platforms such as *odesongel* (clan's burial site) and *iliud* (resting stone platform), stone paths, docks, and paved bathing pools, which first appeared around 1200 AD and continued up to the present.<sup>343 344</sup> Snyder recorded 119 village areas in the 16 Palauan states, with some areas comprising up to 40 historic sites<sup>345</sup> and Krämer 'recorded 235 villages in 1910, although at the time of the survey, 151 of them had been abandoned.'<sup>346</sup>

Contact between indigenous Palauans and foreigners occurred when English explorer Henry Wilson was shipwrecked on Palau in 1783<sup>347</sup> although the Chief of Koror had a Malayan translator when he met Wilson.<sup>348</sup> Palau was claimed by Spain (1885-1898), and Germany (1898-1914) during which time Augustin Krämer 'amassed an enormous amount of anthropological data from Palau, which was published in five volumes.'<sup>349</sup> Japan administered Palau from 1914 to 1944<sup>350</sup> initially as a League of Nations mandate and encouraged Japanese migration to 'work on plantations or in other economic enterprises resulting in Palau becoming a major colonial centre.'<sup>351</sup>

Prior to WWII, Japan had established four regional headquarters in Micronesia (Saipan, Palau, Chuuk and in the Marshall Islands) each with a 'Base Force' of a few thousand men. Palau became an important base for Japanese merchant vessels supplying personnel and supplies to the Philippines and New Guinea during the war. In early 1944, Japan relocated its fleet to Palau as the US was successfully moving west across the Pacific. The US bombed the central islands of Babeldaob and Koror, sinking ships, destroying aircraft and obliterating Japanese ground structures from March through to August 1944. Invasion did not come until September 1944, when the US launched a major offensive against Japanese forces in the southern island of Peleliu that lasted until the end of November, during which time all but a few of the 11,000 Japanese troops were killed, and the US sustained very heavy casualties.<sup>352</sup>

After WWII Palau was part of the TTPI administered by the US. In 1981, Palau achieved self-governance with the adoption of the Constitution of the Republic of Palau. In 1982, it entered into a Compact of Free Association with the US. This would ensure continued US aid and ensure that

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<sup>343</sup> Olsudong 2006

<sup>344</sup> Liston 1999

<sup>345</sup> Snyder 1997: 58

<sup>346</sup> Fitzpatrick 2008: 138

<sup>347</sup> Ottley B.L., 1993, "The Republic of Palau" in Ntunmy, M.A. (ed.) *South Pacific Islands Legal Systems* University of Hawaii Press p. 567

<sup>348</sup> Snyder 1997: 4

<sup>349</sup> Krämer 1917-1929

<sup>350</sup> Japan withdrew from the League of Nations in 1933

<sup>351</sup> Snyder 1997: 4

<sup>352</sup> Price & Knecht 2012



the US would assume full responsibility for the security and defence of Palau for fifty years. Disagreement over the presence of US nuclear powered or nuclear capable ships in Palauan waters stalled the ratification of the Compact of Free Association until 1993. This allowed the Republic of Palau to emerge as an independent state in 1994.

### 3.3 UCH-RELATED LAWS

The Constitution and laws of Palau do not address UCH directly, but a number are relevant in terms of providing structures that might, through amendment, be utilized to give effect to the UCH Convention. As will be evident, much of this law resembles, and indeed is identical to, provisions in FSM and the Marshall Island Maritime Regulation. These are contained in the National Law Code, first adopted in 1985 with the most recent re-codification in 2015.<sup>353</sup>

The legislation considered in this review include:

Constitution of the Republic of Palau

General Provisions 1 PNC 1

Historical and Cultural Preservation Act 19 PNC 1.

National Maritime Act 7 PNC

Environmental Protection 24 PNC 34

#### 1. Sovereignty and territoriality

The Constitution of the Republic of Palau establishes the sovereignty and maritime zones necessary for implementation of the UCH Convention. Article I provides:

Palau shall have jurisdiction and sovereignty over its territory which shall consist of all of the islands of the Palauan archipelago, the internal waters, the territorial waters, extending to two hundred (200) nautical miles from a straight archipelagic baseline, the seabed, subsoil, water column, insular shelves, and airspace over land and water, unless otherwise limited by international treaty obligations assumed by Palau.

Palau is, in fact, a federation of sorts, consisting of 16 states. Each state has a constitution that provides for a state government and a Governor.<sup>354</sup> All powers not expressly delegated to the states or that are denied the federal government, are powers of the federal government.<sup>355</sup> The implementation of the UCH Convention would usually then be a matter for the federal government. However, the federal Constitution provides that ‘[e]ach state shall have exclusive ownership of all

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<sup>353</sup> Palau Public Laws Numerical List - Ninth Olbiil Era Kelulau (2013-2015) – appears to be most recent Codification.

<sup>354</sup> Palau Constitution of the Republic of Palau section XI

<sup>355</sup> Bruce L Ottley, “The Republic of Palau” in Ntuny, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 571.

living and non-living resources, except highly migratory fish, from the land to twelve (12) nautical miles seaward from the traditional baselines; provided, however, that traditional fishing rights and practices shall not be impaired'.<sup>356</sup> This is a complex provision in that it refers to ownership rather than jurisdiction. Article 1 vests jurisdiction in the federal government, and this section appears, on the whole, to address issues of jurisdiction by providing, in section I(4) that '[n]othing in this Article shall be interpreted to violate the right of innocent passage and the internationally recognized freedom of the high seas'. As such, jurisdiction might continue to vest in the federal government. However, the reference to ownership within the territorial sea may suggest an element of jurisdictional capacity in the state government. Moreover, the vesting of ownership rights might include UCH within the territorial sea. Indeed, *Historical and Cultural Preservation Act*<sup>357</sup> provides that each state within Palau 'reserves to itself the exclusive right and privilege of ownership and control over historical sites and tangible cultural property located on lands or waters owned or controlled by the state'.<sup>358</sup> It also provides that the federal government 'reserves to itself the exclusive right and privilege of ownership and control over historical sites and tangible cultural property located on lands or under waters owned or controlled by the national government'. What is not clear is whether the states have jurisdiction over their territorial sea or only ownership of its resources.

This issue of jurisdiction and ownership of UCH in the territorial seas in Palau would need clarification.

## 2. Legal Pluralism

The Palauan National Code contains the body of statutory law duly adopted. It also provides that:

The customs of the people of Palau not in conflict with the [Palauan national Code] .... shall be preserved. The recognized customary law of the Republic shall have the full force and effect of law so far as such customary law is not in conflict with [the Palauan national Code].<sup>359</sup>

It also provides that:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable under section 301 of this chapter or local customary law applicable under section 302 of this chapter to the contrary, and except as otherwise provided in section 305 of this chapter; provided that no person shall be subject to criminal prosecution except under the written law of the Republic or recognized local customary law not inconsistent therewith.

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<sup>356</sup> Palau Constitution section I(2).

<sup>357</sup> *Historical and Cultural Preservation Act* 19 PNC 1.

<sup>358</sup> See also *Historical and Cultural Preservation Act* 19 PNC 1 sections 171-172 regarding the competency of the individual states.

<sup>359</sup> *General Provisions* 1 PNC 1 section 302.

The effect of this is that the common law may be derived from the customary law and the common law as understood in the US, as amended by the National Code or subsequent decisions of Palauan courts. This legal pluralism is also addressed slightly differently in the Constitution itself. Article V of the Constitution, headed ‘Traditional rights’, provides that:

Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law.

This might be rather difficult to apply in different circumstances. This is especially the case for land tenure which is a combination of statutory freehold land in fee simple and that which applies by way of customary title, especially when the land claimed may extend out into the territorial sea. The Constitution also provides that:

The government shall take no action to prohibit or revoke the role or function of a traditional leader as recognized by custom and tradition which is not inconsistent with this Constitution, nor shall it prevent a traditional leader from being recognized, honored, or given formal or functional roles at any level of government.

The role of the traditional leader in land disputes cannot be ignored. UCH in the territorial sea may be the subject of, or caught up, in such a dispute.<sup>360</sup> Since, however, the UCH Convention does not address ownership issues, this is not directly on point though any regulation as to that UCH may be perceived as an infringement on ownership rights. This might, for example, impact ancient fish traps and similar UCH.

### **3. Cultural heritage and the competent authority**

The National Code includes Title 19 Cultural Resources, Chapter 1, which is titled *Historical and Cultural Preservation Act*. The Act is detailed and appears to have been amended on a number of occasions, most recently to take into account Palau’s adoption of the Intangible Heritage Convention.<sup>361</sup> This Act provides a basis upon which the implementation of the UCH Convention could rest.

The basic principles underlying the Act is that the ‘historical and cultural heritage of the people of Palau constitutes a precious national resource which should be preserved and fostered for the benefit of all’.<sup>362</sup> Moreover, the concerns raised in the UCH Convention’s preamble are reflected in the Act, which recognizes that ‘a strong regulatory framework is necessary to assure that historical sites and historical and cultural properties located in Palau are protected from

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<sup>360</sup> Bruce L Ottley, “The Republic of Palau” in Ntuny, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 585.

<sup>361</sup> See for examples *Historical and Cultural Preservation Act* PNC Title 19(1) sections 102(d) and 103 (e) and (f).

<sup>362</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 102(a).

destruction’.<sup>363</sup> This includes UCH since ‘historical site’ means any location, site, structure, building, artifact, or landmark located in the Republic *or its territorial waters* which are of outstanding prehistoric, archaeological, or cultural significance’.<sup>364</sup> ‘Site’ and ‘artifact’ are defined broadly enough to include UCH.<sup>365</sup> Indeed, section 143 of the Act specifically refers to historical sites ‘on land or under water’.<sup>366</sup>

The competent authority required by the UCH Convention is the Ministry (Division) of Community and Cultural Affairs,<sup>367</sup> Bureau of Cultural and Historical Preservation, supported by the Palau Historical and Cultural Advisory Board. The Board has an advisory function to the President and the Minister and the Chief of the Division of Cultural Affairs, as well as recommending the registration of historical sites that are to be protected under the Act.<sup>368</sup> The Division though is the entity capable of implementing the requirements of the UCH Convention. For example, the Ministry is tasked with the establishing

a comprehensive historical and cultural preservation program which shall include, but not be limited to, the development of an ongoing program of historical, architectural, archaeological, anthropological and cultural research and development, including surveys, excavations, scientific recording, interpretation and publications of the Republic’s historical and cultural resources.

This would enable the Division to address a number of obligations in the UCH convention and rules in the annex. Indeed, the Division is already capable of undertaking many of these obligations. For example, section 131(a) requires the divisions to establish, order and maintain a register of historical sites as required by article 22(1) of the UCH Convention. Similarly, section 131(i) requires the Division to ‘stimulate public interest in historical and cultural preservation, including the development and implementation of interpretive programs for historical sites’ as required in article 20 of the UCH Convention. Other functions of the Division that will give effect to the UCH Convention include serving as ‘the depository for, all field notes, photographs, negatives, maps, artifacts, or other materials generated or recovered through historical and cultural preservation projects’<sup>369</sup>, issuing permits<sup>370</sup> and imposing sanctions<sup>371</sup>.

The Act does include UCH within the regime, but does not directly address its protection, except in respect of the Palau Lagoon Monument. The Monument is in fact:

<sup>363</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 102(c).

<sup>364</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 103(d). Emphasis added.

<sup>365</sup> *Historical and Cultural Preservation Act* 19 PNC 1 sections 103(i) and (k).

<sup>366</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 134 headed ‘Control over historical sites and cultural property on public lands’.

<sup>367</sup> Referred to in the Act as the Division of Cultural Affairs.

<sup>368</sup> *Historical and Cultural Preservation Act* 19 PNC 1 sections 111-114.

<sup>369</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 133.

<sup>370</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 134.

<sup>371</sup> *Historical and Cultural Preservation Act* 19 PNC 1 section 181.

