

I. TRAVAUX PRÉPARATOIRES

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I. Preliminary Report

A. *The Notion of Wreck*

This report is devoted to wrecks (*épaves*) of warships and of government vessels. Government vessels, in this Report, are those owned by the State and operated on non-commercial services. The first problem is one of definition. Lucius Caflisch in dealing with this subject at the turn of century, after having pointed out that there was not a general definition of wreck, affirmed that the term “épave” may be deemed as “tout objet qui était autrefois un navire, qui flotte, qui a coulé ou qui s’est échoué sur la côte, ayant ainsi perdu, temporairement ou définitivement, sa capacité de se déplacer; il embrasse également les objets qui se trouvaient à bord au moment du naufrage”. He gives the following short formula “une épave est un objet qui était un navire ou se trouvait à bord d’un navire lors du naufrage”³.

Now the interpreter may rely on the definition given by the 2007 Nairobi International Convention on the Removal of Wrecks, even though this definition is accompanied by the customary reservation “for the purposes of this Convention”. The Convention gives a definition of wreck that is the result of a maritime casualty. Wreck means:

- “(a) a sunken or stranded ship; or
- (b) any part of a sunken or stranded ship, including any object that is or has been on board such ship; or
- (c) any object that is lost at sea from a ship and that is stranded, sunken or adrift at sea; or
- (d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken”.

The definition given by the Nairobi Convention is very broad. It refers to sunken and stranded ships, to any objects that is or has been on board and even to ships that are adrift at sea and ships expected to sink or to strand. This is in keeping with the purpose of the Convention which, as set out in the preamble, is aimed at removing objects which may constitute a danger

³ Lucius Caflisch, « La condition des épaves maritimes en droit international public », in René-Jean Dupuy (sous la direction de), *Mélanges en l’honneur de Nicolas Valticos. Droit et justice*, Paris 1999, 69.

for navigation or to the marine environment. The definition is centred around the notion of ship and consequently fixed platforms and installations as well as pipelines are excluded⁴.

At the same time the definition of wreck is narrower than the definition of underwater cultural heritage, since the latter embodies not only vessels, aircraft and their cargo, but also the archaeological and natural contexts together with the structures and buildings that are submerged (Article 1 of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage).

For the purpose of this report we will prefer to employ the notion of sunken ship instead of that of wreck. In particular, the report will deal only with sunken warships and government vessels operated for non-commercial purposes, including any object on board. On the contrary, the regulation of warships and government/State vessels which are about to sink or to strand is excluded. We prefer to employ the short formula "State Vessels" for those ships owned by a State and operated for non-commercial purposes, since they may be assimilated to warships as to their immunity⁵. Platform and fixed installations are not dealt with⁶. Likewise sunken aircraft and space objects (for instance satellites) will not be considered even though the findings on warships may be applied by analogy to those objects.

⁴ They are the object of the IMO resolution A 672(16) of 10 October 1989 on "Guidelines and Standards for the Removal of Offshore Installations and Structures on the Continental Shelf and in the Exclusive Economic Zone".

⁵ See Arts 32 and 96 UNCLOS. Unlike warships, the Law of the Sea Convention does not contain any definition of government ships operated for non-commercial purposes. For instance Article 96 addresses the question of ships owned or operated by a State and used only on government non-commercial service. This means that immunity extends not only to ships "owned" but also to ships "operated" by a State. In the latter instance, the ship belongs to another subject but it is for the time being used by the State. Auxiliary vessels, i.e. those vessels used for troop transportation or for refuelling, may be assimilated to warships and under UNCLOS they enjoy sovereign immunity (see Article 236, which makes a distinction between warships, naval auxiliary and other vessels owned or operated by a State and employed on government non-commercial service). Ships owned by a State but employed for a commercial service do not enjoy any immunity and can be object of measures of restraints (