All ships, other vessels and aircraft, and any and all parts and contents thereof, which formerly belonged to or were part of the armed forces or commercial fleet of Spain, Germany, Japan, the United States or any other nation, which were sunk to or otherwise deposited on the bottom of the Palau Lagoon and its territorial waters, subject to applicable salvage laws, shall be and hereby are set apart as monuments which shall be collectively called the "Palau Lagoon Monument."<sup>372</sup>

At the heart of the regime is the requirement to obtain a permit from the President or authorized person to:

dive to or by any other means seek and obtain access to the aforesaid ships, other vessels and aircraft, or any and all parts and contents thereof, for the purpose of examination or the gathering of objects therefrom<sup>373</sup>

It is an offence, punishable by a fine and/or imprisonment up to 3 years, to remove, damage or destroy any ship of aircraft without a permit.<sup>374</sup> The President is authorized to issue such permits to those persons whom he deems qualified to conduct such examination or gathering, subject to such rules and regulations as he may prescribe.<sup>375</sup> This could certainly include the UCH Convention and its rules in the Annex. However, the reference in section 302 to the applicable salvage law would require amendment, particularly in light of the laws applicable to salvage and wreck.

In 2006, five divers were prosecuted for removing artefacts from wrecks within the Palau Lagoon Monument, including from the Amatsu Maru wreck, the Chuyu Maru wreck and the Ryuku Maru wreck, and an unidentified forth wreck.<sup>376</sup> Amongst the artifacts found during the search was a porthole, a compass, a frame, lanterns, lightbulb covers, and porthole frames.

There is no direct mention in the National Code of the application of the US National Historic Preservation Act (NHPA), nor of the existence of a Historic Preservation Office with a State Historic Preservation Officer (SHPO) in Palau. Nevertheless, the implementation of the existing legislation and any future legislation will need to take into account the fact that the State Historic Preservation Office of the US National Park Service operated in this space. Six sites in Palau are listed on the US National Register of Historic Places – Bai Ra Irrai, Ked Ra Ngchemiangel, Meteu ‘L Klechem, Odalmelech, Ongeluluul and Peleliu Battlefiled.<sup>377</sup>

<sup>372</sup> *Historical and Cultural Preservation Act* 19 PNC 3 section 302.

<sup>373</sup> *Historical and Cultural Preservation Act* 19 PNC 3 section 304. See *Francis Toribiong and the Republic of Palau (plaintiffs) v. John C. Gibbons, Koror State Executive Administrator, et al.* Civil Action No. 451-91; 24 September 1993.

<sup>374</sup> *Historical and Cultural Preservation Act* 19 PNC 3 section 306.

<sup>375</sup> *Historical and Cultural Preservation Act* 19 PNC 3 sections 304 and 305.

<sup>376</sup> *Republic of Palau (plaintiff) v. Cameron James Avenell, Matthew Young, Richard Sumor, David Tansey, and Ian McCombie; ROP vs. Avenell*, 13 ROP 272 (Tr. Div. 2006) Criminal Action No. 06-072.

<sup>377</sup> <https://npgallery.nps.gov/>

#### 4. Maritime Law

The National Maritime Act of Palau<sup>378</sup> addresses both the application of salvage law and the jurisdictional capacity of Palau needed to give effect to the UCH Convention. This includes the jurisdiction over Palauan registered vessels.<sup>379</sup>

With respect to foreign vessels, such as those that might be engaged in activities directed at UCH, the Regulation and Control of Shipping chapter provides for regulation in the territorial sea. So, for example, section 102 provides that, with some exceptions such as force majeure, ‘it shall be unlawful for any unlicensed vessel to enter or remain within the territorial waters of the Republic without first receiving permission therefor from the President’.<sup>380</sup> While this refers to ‘unlicensed vessels’, this appears to be intended to apply to foreign flagged vessels. Moreover, any vessel ‘hovering’ within territorial waters may at any time be boarded and examined, order the vessel into a Palauan port, and the vessel searched.<sup>381</sup> It is unlawful for any vessel to engage within the territorial waters of the Republic in fishing or the removal of scrap iron without authorization of the national government.<sup>382</sup> This is a peculiar section as it naturally overlaps with the application of salvage law in some cases. In the territorial sea though the effect is to ensure that foreign flagged vessels cannot engage in any salvage activity that has the raising of the vessel that could be regarded as scrap. This, though is narrow, and may not, for example, apply to the raising of come other material, such as a cargo of ceramics. Penalties for a breach of these sections is provided for<sup>383</sup>, as is seizure and forfeiture of a vessel involved in a breach of the National Maritime Act.<sup>384</sup> The Chapter on Wrecks and Salvage<sup>385</sup> are particularly limited and do not address the issue of UCH. Indeed, the law merely introduces time limitation for salvage actions<sup>386</sup> and provides for life salvage<sup>387</sup>, leaving the substantive salvage law to be applied by way of the general admiralty law as part of the common law. This is the Admiralty law ‘as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States’, unless contrary to customary law.<sup>388</sup> This is inconsistent with the UCH Convention. However, a combination of amendments to the *National*

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<sup>378</sup> *National Maritime Act 7 PNC* appears to be based on the original National Maritime Act contained in the Trust Territory Code of 1966.

<sup>379</sup> *National Maritime Act 7 PNC 7*.

<sup>380</sup> *National Maritime Act 7 PNC 2 section 204*.

<sup>381</sup> *National Maritime Act 7 PNC 2 section 205*.

<sup>382</sup> *National Maritime Act 7 PNC 2 section 206*.

<sup>383</sup> *National Maritime Act 7 PNC 2 section 207*.

<sup>384</sup> *National Maritime Act 7 PNC 3 sections 301-310*.

<sup>385</sup> *National Maritime Act 7 PNC 13*.

<sup>386</sup> *National Maritime Act 7 PNC 13 section 1306*.

<sup>387</sup> *National Maritime Act 7 PNC 13 section 1305*.

<sup>388</sup> *General Provisions 1 PNC 1 section 303*.

*Maritime Act* and the *Historical and Cultural Preservation Act* would, with relative ease, bring the Code into conformity with the UCH Convention.

## 5. Environmental law

The Environmental law provides, amongst many things, for the establishment of Protected Areas that will form part of a Network of Protected Areas.<sup>389</sup> The areas subject to this do not appear to be limited to land areas, merely being ‘areas in the Republic’<sup>390</sup> and thus might cover marine areas as part of the network. The nomination may include historical sites and cultural properties<sup>391</sup> protected by the *Historical and Cultural Preservation Act*<sup>392</sup> and the cultural use in that area can be part of the nomination process.<sup>393</sup> This may therefore be a mechanism for further implementation of the UCH Convention, together with that established for the Palau Lagoon Monument.

Palau is to host the Our Ocean Conference in 2020. The Conference is dedicated to the protection of the oceans focussing on key ocean issues including marine protected areas, sustainable fisheries, marine pollution, and climate-related impacts on the ocean. This is an important opportunity not only for Palau, but all Pacific States, to leverage UCH protective mechanism and funding within the ocean conservation space.

### 3.4 UCH-RELATED PROGRAMMES AND INITIATIVES

Prepared questionnaires were distributed and the Bureau of Cultural and Historical Preservation, (acting as the Palau Historic Preservation Office), Ministry of Community and Cultural Affairs provided feedback. This feedback has been incorporated in the details that follow, in addition to the authors’ research (see Appendices 1-3 for the information sought in the questionnaires).

#### 3.4.1 Types of UCH

Traditional villages were built from about 1,000 to 1,250 AD along the coast, and ‘obstructed by mangrove forest to discourage an attack from the sea. Various defensive fortifications (e.g. large platforms, massive stone walls, stone walls in mangrove channels) were also constructed to repel attackers.’<sup>394</sup> <sup>395</sup> Fishing was a significant subsistence activity, and archaeological evidence shows

<sup>389</sup> *Environmental Protection* 24 PNC 34.

<sup>390</sup> *Environmental Protection* 24 PNC 34 section 3402.

<sup>391</sup> *Environmental Protection* 24 PNC 34 section 3404(d).

<sup>392</sup> *Historical and Cultural Preservation Act* 19 PNC 1

<sup>393</sup> *Environmental Protection* 24 PNC 34 section 3404(e).

<sup>394</sup> Liston & Tuggle 2006

<sup>395</sup> Fitzpatrick 2008: 138

how this changed over time from 2,000 BP, possibly because of increasing agricultural production, and supplemented with shellfish.<sup>396</sup>

Palau contains a number of different types of UCH including: remains of traditional coastal villages, their traditional docks/piers and walls, burials, fish weirs/traps (some being built by Yapese<sup>397</sup>); a sunken city mentioned in traditional folklore;<sup>398</sup> and colonial era shipwrecks, including WWII remains including shipwrecks, aircraft, and piers.<sup>399</sup> The transport of over 13,000 or more *rai* (stone money) between Palau where they were quarried and the c. 450 km voyage to Yap has most likely resulted in some of the canoes and *rai* being lost in the sea and to be found in Palau or Yap's seas.<sup>400</sup>

As in other parts of Micronesia, the sea is a dominant part of the environment and has an influential cultural connection with Palauans, and many archaeological investigations have a maritime connection, although the sites may not be located underwater.



Figure 11: Kukau El Bad, in Ollei, Ngarchelong State, consisting of a series of upright and fallen rocks in an area of about 500 sq. metres at the edge of the mangroves and which is sometimes underwater caused by sea-level rising. It is an offering place relating to the health of all Palau's taros. Source: Bill Jeffery, 2015

<sup>396</sup> Fitzpatrick et al. 2011: 11

<sup>397</sup> Fitzpatrick 2004

<sup>398</sup> Ngirmang & Emesiochel 2014

<sup>399</sup> Bailey 1991; Ngirmang & Emesiochel 2014

<sup>400</sup> Fitzpatrick 2008





Figure 12: Japanese WWII aircraft 'Jake'. Source: Graeme Henderson, 2013



Figure 13: The 14,000 ton Japanese WWII oil tanker *Iro Maru* lying on the seabed. Source: Bill Jeffery, 2013

### 3.4.2 Programmes related to tangible and intangible UCH

The Palau Bureau of Cultural and Historical Preservation (BOCHP) conduct annual surveys of cultural, historical, and archaeological sites within Palau, including its territorial waters. The surveys are at a reconnaissance level and are aimed at identifying and assessing the current condition of heritage resources in order to compile an inventory of sites, in addition to making recommendations for their preservation. There have been numerous archaeological surveys that date back to the early 1900s, with an acceleration since the 1990s. A UCH survey is projected for 2021.

In 1988 the US NPS Submerged Resources Center carried out a survey of a number of Japanese WWII shipwrecks and aircraft, identifying and documenting the remains, in addition to noting how divers have greatly impacted the sites through recovering artefacts.<sup>401</sup> In 2017, a team working under the NOAA umbrella visited Peleliu to: ‘locate the scattered material remains of Peleliu’s submerged battlefield, to photogrammetrically record those remains, and to survey the reef to determine if the scars from the UDT mission to blow access ramps into the lagoon were still visible after 73 years.’<sup>402</sup>

BOCHP assists in the effective management of the many shipwrecks and aircraft that are located in Rock Islands Southern Lagoon World Heritage site. In 2013, they arranged for a UNESCO funded UCH training programme to be conducted primarily for its staff, and the Koror State Rangers who assist in the management of the World Heritage site. BOCHP staff have also received training in the use of the Geographical information System (GIS), and a spatial database of UCH will be developed consistent with the terrestrial sites. They are also keen to develop public education and outreach in regard to UCH through collaboration with Palau Visitors Bureau and Belau National Museum, in addition to collaborating with dive tour operators.

In 2006, criminal action was brought against two defendants for removing artefacts from four Japanese shipwrecks under the Palau Lagoon Monument Act and both were imprisoned and fined.<sup>403</sup> It is most likely that these are the only such successful prosecutions for the looting of shipwrecks in Micronesia and Asia-Pacific.

Some of Palau’s islands are suffering under climate change and an important site in Ngarchelong State, ‘Kakau el Bad’, containing several stone monoliths on top of a stone platform that is frequently inundated by the sea is being damaged. The site is visited by BOCHP and occasionally a nonprofit ‘Ebiil’ clear the site of debris as part of educational activities.

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<sup>401</sup> Carrell 1991

<sup>402</sup> <https://oceanexplorer.noaa.gov/explorations/18peleliu/summary/summary.html> Accessed 2 December 2018

<sup>403</sup> Jeffery 2007: 247; Ngirmang 2014

An MRS of the Archaeology and Historic Preservation of Palau was carried by David Snyder and Brian Butler in 1989.<sup>404</sup> It is one of three volumes in a Republic of Palau, Division of Cultural Affairs ‘Anthropology Research Series’, the other two being: *Rechuodel: Traditional Culture and Lifeways Long Ago in Palau*<sup>405</sup>; and *Recommendations for the Preservation of Historic and Cultural Resources in Palau*<sup>406</sup>. Two other series have produced reports on 1. Oral History Research; 2. Traditional and Customary Practices. The MRS study had three main aims: to compile a database of all recorded archaeological and historical sites in Palau; to compile a management plan for the Division of Cultural Affairs to use as a guide in making decisions about the protection and treatment of cultural resources; and to conduct limited surveys in two villages. The MRS provides good general background information on Palau, information on a number of important archaeological sites, and refers to a database of 780 archaeological sites, but which does not appear to include UCH sites.

### **Gaps to address to join and implement the UCH Convention**

It was shown by the FSM that ratification is possible primarily through political will alone. Palau has a similar cultural identity related to the coast and sea as the FSM, and a similar range and quantity of UCH and related ICH. However, ‘Palau is divided into sixteen administrative regions, called states. Palau is the most over-governed place on earth, with 16 states and both a tribal chiefdom and elected legislature in each municipality, for 20,000 people.’<sup>407</sup> To ratify the UCH Convention approval from all the states as well as the National government is required. In order to address these issues, it was recommended that ‘further technical assistance to educate the Palau leadership of the Convention...funding to conduct outreach and technical expertise assistance from UNESCO to lead the discussion is needed.’<sup>408</sup>

The resource gaps in being able to implement a UCH programme in Palau are not as dire as in other Micronesian countries. The BOCHP has four certified scuba divers but would require funding for resources and programme implementation, and they are keen to work with the UNESCO Participation Programme. Further UCH skill development in association with implementing projects would be desirable.

The BOCHP is the appropriate “Competent Authority” to conduct the work, being the responsible agency in heritage preservation in Palau. They currently work with the government leaders, the local community, chiefs and traditional owners, which are also important collaborative activities

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<sup>404</sup> Snyder & Butler 1997

<sup>405</sup> Smith 1997

<sup>406</sup> Smith 1997

<sup>407</sup> [https://en.wikipedia.org/wiki/States\\_of\\_Palau](https://en.wikipedia.org/wiki/States_of_Palau), Accessed 15 September 2018.

<sup>408</sup> Ngirmang 2018, pers. comm.

in UCH-related programmes. UCH-related programmes also need to work with scuba divers, as few local people dive given it can be an expensive activity. Foreign tourist divers should be encouraged into assisting BOCHP, much like the EarthWatch project, which is briefly discussed earlier.<sup>409</sup> This would provide divers (visitors) with a broader view of the significance of the heritage, and as in the EarthWatch project, they would gain from understanding the broader perspectives.

An inventory on the full range of UCH should also be a priority in developing a programme, which is an aim for the BOCHP when they commence their UCH work in 2021.

There is also a perception issue that should also be addressed. UCH is a poor cousin in the built heritage, archaeological heritage, and the ICH world—it is a marginalized heritage. And yet in SIDS, their heritage is inexplicably linked to the coast and sea. UCH needs to be brought up to the same level, through publicly showcasing the different types of UCH—that it is not all about colonial shipwrecks—and that it is related to important contemporary heritage and linked to ICH and the other fields. This information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the significance of UCH in the cultural identity of people from SIDS in all levels of the community would assist in furthering UCH-related programmes.

### 3.4.3 Civil society initiatives

A number of the 60 WWII-related UCH (shipwrecks and aircraft) lying in the waters of the states, Koror, Babeldaob, Pelleliu and Anguar are popular wreck dives, and one tour operator hosts a ‘Palau Wreck Week’ to mark the anniversary of the sinking of the Japanese fleet that took place in late March-April 1944.<sup>410</sup> Bailey provides the best knowledge on the shipwreck and aircraft related to World War II in Palau.<sup>411</sup>

An incomplete database of the WWII sites in Palau, and in other areas of Micronesia can be found online, some with geographical coordinates to a degree that might provide the accuracy to allow for people to find the site.<sup>412</sup> Given the recent issues to do with the illegal and unethical salvage of WWII shipwrecks in Indonesia and Malaysia—for the pre-radioactive metal—this information could open up these sites for similar looting.<sup>413</sup>

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<sup>409</sup> <https://earthwatch.org> Accessed 1 December 2018

<sup>410</sup> Ngirmang & Emesiochel 2014

<sup>411</sup> Bailey 1991

<sup>412</sup> [https://en.wikipedia.org/wiki/List\\_of\\_shipwrecks\\_of\\_Oceania](https://en.wikipedia.org/wiki/List_of_shipwrecks_of_Oceania) Accessed 1 December 2018

<sup>413</sup> <https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks> Accessed 1 December 2018

From 2012-2015, two NGOs, Japanese Mine Action Service (JMAS), and Cleared Ground Demining (CGD) were involved in recovering and destroying fused depth charges and sealing cracks in others, from the 165 known to exist on a shipwreck called the ‘Helmet Wreck.’ A review of the sealed depth charges in 2015 found that they were still leaking the explosive chemical substance, picric acid, which had been polluting the surrounding waters. A number of recommendations have been made in regard to the value of the WWII UCH, and management by BOCHP.<sup>414</sup>

### 3.4.4 UCH Safeguarding beyond the cultural sector (Sustainable Development Goals)

The various SDG that are considered to provide a link to safeguarding different types of UCH, include: SDG 2, Zero hunger; SDG 3, Good Health and Well-being; SDG 4, Quality Education; SDG 8 Decent Work and Economic Growth; SDG 12 Responsible Consumption and Production; SDG 13 Climate Change; SDG 14 Life Below the Water; SDG 17, Partnerships.

Palau has 29 partnerships in its nine identified SDG, and 14 in SDG 14, Life Below the Water (see Figure 8).

In a report on Palau’s Millennium Development Goals dated 27 May 2013, Palau outlined ‘Newly proposed New Comprehensive Millennium Development Goals for 2030’, which included (relevant to UCH safeguarding): ‘sustain biodiversity and ecosystem services through better management...conservation and restoration’; acknowledged ‘Palau’s economy is a tourism driven economy and with a need to diversify tourism and growth in the...and aquaculture sector;’ the management plan for the RISL World Heritage site ‘greatly expanded on its cultural management.’ It was further noted how Palau had ‘implemented a nationwide system of connected protected areas including fringing reefs, lagoons and mangroves’—highlighted by the 45 protected areas covering 40% of the near shore marine areas.<sup>415</sup>

Palau is working in partnership with many partners on a number of Sustainable Development Goals, of which many are pertinent to UCH, including:<sup>416</sup>

- Micronesian Challenge: partner with 50 global partners, including other ‘US Micronesian countries and territories’ and a range of NGOs to, amongst other things, to effectively conserve at least 30% of the near-shore marine resources;
- Global Island Partnership: ‘a partnership for all islands, regardless of size or political status, to take greater action to conserve and sustainably utilize invaluable island natural resources that support people, culture and livelihoods around the world.’

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<sup>414</sup> Ngirmang et al. 2017

<sup>415</sup> Republic of Palau 2013

<sup>416</sup> <https://sustainabledevelopment.un.org/memberstates/palau>

- Oceania 21: Oceania Conference involving many SIDS, SPREP, France...
- Pacific Island Leaders Meeting (PALM): ‘summit-level meetings of SIDS every 3 years in which Leaders discuss various issues that Pacific Island Countries are facing.’
- Palau National Marine Sanctuary Initiative (PNMS): Palau seeking consideration from its neighbours in developing Marine Sanctuaries.

The Focal Point for SDG for Palau: H.E. Ms. Ngedikes Olai Uludong, Permanent Representative, Permanent Mission of the Republic of Palau to the United Nations, 866 United Nations Plaza, Suite 575, New York, NY 10017

### **Gaps to address safeguarding UCH for Sustainable Development**

As can be seen by the many Marine Protected Areas, Palau has a strong marine conservation ethic, in addition to wanting ‘to keep its Palauness—our unique culture and environment intact.’<sup>417</sup>

This ethic should be further developed into how safeguarding UCH can play an important role in sustainable development, and that it can be used in a number of SDGs. Information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the role of UCH in sustainable development to all levels of the community would be beneficial. This information should be disseminated to established partners and to emerging partners, at a local level through to regional and inter-regional level.

Palau should coordinate with other Micronesian countries and consider formulation of a coordinated strategy for safeguarding UCH in their SDGs and National Sustainable Development Strategy, and to communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others.

As part of this strategy, Micronesian-wide projects should be considered and implemented to showcase how safeguarding particular UCH can play a role in their SDGs.

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<sup>417</sup> Republic of Palau 2013



## Palau Recommendations

RECOMMENDATION: Palau becomes party to the UCH Convention and adopt a new Act to give effect to the UCH Convention, at the same time making consequential amendments to the *Historical and Cultural Preservation Act* and *National Maritime Act*, and others as appropriate.

RECOMMENDATION: Whether or not Palau becomes a party to the UCH Convention, the *Historical and Cultural Preservation Act* should be amended to more clearly address the protection of UCH and at the same time the *National Maritime Act* should be amended to take UCH out of that regime.

RECOMMENDATION: Further research be undertaken to consider the jurisdictional complexities of implementing the federal legislation that gives effect to an intentional convention in the individual states of Palau and the exact nature of this federation with reference to its maritime jurisdictions. This will require appropriate comparison to existing practice in implementing other international conventions that apply in specific maritime zones.

RECOMMENDATION: Conduct outreach to stakeholders, particularly the Palau leadership on the integration and use of local laws in UCH management, and the applicability and benefits of ratifying the Convention.

RECOMMENDATION: Raise awareness about the value of UCH and its need for safeguarding from the local level through to the heads of government. Issues such as best practices when visiting UCH sites for tourist divers, what laws apply and the penalties for violations should be included in the awareness raising.

RECOMMENDATION: Further develop local human capacity and acquire resources to implement project-based UCH activities in association with other Micronesian countries, specialist partners and civil society.

RECOMMENDATION: Raise awareness about the varied career paths that could be pursued if UCH-related programmes are seen in a broader context, such as with the SDGs as well as the cultural sector.

RECOMMENDATION: A UCH site database is a very useful resource and should be pursued. However, these databases should not contain geographical coordinates to the degree that might provide the accuracy to allow for people to find the site and salvage materials illegally and unethically.

RECOMMENDATION: Raise awareness about the value of safeguarding UCH and its role in the SDG and disseminate information to the broad community, from heads of government, politicians, traditional chiefs and households.

RECOMMENDATION: Given the commitment to SDG 14: Life Below the Water and the far greater number of partnerships compared to other SDG, the development of UCH safeguarding with the current partnerships should be investigated.

RECOMMENDATION: Coordinate the awareness raising strategies (for UCH safeguarding *per se* and its role in SDGs) across the Micronesian region.

RECOMMENDATION: Palau should coordinate with other Micronesian countries and consider formulating a strategy for safeguarding UCH in their SDGs and communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others. As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs, notably the fish weir UCH and the WWII-related UCH.

RECOMMENDATION: The value of UCH safeguarding should be identified in a NSDS, particularly in the areas of marine resource conservation, maintaining traditional cultural practices and tourism.

Funding opportunities exist to assist local communities through organisations and foundations that support cultural, environmental and scientific projects, and they should be pursued to support UCH in Micronesia.

RECOMMENDATION: Funding for local communities should be a priority who should benefit from maintaining their UCH and UCH-related ICH.

RECOMMENDATION: Major financial sponsorship of a UCH ‘team’ to implement a UCH programme at the country and/or regional level could be investigated with an enticement being the team/programme is sponsor branded

RECOMMENDATION: As a nation and/or the region, a champion/spokesperson/ambassador of high status be appointed to raise the level of UCH with government, the media and within the community.



## 4. KIRIBATI

### 4.1 LOCATION/GEOGRAPHICAL INFORMATION

Kiribati consists of three main islands groups – the Gilbert Islands (spread over 640 km either side of the equator), the Phoenix Islands (about 1,400 km east of the Gilbert Islands), and the Line Islands (which are further east), and together they make up thirty-three atolls.<sup>418</sup> Tarawa atoll is the capital and it has about 60,000 inhabitants. The total land area is about 800 km<sup>2</sup> with an exclusive economic zone covering about 3.6 million square kilometres. It covers an area from approximately Longitude 170°E in the west, crossing the International Dateline and extending to Longitude 150°W, and from Latitude 5°N to 10°S. Kiribati is one of the few nations in the world that consists almost entirely of coral atolls which makes it in an extremely vulnerable to climate change.

The population of Kiribati is about 119,200.

### 4.2 HISTORICAL BACKGROUND

The most reliable and oldest date for the earliest settlement of the Kiribati atolls includes that from Nikunau in the Gilbert Islands and is c. 2,050 ± 90 years BP.<sup>419</sup> Spread over a larger area and with atolls containing poor soil and very little good ground water, many remain uninhabited. Other human settlement dates include: c. 900 years BP for Nikumaroro in the Phoenix Islands and Banaba Island at 300-400 years BP.<sup>420</sup> Cultural affiliations of people from the Gilbert Islands ‘appear to be with groups in the southeastern Solomons and northern Vanuatu on the basis of linguistic and archaeological evidence’ and there are ‘links between Gilberts and Polynesian areas are manifest in architecture and words, particularly nautical words.’<sup>421</sup>

While Spanish explorers sighted the Gilbert Islands in the 17<sup>th</sup> Century, the name comes from Captain Gilbert of the English ‘first fleet’ ship to New South Wales, Australia, the *Charlotte* in 1788. Further British, Russian, French and American explorers mapped the region in the early 19<sup>th</sup> Century. Whaling and trading vessels passed through the Phoenix group in the late 1800s and early 1900s. In 1892 Britain declared a protectorate in the Gilbert and Ellice Islands administered by the Western Pacific High Commission based in Fiji, then later in the Solomon Islands. The separate Gilbert and Ellice Islands Colony was established in 1916. Phosphate mining was carried out on some of the Phoenix Islands from the early to mid 20<sup>th</sup> Century and it had a detrimental impact on

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<sup>418</sup> Thomas 2009: 569

<sup>419</sup> Yamaguchi et al. 2009: 542

<sup>420</sup> Thomas 2009: 572

<sup>421</sup> Thomas 2009: 572

the environment, e.g. the elevation of Banaba Island went from c. 80 metres to 20-30 metres.<sup>422</sup> An airstrip was established on remote Kanton Island in the Phoenix Group by Pan Am from 1939-1965 to facilitate the Trans-Pacific air route.

Japan occupied the Gilbert Islands three days after the attack on Pearl Harbor, but lost them to US forces in late 1943. When the Battle of Tarawa commenced in November 1943 on the island of Betio, Japan's forces had its 'defenses nearly impregnable' with 14 large coastal defense guns and 500 pillboxes.<sup>423</sup> In four brutal days of fighting, about 6400 Japanese, Koreans and Americans had died, the first major offensive by the US in the central Pacific Region. As a result of their victory, the US had an airfield on Betio in which to launch aircraft to bomb the Marshall Islands.

During continued British rule, the process to independence began in the 1960s and 1970s with an Executive Council established in 1963, a House of Representatives in 1967 and a Legislative Council in 1970. In 1975, the colony was divided into two parts with the Gilbert Islands to become Kiribati and the Ellice Islands to become Tuvalu. Self-government was achieved in 1977 and in 1979, with a new Constitution, the Republic of Kiribati came into being.<sup>424</sup> Various atolls in the Phoenix and Line atolls were claimed by the British and US from the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries, and they were all became part of the independent nation of Kiribati in 1983.

### 4.3 UCH-RELATED LAWS

The Constitution and laws of Kiribati do not address UCH directly, but a number may be pertinent to the protection of UCH and the possible implementation of the UCH Convention. Those considered are:

Constitution of the Republic of Kiribati

Environment Act 1999

Foreshore and Land Reclamation (Amendment) Act 2005

Maritime Zones (Declaration) Act 2007

Phoenix Islands Protected Area Conservation Trust Act 2009

Maritime Act 2017

Seabed Minerals Act 2017

#### 1. Sovereignty and territoriality

<sup>422</sup> <https://www.sbs.com.au/news/an-island-destroyed-from-tropical-paradise-to-ghostly-mining-town> Accessed 29 November 2018

<sup>423</sup> Sears 2016: 42

<sup>424</sup> Tsamenyia, Maritn, 'Kiribati; in Ntummy, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 75-77. See also Jennifer Corrin and Don Patterson *Introduction to South Pacific Law* (4<sup>th</sup> ed intersentia 2017) 16.

The sovereignty of the Republic of Kiribati established in the Constitution<sup>425</sup> extends to the maritime zones declared in the *Maritime Zones (Declaration) Act* 2011<sup>426</sup>. The Act sets out the relevant maritime zones, including archipelagic waters, in a manner that implements the UN Convention of the Law of the Sea. This enables the implementation of the UCH Convention including articles 7-12. The adoption of the *Seabed Minerals Act* 2017 is of significance given the impact seabed exploration and exploitation might have on UCH. The adoption of this legislation thus impacts not only on the implementation of articles 9-12 of the UCH Convention, but also on article 5 in relation to activities incidentally affecting UCH, such as seabed mining. This will require detailed consideration and some amendment should Kiribati become a party to the UCH Convention.

## 2. Legal Pluralism

Importantly, the *Laws of Kiribati Act*<sup>427</sup> defines ‘customary law’ as comprising ‘the customs and usages, existing from time to time, of the natives of Kiribati’ and provides that it is to have effect, except to the extent that it is inconsistent with legislation<sup>428</sup>, including that which pre-existed independence and has not effectively been repealed. This Act also provides for that the common law is the ‘common law, including the doctrines of equity, of England ... as applied in the circumstances pertaining, from time to time in Kiribati’.<sup>429</sup> This common law does not, however, have affect if it is inconsistent with an enactment or inconsistent with customary law in respect of a particular matter to which it applies.<sup>430</sup> Customary law including that pertaining to land, and which may extent into the maritime zones or include rights in maritime zones, is of significance in Kiribati. This can significantly complicate the implementation of the UCH Convention.<sup>431</sup>

## 3. Cultural heritage and the competent authority

Kiribati does not appear to have any legislation dedicated specifically to the protection of cultural heritage. That is not to say it is not protected, but it appears that the protective mechanism is the application of customary law that will provide rights with respect to cultural heritage that may provide a basis for protection. Some heritage, such as World Heritage pursuant to the World Heritage Convention is addressed in substantial 2007 amendments to the 1999 Environment Act and discussed below.

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<sup>425</sup> Constitution of Kiribati chapter I(1).

<sup>426</sup> Repealed and replaced Replaced the *Maritime Zones (Declaration) Act* 1983 and subsequent amendments.

<sup>427</sup> *Laws of Kiribati Act* 1989 s5(1).

<sup>428</sup> *Laws of Kiribati Act* 1989 s5(2)

<sup>429</sup> *Laws of Kiribati Act* 1989 s6(1).

<sup>430</sup> *Laws of Kiribati Act* 1989 s6(3).

<sup>431</sup> Jennifer Corrin and Don Patterson *Introduction to South Pacific Law* (4<sup>th</sup> ed intersentia 2017) 52-63.

#### 4. Maritime Law

In 2017 Kiribati adopted a new *Maritime Act*.<sup>432</sup> It provides the basis for regulation of Kiribati flagged vessels and of foreign vessels entering Kiribati waters and ports. Included in the act was a section on wrecks and hulks.<sup>433</sup> A wreck includes a vessel that is wrecked, stranded, sunk or abandoned; or is lying on the sea-bed within the territorial seas of Kiribati<sup>434</sup>, thus including within scope UCH. However, the Act is designed to address contemporary wrecks, especially those that pose some risk to Kiribati, such as a pollution or navigational risk. It does however include powers that could be used to protect UCH, such as the ability to declare prohibited areas around wrecks.<sup>435</sup>

However, it did not repeal and replace the *Wreck and Salvage Ordinance* 1966.<sup>436</sup> This pre-independence ordinance has continued to apply pursuant to the Constitution and created in Kiribati a wreck regime substantially similar to that in United Kingdom, with a receiver of wreck, the application of salvage law and a claim by the state of unclaimed wreck subject to payment of salvage and receiver of wreck fees.<sup>437</sup> Not only is this legislation outdated even for the purpose for which it was created, but it is inconsistent with the UCH Convention and would require amendment to take UCH as defined in the Convention out of this salvage and wreck regime.

#### 5. Environmental law

The Environment Act<sup>438</sup> provides a protective regime for the marine environment and extend to the territorial waters and exclusive economic zone.<sup>439</sup> The Act created the Environment and Conservation Division to address a range of matters pertinent to the protection of the marine environment. This includes the creation of protected areas that subject activities within those areas to regulation and oversight.<sup>440</sup> In February 2008, the Government promulgated the Phoenix Islands Protected Area Regulations 2008, thereby creating the Phoenix Islands Protected Area<sup>441</sup>, the largest marine protected area in the world. In 2010 this was added to the World heritage List.

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<sup>432</sup> *Maritime Act* 2017, which repealed and replaced the *Shipping Act* 1990, *Shipping Amendment Act* 1998 and *Shipping Amendment Act* 2001.

<sup>433</sup> *Maritime Act* 2017 Part XXI.

<sup>434</sup> *Maritime Act* 2017 s244(1).

<sup>435</sup> *Maritime Act* 2017 s6(vii).

<sup>436</sup> *Wreck and Salvage Ordinance* 1966 as amended.

<sup>437</sup> *Wreck and Salvage Ordinance* 1966 as amended s32.

<sup>438</sup> *Environment Act* 1999 as amended by *Environment (Amendment) Act* 2007.

<sup>439</sup> *Environment (Amendment) Act* 2007 s5.

<sup>440</sup> *Environment (Amendment) Act* 2007 Division2 ss 42- 47.

<sup>441</sup> See also *Phoenix Islands Protected Area Conservation Trust Act* 2009 and *Phoenix Islands Protected Area Regulation (amendment) Act* 2014.

The Environment Act<sup>442</sup> includes as one of its objectives, ‘to protect, conserve and promote heritage’.<sup>443</sup> Heritage is defined as including ‘a place, feature, structure or object that has aesthetic, archaeological, historic, cultural, natural, scientific or social significance or other special value for the present community and for future generations’.<sup>444</sup> For the most part, however, the Act merely provides for regulation of World Heritage area<sup>445</sup> which, for Kiribati, consists only of one natural site - Phoenix Island Protected Area. It does though make it an offence for a person to cause harm to the cultural heritage or natural heritage of an area included on the World Heritage list, other than in accordance with an environment licence’.<sup>446</sup>

While this regime is not dissimilar to that which could be created to give effect to the UCH Convention, the management of cultural heritage does not always follow environment principles and the competent authority ought to be one dedicated to heritage protection.

The Foreshore and Land Reclamation (amendment) act 2005 amended the 1977 Foreshore and Land Reclamation Ordinance of the Gilbert Islands in order to strengthen the recognition of customary rights over the foreshore of our lands. The 1977 Ordinance asserted Crown ownership of the foreshore subject to public rights of navigation, and passing over the foreshore, and to any private rights that may exist in or over the foreshore or the sea-bed.<sup>447</sup> The central aim of the Ordinance was to control the removal of sand, gravel, reef mud, coral, rock or ‘other like substance’ without a permit,<sup>448</sup> and to allow for land reclamations that extinguished all existing rights subject to compensation.<sup>449</sup> The 2005 amendment ensured that private right holders to the foreshore could agree compensation levels before any resource extraction could occur.<sup>450</sup> While this does not directly cover UCH on the foreshore, the control of resource extractions and land reclamation could have a direct impact on UCH.

#### 4.4 UCH-RELATED PROGRAMMES AND INITIATIVES

Prepared questionnaires were distributed and feedback was obtained from the Kiribati Ministry of Internal Affairs, and Archaeologists Dr. Frank Thomas and Dr. Ania Kotarba-Morley. This feedback has been incorporated in the details that follow, in addition to the authors’ research (see Appendices 1-3 for the information sought in the questionnaires).

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<sup>442</sup> *Environment Act* 1999 as amended by *Environment (Amendment) Act* 2007.

<sup>443</sup> *Environment (Amendment) Act* 2007s4.

<sup>444</sup> *Environment (Amendment) Act* 2007s3(h).

<sup>445</sup> *Environment (Amendment) Act* 2007s48.

<sup>446</sup> *Environment (Amendment) Act* 2007s28.

<sup>447</sup> *Foreshore and Land Reclamation Ordinance* 1977 s 3(1).

<sup>448</sup> *Foreshore and Land Reclamation Ordinance* 1977 s 3(3).

<sup>449</sup> *Foreshore and Land Reclamation Ordinance* 1977 ss 4-12.

<sup>450</sup> *Foreshore and Land Reclamation (Amendment) Act* 2005 s 4.

#### 4.4.1 Types of UCH

Kiribati has ‘submerged sites [that] are culturally linked to the past, relating unique story-telling, songs, navigation, legends, skills, material cultures, healings and dances. Sites include the remains of traditional settlements, meeting places, burial sites and ancient fish weirs.’ Divers have seen ‘erect pillars on the sea floor and confirmed that they are laid out like the plan of a traditional Maneaba [meeting house] at Temotu.’<sup>451</sup> ‘Burial sites exist at Bike in Abemama and Nei Teinaiaeta in Butaritari...Bike island has been inundated and according to legend used to serve as a cemetery’.<sup>452</sup>

A number of shipwrecks can be found in Kiribati, comprising whaling vessels from the 19<sup>th</sup> century, WWII shipwrecks, including the US escort carrier *Liscome Bay* and two Japanese submarines. Numerous remains from the WWII battle fought at Tarawa can be found underwater, and some are being salvaged for their scrap metal. Archaeological and historical data provides good evidence that Amelia Earhart and Fred Noonan landed at Nikumaroro Island in their round the world flight in 1937 and their aircraft is laying somewhere in the adjacent waters, which also contains the remains of the vessel *Norwich City*.<sup>453</sup> Fish traps related to the Polynesian occupation of Nikumaroro, Orona, Manra and Rawaki in the 12<sup>th</sup>-14<sup>th</sup> Centuries AD can also be seen there.



Figure 14: Kiribati fish trap. Source: Frank Thomas, c. 1994-2017

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<sup>451</sup> UNESCO 2010: 53

<sup>452</sup> UNESCO 2010: 53

<sup>453</sup> King 2018





Figure 15: Kiribati fish trap. Source, Frank Thomas, c. 1994-2017



Figure 16: Remains of the vessel *Norwich City* which ran aground on Nikumaroro (Gardner Island) in the Phoenix Group in 1929. Source: Frank Thomas, 2016



Figure 17: Remains of a US Sherman medium tank at Tarawa. Source: Frank Thomas, c.1994-2017

Natan Itonga<sup>454</sup> provided the following information about fish traps:

Kiribati fish traps are an element that has great value for families. They represent the art of fishing, an art of underwater construction and a holistic three-dimensional art. Custodians have property ownership rights, which require legal registration by custodians and include demarcation for each on the reefs. The varied designs depict the different types used to catch different fish species, by height and shape. Similarly, the different islands of Kiribati have different styles and designs for their fish traps. The skill in their construction requires magic and unique skills which differentiate ordinary people and the experts, not everyone can master the same skill of building fish traps. Fish traps in Kiribati are a Traditional Knowledge and Skill that is beginning to be ignored and it is vital that they are documented, mapped, registered, preserved and safeguarded.

In the Phoenix Islands, fish traps are seen to have ‘detrimental effects on the foreshore (erosion) and in affecting the free movements of fish so all can access.’<sup>455</sup>

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<sup>454</sup> Natan Itonga 2018 pers. comm. Cultural Heritage Consultant, Formerly Cultural Officer, Cultural Centre and Kiribati Museum

<sup>455</sup> Kiribati Ministry of Internal Affairs 2018, pers. comm.



#### 4.4.2 Programmes related to tangible and intangible UCH

Traditional laws and cultural practices have been used in the past to safeguard the marine ecosystem, given the ‘reef area into the sea (beyond the breakers) is seen as a dwelling place of our ancestors and spirits but since colonization traditional laws and practices have faded.’<sup>456</sup>

However, ‘unlike the US TTPI (“American Micronesia”), which have benefitted from the historic preservation program of the USNPS, Kiribati lacks a comprehensive heritage-management agenda. This is largely attributable to limited financial resources.’<sup>457</sup> The one programme that includes UCH in its remit is the World Heritage site known as the Phoenix Islands Protected Area (PIPA). Objectives contained in the PIPA Management Plan include: ‘to preserve, protect, and manage historical and cultural sites and natural aesthetic values’<sup>458</sup> but PIPA staff are few and with a small budget, and an active UCH programme is beyond their present capabilities. To enhance the safeguarding of areas in the PIPA, terrestrial and marine areas are closed off to fishing to assist in the management of the areas, whereas the community living on Kanton Island can take fish from selected areas under a quota system.

The UCH programme is very much linked to the Government's vision for the next twenty years known as the KV20 for the reviving of culture and heritage including ICH and TCH.<sup>459</sup>

#### Gaps to address to join and implement the UCH Convention

It was shown by the FSM that ratification is possible primarily through political will. Kiribati has a similar cultural identity related to the coast and sea as the FSM.

The gaps in being able to implement a UCH programme are similar but also greater when compared to other Micronesian countries, i.e., a lack of finances, and a lack of trained personnel and appropriate equipment to implement a whole of nation programme. A small group managing the PIPA World Heritage site could assist in managing UCH in PIPA but not for the whole Nation. There is no other existing group that could be given the responsibility for a UCH programme, although it could possibly fall within the focus of the Cultural Centre and Museum, or the Office of the President.<sup>460</sup>

These offices would need to work with the community, chiefs and traditional owners, which is an important aspect in UCH-related programmes, in addition to dive operators and foreign tourist

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<sup>456</sup> Kiribati Ministry of Internal Affairs 2018, pers.comm.

<sup>457</sup> Thomas 2009: 571

<sup>458</sup> <https://whc.unesco.org/document/105314> Accessed 29 November 2018

<sup>459</sup> Kiribati Ministry of Internal Affairs 2018, Personal Communications

<sup>460</sup> Thomas and Kotarba-Morley 2018, Personal Communication.

divers. A community engagement programme would therefore need to be considered and developed.

An inventory on the full range of UCH should also be a priority in developing a programme.

There is also a perception issue that should also be addressed. UCH is a poor cousin in the built heritage, archaeological heritage, and the ICH world—it is a marginalized heritage. And yet in SIDS, their heritage is inexplicably linked to the coast and sea. UCH needs to be brought up to the same level, through publicly showcasing the different types of UCH—that it is not all about colonial shipwrecks—and that it is related to important contemporary heritage and linked to ICH and the other fields. This information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the significance of UCH in the cultural identity of people from SIDS in all levels of the community would assist furthering UCH-related programmes.

#### **4.4.3 Civil society initiatives**

An investigation into the disappearance of Amelia Earhart and Fred Noonan in their round-the-world flight in 1937 by the nonprofit group The International Group for Historic Aircraft Recovery (TIGHAR) led them to Nikumaroro Island in Kiribati, and while remains have been found to suggest they lived their last days on the island, the aircraft is considered to have sunk into the surrounding waters.<sup>461</sup>

An incomplete database of the WWII sites in Kiribati, and in other areas of Micronesia can be found online, some with geographical coordinates to a degree that might provide the accuracy to allow for people to find the site.<sup>462</sup> Given the recent issues to do with the illegal and unethical salvage of WWII shipwrecks in Indonesia and Malaysia—for the pre-radioactive metal—this information could open up these sites for similar looting.<sup>463</sup>

#### **4.4.4 UCH Safeguarding beyond the cultural sector (Sustainable Development Goals)**

The various SDG that are considered to provide a link to safeguarding different types of UCH, include: SDG 2, Zero hunger; SDG 3, Good Health and Well-being; SDG 4, Quality Education; SDG 8 Decent Work and Economic Growth; SDG 12 Responsible Consumption and Production; SDG 13 Climate Change; SDG 14 Life Below the Water; SDG 17, Partnerships.

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<sup>461</sup> King 2018

<sup>462</sup> [https://en.wikipedia.org/wiki/List\\_of\\_shipwrecks\\_of\\_Oceania](https://en.wikipedia.org/wiki/List_of_shipwrecks_of_Oceania) Accessed 1 December 2018

<sup>463</sup> <https://www.theguardian.com/world/ng-interactive/2017/nov/03/worlds-biggest-grave-robbery-asias-disappearing-ww2-shipwrecks> Accessed 1 December 2018

Kiribati has 20 partnerships in its 12 identified SDG, and 14 in SDG 14, Life Below the Water (see Figure 8).

There is the potential to develop ecotourism related to Kiribati's fish weirs, as highlighted in Yap (FSM), in association with the tourist resources on Abaiang and Abemama. Traditional cultural practices related to fishing in general could supplement the game fishing carried out on Kiritimati.<sup>464</sup>

A vision for the sustainable development of Kiribati 'KV20' identifying amongst other things, marine resources and tourism (being pertinent to UCH) are seen as key issues to sustainably develop.<sup>465</sup>

The vision of the KV20 is for Kiribati to become a wealthy, healthy and peaceful nation. It seeks to achieve the development aspiration by maximising the development benefits from fisheries and tourism as key productive sectors.

The nexus between tourism and culture is one of the priority areas for the KV20. It is in this context, that Government will strive to safeguard, revive and promote tangible and intangible cultural and historical heritages evident across the chants, music, dance and craft heritage sectors as well as the significant remnants from World War II. Government will also redefine the mission, the goals, the functions and the strategies of our national museum for the promotion and better understanding of our cultural heritage and our agenda for national growth and development in the next twenty years.

The Phoenix Islands Protected Area (PIPA) has been inscribed as a World Heritage Site under the Convention on the Protection of World Cultural and Natural Heritage. PIPA is now a marine protected area and many more cultural properties and cultural treasures need to be nationally identified and registered.

KV20 recognised Kiribati's 'vulnerability to climate change as a key constraint to achieving the desired outcomes...and the need to further mainstream climate change adaptation and mitigation into various programmes.'

Kiribati is working in partnership with many partners on a number of Sustainable Development Goals, of which many are pertinent to UCH, including:<sup>466</sup>

- Oceania 21: Oceania Conference involving many SIDS, SPREP, France...;
- PacSIDS Ridge to Reef Programme Partnership: 'program is to maintain and enhance Pacific Island countries' ecosystem goods and services (provisioning, regulating, supporting and cultural) through integrated approaches to land, water, forest, biodiversity

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<sup>464</sup> Thomas & Kotarba-Morley 2018, Personal Communication

<sup>465</sup> Kiribati 20-year vision 2016-2036, KV20: <http://www.mfed.gov.ki/sites/default/files/KV20%20VISION.pdf>  
Accessed 2 December 2018

<sup>466</sup> <https://sustainabledevelopment.un.org/memberstates/kiribati>

and coastal resource management that contribute to poverty reduction, sustainable livelihoods and climate resilience;’

- **Sustainable Living:** ‘sustainable production and consumption patterns as a key driver of sustainable development...emerged as a recognition of culture as an enabler of sustainable development with the usage of phrases such as "culture of sustainable living.’

The Focal Point for SDG in Kiribati: Mr. Taneti Maamau, Permanent Secretary, Ministry of Finance and Economic Development, Tarawa.

### **Gaps to address safeguarding UCH for Sustainable Development**

An important priority to be addressed should be the issue of perception—that safeguarding UCH can play an important role in sustainable development, and that it can be used in a number of SDGs. Information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the role of UCH in sustainable development to all levels of the community would be beneficial. This information should be disseminated to established partners and to emerging partners, at a local level through to regional and inter-regional level.

Kiribati should coordinate with other Micronesian countries and formulate a strategy for safeguarding UCH in their SDGs and National Sustainable Development Strategy, and to communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others.

As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs.

## **Kiribati Recommendations**

RECOMMENDATION: Kiribati becomes party to the UCH Convention and adopt a new Act to give effect to the UCH Convention or, given its lack of a specific Act to address cultural heritage more broadly, one that would do so and encompass UCH within the broader scope. Consequential amendments would need to be made to a small number of other Acts such as the *Maritime Act* and *Wreck and Salvage Ordinance*.

RECOMMENDATION: Whether or not Kiribati becomes a party to the UCH Convention, consideration should be given to adopting an Act dedicated to the protection of cultural heritage, including UCH. The *Maritime Act* and *Wreck and Salvage Ordinance* should be amended to take UCH out of their respective scopes.

RECOMMENDATION: Raise awareness about the value of UCH and its need for safeguarding from the local level through to the heads of government.

RECOMMENDATION: Develop local human capacity and acquire resources to implement project-based UCH activities in association with other Micronesian countries and specialist partners.

RECOMMENDATION: Raise awareness about the varied career paths that could be pursued if UCH-related programmes are seen in a broader context, such as with the SDGs as well as the cultural sector.

RECOMMENDATION: A UCH site database is a very useful resource and should be pursued. However, the database should not contain geographical coordinates to the degree that might provide the accuracy to allow for people to find the site and salvage materials illegally and unethically.

RECOMMENDATION: Raise awareness about the value of safeguarding UCH and its role in the SDG and disseminate information to the broad community, from heads of government, politicians, traditional chiefs and households.

RECOMMENDATION: Given the commitment to SDG 14: Life Below the Water and the far greater number of partnerships compared to other SDG, the development of UCH safeguarding with the current partnerships should be investigated.

RECOMMENDATION: Coordinate the awareness raising strategies (for UCH safeguarding *per se* and its role in SDGs) across the Micronesian region.

RECOMMENDATION: Kiribati should coordinate with other Micronesian countries and consider formulating a strategy for safeguarding UCH in their SDGs and communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others. As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs, notably the fish weir UCH and the WWII-related UCH.

RECOMMENDATION: The value and integration of UCH safeguarding should be identified in KV20, particularly in the areas of marine resource conservation, maintaining traditional cultural practices and tourism.

Funding opportunities exist to assist local communities through organisations and foundations that support cultural, environmental and scientific projects, and they should be pursued to support UCH in Micronesia.

RECOMMENDATION: Funding for local communities should be a priority and they should benefit from maintaining their UCH and UCH-related ICH.

RECOMMENDATION: Major financial sponsorship of a UCH team to implement a UCH programme at the country and/or regional level could be investigated with an enticement being the team/programme is sponsor branded

RECOMMENDATION: As a nation and/or the region, a champion/spokesperson/ambassador of high status be appointed to raise the level of UCH with government, the media and within the community.

## 5. NAURU

### 5.1 LOCATION/GEOGRAPHICAL INFORMATION

Nauru is a single raised coral-limestone island surrounded by reef, with an area of 21 km<sup>2</sup>. Lying just south of the equator (Longitude 167°E, Latitude 0.5°S), it is 770 km south of Kosrae in FSM, and 1250 km north east of the Solomon Islands. It is one of the smallest independent states in the world, and one of the most remote.<sup>467</sup> In 1906 the island was mined for its large reserves of phosphate, until the 1980s. Phosphate mining and export was resumed in 2005, with an estimated remaining life of about 30 years.<sup>468</sup>

The population of Nauru is about 11,300.

### 5.2 HISTORICAL BACKGROUND

The Nauruan Department of Economic Development and Environment state that ‘the indigenous people of Nauru are Micronesian, who have probably inhabited the island for up to 3,000 years or more’<sup>469</sup> although Irwin, who studied indigenous exploration and colonization of the Pacific, considered Nauru a ‘discontinuity of a cultural kind...and not settled earlier because people chose not to sail in its direction...and the language a linguistic isolate.’<sup>470 471</sup>

The first European contact with Nauru is recorded as being British Captain John Fearn of the whaling ship *Hunter* in 1798, who named it the “Pleasant Island”. The island was used to replenish water by whalers, resulting in ‘European beachcombers settling on the island.’<sup>472</sup> Germany incorporated Nauru into the Imperial German Protectorate in 1886 on the urging of German trading companies because of the coconut oil and copra they acquired from the 1,000 Nauruans and a few Europeans who inhabited the island.<sup>473</sup> Following the discovery of phosphate on Nauru in 1900, German and British companies using indentured labor from Nauru, the Carolines and China to mine the phosphate, significantly increased the economic importance of the island but ultimately

<sup>467</sup> See Mary Nazzari, *Nauru: An Environment Destroyed and International Law* (2005) available at <http://www.lawanddevelopment.org/docs/nauru.pdf>

<sup>468</sup> <http://www.naurugov.nr/about-nauru/our-country.aspx> Accessed 29 November 2018

<sup>469</sup> <https://web.archive.org/web/20110722013720/http://www.unccd.int/cop/reports/asia/national/2002/nauru-eng.pdf>  
Accessed 30 November 2018

<sup>470</sup> Irwin 1994: 118, 209

<sup>471</sup> No archaeological investigations were found to confirm or dispute these assertions.

<sup>472</sup> Spennemann 2002: 552

<sup>473</sup> Kühnast 2016: 44

devastated it environmentally and culturally.<sup>474 475</sup> ‘The German government’s negligence and the mining companies greed caused the devastating health situation on Nauru.’<sup>476</sup> German rule ended at the beginning of WWI with occupation of Nauru by Australian troops. Following Germany’s defeat in 1918, Nauru was administered by Britain as a League of Nations mandate with Australia assuming de facto administration. In 1942 Japan occupied Nauru and deported two-thirds of the population to work in Chuuk lagoon, a major Japanese base in FSM. The US bombed the Japanese airstrip on Nauru in 1943, but essentially bypassed it during the war. Following Japanese surrender in 1945, the deportees returned, and Australia was granted a mandate by the United Nations. From 1950, the slow process towards self-governance began and independence finally achieved in 1968.<sup>477</sup>

‘Today the people of Nauru are comprised of 12 tribes, as symbolized by the 12-pointed star on the Nauru flag and are believed to be a mixture of Micronesian, Polynesian and Melanesian descent.’<sup>478</sup>

### 5.3 UCH-RELATED LAWS

The Constitution and laws of Nauru do not address UCH directly, but a number may be pertinent to the protection of UCH and the possible implementation of the UCH Convention.<sup>479</sup> Nauru presents a particularly interesting case as there appears to be a number of pre-independence statutes that may continue to be relevant to current law. These include a number association with wreck - *Wreck and Salvage Ordinance* 1902 and the *Salvage of Derelict Wreck Act* 1969 - and until 2017, the *Nauru Antiquities Ordinance* 1935.

The legislation that appears to be relevant to the protection of UCH and the possible implementation of the UCH Convention include:

Constitution of Nauru  
Customs and Adopted Laws Act 1971  
Statute Law Revision Act 2011  
Sea Boundaries Act 1997  
National Heritage Act 2017  
Wreck and Salvage Ordinance 1902  
Salvage of Derelict Wreck Act 1969

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<sup>474</sup> See Mary Nazzari, *Nauru: An Environment Destroyed and International Law* (2005) available at <http://www.lawanddevelopment.org/docs/nauru.pdf>

<sup>475</sup> Kühnast 2016: 45

<sup>476</sup> Kühnast 2016: 45

<sup>477</sup> Delkin, Tony, ‘Nauru’ in Ntumu, Michael A (ed.) *South Pacific Islands Legal Systems* (University of Hawaii Press, 1993) 142-143.

<sup>478</sup> <http://www.naurugov.nr/about-nauru.aspx> Accessed 29 November 2018

<sup>479</sup> [http://ronlaw.gov.nr/nauru\\_lpms/](http://ronlaw.gov.nr/nauru_lpms/)



Rehabilitation Corporation Act 1997  
 Lands Act 1976  
 Nauru Fisheries & Marine Resources Authority Act 1997  
 Nauru Fisheries and Marine Resources Authority (Amendment) Act 2016  
 Marine Resources Act 1978  
 Fisheries Act 1997

### 1. Sovereignty and territoriality

While the Constitution of Nauru declares its sovereignty, the territorial scope of that sovereignty is not addressed in the constitution, but in the *Sea Boundaries Act*.<sup>480</sup> The Act sets out the various maritime zones provided for in the UN Convention on the Law of the Sea and is compatible with the UCH Convention.<sup>481</sup>

### 2. Legal Pluralism

Section 85 of the Constitution provides that legislation predating independence continued in force. As such Acts – called Ordinances pre-independence – continue in force unless repealed. As will be evident in the section dealing with wreck and salvage some pre-independence ordinances are still in force.

The *Customs and Adopted Laws Act* 1971 adopts both the common law and principles of equity in force in England in force on 31 January 1968 – the date of independence.<sup>482</sup> The Act also provides that this common law is subject to the ‘customs and usages of the Nauruans to the extent that they existed immediately before the commencement of the Act unless abolished, altered or limited by any law enacted by Parliament.’<sup>483</sup> In particular, this applies to title to, and interests in, land.<sup>484</sup> This may have an impact on the regulation of UCH in land subject to this custom and usage.

### 3. Cultural heritage and the competent authority

In 2017, the *National Heritage Act* was adopted and finally repealed the *Nauru Antiquities Act* 1935.<sup>485</sup> At the same time, it does adopt some of the earlier Act, including its definition of a ‘Nauru

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<sup>480</sup> *Sea Boundaries Act* 1997

<sup>481</sup> See also the *Sea Boundaries Proclamation* 1997.

<sup>482</sup> *Customs and Adopted Laws Act* 1971 s4.

<sup>483</sup> *Customs and Adopted Laws Act* 1971 s3.

<sup>484</sup> Jennifer Corrin and Don Patterson *Introduction to South Pacific Law* (4<sup>th</sup> ed intersentia 2017) 52.

<sup>485</sup> Originally the *Nauru Antiquities Ordinance*, subsequent amendments have merely been technical, replacing, for example ‘Administrator’ with ‘Minister’ and ‘Crown’ with ‘Republic’ so as to make it appropriate for the independence state of Nauru. See *Executive Council Ordinance* 1966, *Ordinances Revision Ordinance* 1967 and *Statute Law Revision Act* 2011.

Antiquities’ as ‘including Nauru relics and curios and articles of ethnological and anthropological interest or value and articles manufactured by the natives according to Nauru methods and historical remains of any description, and such other articles or things of historical or scientific value or interest and relating to Nauru as may be prescribed.’<sup>486</sup>

However, unlike the old Act, the 2017 Act includes a definition of site, meaning ‘an area declared by an order ... which includes any area of land or sea bed on which such object is situated’ – thus applying potentially to UCH.<sup>487</sup> Importantly, it includes ‘war relics’ – being any object or artefact brought into the Republic by or for the use of any combatants in World War II – as objects of heritage.<sup>488</sup> This too might include UCH.

The Act provides for a regime to protect objects of heritage *in situ*. It allows the Minister to declare any area around an object of heritage as a protected area if the site is, or may prove to be, a heritage site; and on account of the historical, archaeological or artistic importance of the object, the site ought to be protected from unauthorised interference.<sup>489</sup> A person commits an offence if in a protected area he or she tampers with, damages or removes any object; or carries out excavation operations directed to the exploration of any site or to removing any part from the object or from the ground, or uses an equipment constructed or adapted for any purpose of excavation operations without a licence.<sup>490</sup> This would facilitate the form of protection of UCH as envisaged in the UCH Convention. The Minister then has the authority to grant excavation licences on application provided the applicant is properly equipped, to carry out excavations in a manner appropriate to the historical, archaeological or artistic importance of any object which may be lying in the area or have any other legitimate reason for carrying out excavations in the area.<sup>491</sup> The Act also regulates the export of objects of heritage<sup>492</sup> and provides that ‘All objects of heritage vests in the Republic’.<sup>493</sup> This is potentially problematic with respect to UCH such as sovereign vessels, including those of WWII.

The Act creates the office of the Director of National Heritage.<sup>494</sup> The functions and powers of the Director include many which would allow the office of Director to give effect to the duties required of the competent authority pursuant to the UCH Convention. These include, for example:

<sup>486</sup> *National Heritage Act 2017* s 3. cf. *Nauru Antiquities Act 1935* s 2.

<sup>487</sup> *National Heritage Act 2017* s 3.

<sup>488</sup> *National Heritage Act 2017* s 3.

<sup>489</sup> *National Heritage Act 2017* s 13..

<sup>490</sup> *National Heritage Act 2017* s 13(3). Any person who commits an offence under this section shall upon conviction be liable to a fine not exceeding \$20,000 or to a term of imprisonment not exceeding 2 years or to both.

<sup>491</sup> *National Heritage Act 2017* s 19.

<sup>492</sup> *National Heritage Act 2017* ss 15-17

<sup>493</sup> *National Heritage Act 2017* s 9(1).

<sup>494</sup> *National Heritage Act 2017* s 5.

maintaining the National Heritage Register<sup>495</sup>, identifying, recording, investigating, assessing, listing, protecting and conserving historic places, historic areas, or enter such places which have heritage value; fostering public interest and involvement in historic places and areas.<sup>496</sup> With some amendment, this Act might form the basis for the implementation of the UCH Convention.

#### 4. Maritime Law

The *Wreck and Salvage Act 1902*<sup>497</sup>, like the Kiribati *Wreck and Salvage Ordinance 1966*, effectively copies the British Merchant Shipping Act 1894 regime as it applies to wrecks and salvage.<sup>498</sup> It thus creates a receiver of wreck (magistrates in Nauru), applies salvage law and provides for a claim by the state of unclaimed wreck subject to payment of salvage and receiver of wreck fees.<sup>499</sup> However, in force is also the *Salvage and Derelict Act 1969*. It too provides for a receiver of wreck, and sets out a substantially similar regime to that provided for in the *Wreck and Salvage Act 1902*. However, the *Salvage and Derelict Act 1969* was enacted to encourage Nauruan vessels to undertake salvage operations when appropriate, and indeed, it requires Nauruan vessel to ‘use their best endeavours to salve any wreck observed or found by them and apparently of the value of Five hundred dollars or more unless the salvage thereof would unduly interfere with the vessel's safety or schedule’.<sup>500</sup> In such a case, the receiver of wreck functions in the same way as that which applies to any wreck reported to the receiver of wreck pursuant to the *Wreck and Salvage Act 1902*. Neither Act, however, is appropriate for the regulation of UCH and would require amendment to take UCH out of the wreck and salvage regime.

#### 5. Environmental law

Environmental issues in Nauru are dominated by the effect of long term and continued phosphate mining<sup>501</sup>, and its destructive effect on the environment. Despite a call over a decade ago for the development of an *Environment Management Act* to address all environmental issues systematically and coherently, Nauru does not appear to have done so and has no Act dedicated specifically to the protection of the environment.<sup>502</sup> Rather, Nauru has a number of Acts that touch on or are pertinent to the protection of the environment in this context, such as the *Nauru*

<sup>495</sup> *National Heritage Act 2017* s 5(3)(a) and s 6. The Act also refers to the ‘Nauru national Heritage List’ but this is not defined or address in the Act and as such appears synonymous with the National Heritage Register.

<sup>496</sup> *National Heritage Act 2017* s 7.

<sup>497</sup> Subject only to minor amendment by *Laws Repeal & Adopting Ordinance 1922* and *Statute Law Revision Act 2011*.

<sup>498</sup> The *Shipping (Registration of Foreign Vessels) Act 2018* touches on the issue of wrecks that pose a hazard, including giving effect to the IMO 2007 Nairobi Wreck Removal Convention.

<sup>499</sup> *Wreck and Salvage Act 1902* ss 1, 17 and 25.

<sup>500</sup> *Salvage and Derelict Act 1969* s 4.

<sup>501</sup> See Mary Nazzal, *Nauru: An Environment Destroyed and International Law* (2005) available at <http://www.lawanddevelopment.org/docs/nauru.pdf>

<sup>502</sup> Graham Bruce Powell *Nauru: Review of Environment Related Laws* (2007 SPREP) available at <https://www.sprep.org/members/nauru>

*Rehabilitation Corporation Act 1997* and *Lands Act 1976*. Nauru also has legislation that addresses issues in the marine environment, especially fishing, and creates the Nauru Fisheries and Marine Resources Authority.<sup>503</sup> These are pertinent to, though not directly relevant to the protection of UCH, especially activities incidentally affected UCH, such as fisheries – a very important activity in Nauru.

## 5.4 UCH-RELATED PROGRAMMES AND INITIATIVES

Prepared questionnaires were distributed and but no feedback was obtained from anyone in Nauru. It was not possible to find anything about UCH-related programmes in the literature and it is considered no programmes exist.

### 5.4.1 Types of UCH

Nauru has the potential to include tangible and intangible traditional indigenous heritage associated with island living and exploiting the marine resources, such as fish traps and weirs. ‘The traditional subsistence economy of Nauru was based on coconut and pandanus as the main staples, a limited range of wild terrestrial food products, sea birds...and a wide range of fish and other marine foods.’<sup>504</sup>

‘Four WWII shipwrecks are located in Nauru’s waters, the Japanese ships *Minatu Maru* and *Hokushu Maru*, the Italian ship *Romolo* and the British ship *Triadic*, the last two being over 10,000 tons each.’<sup>505</sup> No other types of UCH are known to exist in Nauru, but it is highly likely.

### 5.4.2 Programmes related to tangible and intangible UCH

No feedback was gained from anyone in Nauru on whether any programmes related to intangible and tangible heritage exist, and it has not been possible to find any literature outlining programmes, and it is likely none exist.

Nauru reportedly had a museum established by the Nauru Phosphate Company to highlight the island’s history (known as the Nauru Museum as well as the Nauru Military Museum). It housed primarily Japanese WWII artefacts (munitions, guns and parts of an aircraft) but it closed in the 2000s.<sup>506</sup>

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<sup>503</sup> *Nauru Fisheries & Marine Resources Authority Act 1997 and Nauru Fisheries and Marine Resources Authority (Amendment) Act 2016*. See also *Marine Resources Act 1978 and Fisheries Act 1997*.

<sup>504</sup> <https://web.archive.org/web/20110722013720/http://www.unccd.int/cop/reports/asia/national/2002/nauru-eng.pdf>  
Accessed 30 November 2018

<sup>505</sup> UNESCO 2010: 61.

<sup>506</sup> <https://www.pacificwrecks.com/restore/nauru/index.html> Accessed 30 November 2018

## **Gaps to address to join and implement the UCH Convention**

It was shown by the FSM that ratification is possible primarily through political will alone. Nauru has a similar cultural identity related to the coast and sea as the FSM.

The gaps in being able to implement a UCH programme are similar but also far greater when compared to other Micronesian countries, i.e., a lack of finances, and a lack of trained personnel and appropriate equipment to implement a whole of nation programme. Identifying an Office that would be responsible for implementing a UCH programme is required.

This office would need to work with the community, chiefs and traditional owners, dive operators and foreign tourist divers, and a community engagement programme would therefore need to be considered and developed.

An inventory on the full range of UCH should also be a priority in developing a programme.

There is also a perception issue that should also be addressed. UCH is a poor cousin in the built heritage, archaeological heritage, and the ICH world—it is a marginalized heritage. And yet in SIDS, their heritage is inexplicably linked to the coast and sea. UCH needs to be brought up to the same level, through publicly showcasing the different types of UCH—that it is not all about colonial shipwrecks—and that it is related to important contemporary heritage and linked to ICH and the other fields. This information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the significance of UCH in the cultural identity of people from SIDS in all levels of the community would assist furthering UCH-related programmes.

### **5.4.3 Civil society initiatives**

No related civil society initiatives in Nauru are known to exist.

### **5.4.4 UCH safeguarding beyond the cultural sector (Sustainable Development Goals)**

The various SDG that are considered to provide a link to safeguarding different types of UCH, include: SDG 2, Zero hunger; SDG 3, Good Health and Well-being; SDG 4, Quality Education; SDG 8 Decent Work and Economic Growth; SDG 12 Responsible Consumption and Production; SDG 13 Climate Change; SDG 14 Life Below the Water; SDG 17, Partnerships.

Nauru has 23 partnerships in its eight identified SDG, and 11 in SDG 14, Life Below the Water (see Figure 8).

A number of challenges—pertinent issues relevant to UCH—were highlighted in the Nauru National Sustainable Development Plan,<sup>507</sup> including having an adequate and nutritious food supply; addressing the impact of climate change on its coastline, marine ecosystem and food; and in the education and employment sector, which noted that ‘students should take pride in their Nauruan culture and identity’. It was further noted:

Community-based coastal fisheries management plan are now in place for one district and two others are work in progress, and a legal basis for firming up community-government co-management and establishing marine protected areas has been drafted.

A pertinent strategy in the ‘Traditional Leadership and Culture’ Sector was to ‘Conserve and preserve Nauruan culture, tradition and heritage sites’, which included the recording and documentation of Nauruan culture, tradition and heritage sites, and the establishment of a National Museum, with the Ministry of Home Affairs and Ministry of Education being the responsible government agencies.

A separate tourism related study was made and found that Nauru had only 213 leisure tourists in 2012, with key activities being ‘game fishing for marlin, yellowfin tuna, skipjack and barracuda, tours of phosphate mines and the remnants from Japan’s occupation during World War II, taming of frigate birds, and diving and snorkeling.’<sup>508</sup>

Nauru is working in partnership with many partners on a number of Sustainable Development Goals, of which many are pertinent to UCH, including:<sup>509</sup>

- Oceania 21: Oceania Conference involving many SIDS, SPREP, France...;
- Pacific Island Leaders Meeting (PALM): ‘summit-level meetings of SIDS every 3 years in which Leaders discuss various issues that Pacific Island Countries are facing’
- PacSIDS Ridge to Reef Programme Partnership: ‘program is to maintain and enhance Pacific Island countries’ ecosystem goods and services (provisioning, regulating, supporting and cultural) through integrated approaches to land, water, forest, biodiversity and coastal resource management that contribute to poverty reduction, sustainable livelihoods and climate resilience’

Ms. Margo Deiye, Third Secretary/Sustainable Development Advisor, Permanent Mission of the Republic of Nauru

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<sup>507</sup> Republic of Nauru National Sustainable Development Strategy 2005-2025 (As Revised 2009), <https://sustainabledevelopment.un.org/content/documents/1265NAURU-NSDS2009.pdf> Accessed 2 December 2018

<sup>508</sup> Noakes 2013, Personal Communication. Griffith University.

<sup>509</sup> <https://sustainabledevelopment.un.org/index.php?page=view&type=6&nr=201&menu=139>

## **Gaps to address safeguarding UCH for Sustainable Development**

An important priority to be addressed should be the issue of perception—that safeguarding UCH can play an important role in sustainable development, and that it can be used in a number of SDGs. Information should be disseminated to the broad community, from heads of government, politicians, traditional chiefs, and households. It is considered that raising an awareness about the role of UCH in sustainable development to all levels of the community would be beneficial. This information should be disseminated to established partners and to emerging partners, at a local level through to regional and inter-regional level.

Nauru should coordinate with other Micronesian countries and formulate a strategy for safeguarding UCH in their SDGs and National Sustainable Development Strategy, and to communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others.

As part of this strategy, Micronesian-wide projects should be considered, developed and implemented to showcase how safeguarding particular UCH can play a role in their SDG.

## Nauru Recommendations

RECOMMENDATION: Nauru becomes party to the UCH Convention and adopt a new Act to give effect to the UCH Convention or amend the *National Heritage Act* to do so. Consequential amendments would need to be made to a small number of other Acts such as the *Wreck and Salvage Act and Salvage and Derelict Act*

RECOMMENDATION: Whether or not Nauru becomes a party to the UCH Convention, consideration should be given to adopting an Act dedicated to the protection of cultural heritage, including UCH. The *Salvage and Derelict Act* and *Wreck and Salvage Act* should be amended to take UCH out of their respective scopes.

RECOMMENDATION: Raise awareness about the value of UCH and its need for safeguarding from the local level through to the heads of government.

RECOMMENDATION: Develop local human capacity and acquire resources to implement project-based UCH activities in association with other Micronesian countries and specialist partners.

RECOMMENDATION: Raise and awareness about the varied career paths that could be pursued if UCH-related programmes are seen in a broader context, such as with the SDGs as well as the cultural sector.

RECOMMENDATION: A UCH site database is a very useful resource and should be pursued. However, these databases should not contain geographical coordinates to the degree that might provide the accuracy to allow for people to find the site and salvage materials illegally and unethically.

RECOMMENDATION: Raise awareness about the value of safeguarding UCH and its role in the SDG and disseminate information to the broad community, from heads of government, politicians, traditional chiefs and households.

RECOMMENDATION: Given the commitment to SDG 14: Life Below the Water and the far greater number of partnerships compared to other SDG, the development of UCH safeguarding with the current partnerships should be investigated.

RECOMMENDATION: Coordinate the awareness raising strategies (for UCH safeguarding *per se* and its role in SDGs) across the Micronesian region.



RECOMMENDATION: Nauru should coordinate with other Micronesian countries and consider formulating a strategy for safeguarding UCH in their SDG and communicate with established partners/programmes such as the Micronesian Challenge, PIF, SPC, SPREP and others. As part of this strategy, Micronesian-wide projects should be developed and implemented to showcase how safeguarding particular UCH can play a role in their SDGs, notably the fish weir UCH and the WWII-related UCH.

RECOMMENDATION: The value of UCH safeguarding should be identified in the NSDS, particularly in the areas of marine resource conservation, maintaining traditional cultural practices and tourism.

Funding opportunities exist to assist local communities through organisations and foundations that support cultural, environmental and scientific projects, and they should be pursued to support UCH in Micronesia.

RECOMMENDATION: Funding for local communities should be a priority and they should benefit from maintaining their UCH and UCH-related ICH.

RECOMMENDATION: Major financial sponsorship of a UCH team to implement a UCH programme at the country and/or regional level could be investigated with an enticement being the team/programme is sponsor branded

RECOMMENDATION: As a nation and/or the region, a champion/spokesperson/ambassador of high status be appointed to raise the level of UCH with government, the media and within the community.

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## **Appendix 1: Questionnaire 1**

### **Underwater Cultural Heritage (UCH)-related legislation and programme review in the five countries in Micronesia**

**Federated States of Micronesia, Kiribati, Nauru, Republic of Palau,  
Republic of Marshall Islands**

*This is a questionnaire/information gathering form related to an investigation of the UCH in Micronesia.*

*We would like to hear from you on the questions below and any other information you would like to share. The investigation will essentially be implemented through email, online and not in any face-to-face meetings.*

*Please email the completed questionnaire to, as well as seek further information from, Bill Jeffery: [billjeffery@gmail.com](mailto:billjeffery@gmail.com)*

#### **Scope of the investigation is to provide information on:**

1. UCH-related policies/laws/legislation in each country;
2. UCH-related programmes and initiatives in each country;
3. Enforcement and implementation of these laws and activities, including challenges and opportunities;
4. Areas that could be addressed in order to strengthen the UCH safeguarding for sustainable development and to implement/join the UCH Convention.

#### **Background**

Dr. Craig Forest and Dr. Bill Jeffery through the University of Queensland have been contracted by UNESCO Apia, Samoa Office to carry out this investigation and to provide a report on their findings. Both have extensive experience in UCH laws and programmes in Micronesia and Oceania.

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (UCH Convention) is regarded as the most effective framework in the best practice management of

Underwater Cultural Heritage (UCH). It has been ratified by 60 countries, including the Federated States of Micronesia on 19 April 2018, and it is the only country in Oceania to have done so.

The UCH Convention defines UCH 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’

The UCH Convention has a number of aims and methods in protecting and preserving UCH, with a major aim being the prohibition of commercial exploitation (treasure hunting) of shipwrecks. Other aims include the preservation of a site *insitu*, as a first step, or perhaps the only step in its management. The UCH has broad aims in including all types of UCH, not just shipwrecks, and for it to be recognized ‘as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.’

In recognizing this, the term ‘shipwreck’ is not used in the UCH Convention, being replaced with the term Underwater Cultural Heritage. Other important aims are the need for international cooperation and collaborative management, as well as the management of UCH in providing for cultural tourism.

The UCH Convention is relevant to the countries of Micronesia and Oceania, because of its shipwreck heritage, but also its non-shipwreck UCH can be of greater significance, especially the sites and objects found underwater that provide an islander cultural identity. These sites can include fish weirs, sunken villages and any other trace of human activity that is partially or totally underwater, e.g. the stone money dropped into the sea when being transported between Palau and Yap.

It is also recognized that UCH Convention-related laws and programmes may need to be implemented in association with other types of laws and programmes, such as that covering Intangible Cultural Heritage (ICH) and/or general heritage legislation (Built Heritage). Being related to the coast, sea and inland rivers, implementation of UCH programme activities may need to be carried out in association within a maritime heritage theme, such as boat building, voyaging and navigation.

Your domestic legislation may already cover UCH, but you may not implement UCH-related programme activities for some reason, such as a lack of personnel, experience and resources.

We would therefore like to ask if you could provide information on any of these issues.

Please feel free to provide any further information (in addition to the questions) that you think is relevant.

We have also included you in a dropbox folder which contains the UCH Convention and further information. Please use this to drop copies of any or your related documents/laws/programme outlines. This would be very helpful to us.

Thank you

## Questions

1. What types of Underwater Cultural Heritage (UCH) does your country contain?
2. What laws do you have that recognize, protect and preserve UCH?
  - 2.1 Are these laws effective?
  - 2.2 Would more specific UCH laws be of value
3. Do you have and utilize traditional laws and cultural practices in preserving UCH?
  - 3.1 If you do, how are they used to protect UCH?
4. Do you actively implement projects to preserve UCH (including survey, identification of sites)?
  - 4.1 If you do, please elaborate on what you do
    - 4.1.1 How long have you been implementing these activities?
    - 4.1.2 Are these activities effective?
    - 4.1.3 What staffing, resources do you have in implementing these activities?
5. If you do not implement any UCH programme activities, what would you need to initiate and carry out such a programme?
6. Would some initiative (training, equipment sharing, etc.) between the 5 Micronesian countries assist you in developing a UCH programme?
7. Would broader international support be of benefit—from where and what type of support?
8. Do you think ratification of the UCH Convention would be of benefit to you?
  - 8.1 If you do, what do you see as the main benefit?

9. What is needed to ratify the UCH Convention in your country and how can you be supported in this endeavor?

10. Who in your country should be involved in implementing a UCH programme?

11. Is UCH tourism an important activity, or potentially an important activity?

12. What issues could be addressed to support effective UCH management (support members of the public or owners of UCH/submerged land), or tourism operators?

13. Anything else you would like to add?

## Review of Underwater Cultural Heritage in Micronesia

### Appendix 2: Questionnaire 2

#### Underwater Cultural Resources Laws Heritage (UCH) and Sustainable Development Goals (SDG)

All of the countries of Micronesia are partners in the United Nation's Development Program and have identified a number of Sustainable Development Goals that they are working toward.

Underwater Cultural Heritage (UCH) fits into a number of SDG, including: 3, Good health & well-being; 4, Quality Education; 8, Decent work and economic growth; 11 Sustainable cities and communities; 13, Climate action; 14 Life below water; and 17, Partnerships for the goals.

In our review of the UCH laws, programs and activities in Micronesia, we are keen to see how you think UCH activities could fit into your SDGs; what programs and projects could be or have been enacted, and what partnerships could be sought or have been entered into.

As an example the FSM have made a commitment to Safeguarding Underwater Cultural Heritage in an Emergency Situation, which are related to the environmental hazards emanating from certain World War II shipwrecks in Chuuk Lagoon and have identified partners, being Relevant National Agencies, Chuuk State Government, University of Guam, UNESCO (and JMAS—Japanese Mine Action Service are currently working in Chuuk in retrieving some of the oil leaking from the shipwrecks), <https://oceanconference.un.org/commitments/?id=16691> (SDG 11).

We are aware all of the Pacific Island Nations have identified SDG 14, Life below water, as an important goal and are working on (amongst many other activities) the need to provide sustainable development of coastal fisheries, to sustainably manage the country's marine biodiversity, as well as to have a sustainable tourism industry related to its fishing industry.

*The Negotiating History of the many fish weirs that can be found throughout Micronesia, and which are an important UCH and covered in UNESCO's *Convention on the Protection of the Underwater Cultural Heritage: Before and After the 2001*, would appear to an important heritage that could link UCH and your SDG.*

There would be other types of UCH, that link to SDG 14 and other SDG.

We therefore seek your input into the following short questionnaire.

Please let us know if there is anything else where UCH could link with your SDG.

We are also keen to receive photographs of your UCH, please email to me [billjeffery@gmail.com](mailto:billjeffery@gmail.com), or place into the dropbox folder we created for you: <https://www.dropbox.com/home/UCH%20Review%20in%20Micronesia>

### **Questions**

1. What are your Sustainable Development Goals (SDG)
2. What types of Underwater Cultural Heritage (UCH) are located in your country
3. How could you link UCH with you SDG
4. Who would be your partners in linking UCH and SDGs (in your country), region and world-wide



### **Appendix 3: Questionnaire 3**

#### **Underwater Cultural Heritage (UCH)-related legislation and programme review in the five countries in Micronesia**

**Federated States of Micronesia, Kiribati, Nauru, Republic of Palau,  
Republic of Marshall Islands**

*This is a questionnaire/information gathering form related to an investigation of the UCH in Micronesia.*

*We would like to hear from you on the questions below and any other information you would like to share. The investigation will essentially be implemented through email, online and not in any face-to-face meetings.*

*Please email the completed questionnaire to, as well as seek further information from, Bill Jeffery: [billjeffery@gmail.com](mailto:billjeffery@gmail.com)*

#### **Scope of the investigation is to provide information on:**

1. UCH-related policies/laws/legislation in each country;
2. UCH-related programmes and initiatives in each country;
3. Enforcement and implementation of these laws and activities, including challenges and opportunities;
4. Areas that could be addressed in order to strengthen the UCH safeguarding for sustainable development and to implement/join the *UCH Convention*, Leiden: Martinus Nijhoff Publishers, 2003.

#### **Background**

Dr. Craig Forest and Dr. Bill Jeffery through the University of Queensland have been contracted by UNESCO Apia, Samoa Office to carry out this investigation and to provide a report on their findings. Both have extensive experience in UCH laws and programmes in Micronesia and Oceania.

The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (UCH Convention) is regarded as the most effective framework in the best practice management of

Underwater Cultural Heritage (UCH). It has been ratified by 60 countries, including the Federated States of Micronesia on 19 April 2018, and it is the only country in Oceania to have done so.

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‘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’

The UCH Convention has a number of aims and methods in protecting and preserving UCH, with a major aim being the prohibition of commercial exploitation (treasure hunting) of shipwrecks. Other aims include the preservation of a site *insitu*, as a first step, or perhaps the only step in its management. The UCH has broad aims in including all types of UCH, not just shipwrecks, and for it to be recognized ‘as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.’

In recognizing this, the term ‘shipwreck’ is not used in the UCH Convention, being replaced with the term Underwater Cultural Heritage. Other important aims are the need for international cooperation and collaborative management, as well as the management of UCH in providing for cultural tourism.

The UCH Convention is relevant to the countries of Micronesia and Oceania, because of its shipwreck heritage, but also its non-shipwreck UCH can be of greater significance, especially the sites and objects found underwater that provide an islander cultural identity. These sites can include fish weirs, sunken villages and any other trace of human activity that is partially or totally underwater, e.g. the stone money dropped into the sea when being transported between Palau and Yap.

It is also recognized that UCH Convention-related laws and programmes may need to be implemented in association with other types of laws and programmes, such as that covering Intangible Cultural Heritage (ICH) and/or general heritage legislation (Built Heritage). Being related to the coast, sea and inland rivers, implementation of UCH programme activities may need to be carried out in association within a maritime heritage theme, such as boat building, voyaging and navigation.

Some government agencies are implementing programmes/projects to document, protect and manage UCH. These sites are also a focus for tourist operators. The economic benefit to local businesses through diving, including diving on UCH can be considerable.

We would therefore like to ask if you could provide information on any of these issues.

Please feel free to provide any further information (in addition to the questions) that you think is relevant.

Thank you

## Questions

1. What types of Underwater Cultural Heritage (UCH) does your country contain?
2. Are you aware of any laws and programmes that recognize, protect and preserve UCH?
  - 2.1 Are these laws/programmes effective?
  - 2.2 Would more specific UCH laws be of value
  - 2.3 Do you know the name of the government agency in your country that is involved in UCH management
3. Are you aware of any traditional laws and cultural practices in preserving UCH?
  - 3.1 If you do, how are they used to protect UCH?
4. What UCH sites do you visit as a tourist operator?
  - 4.1. Are they a significant focus in your operations, what percentage of your diving is on UCH?
  - 4.2. Are the UCH you dive in good condition? If not, what has caused this deterioration and what could be done to arrest/slow down the deterioration
  - 4.3. Are there any particular sites or site types that tourists prefer to visit
5. Would you be interested in any outreach activities (promotional material, staff training, collaboration) in regard to UCH
  - 5.1 What types of outreach would best suit you
6. Are you aware of the UCH Convention (mentioned in the preamble) and what it does?
  - 6.1 If you know of the UCH Convention, and if ratified in your country, what benefits could it have for your operations?
7. What issues could be addressed to support effective UCH management
8. Anything else you would like to add?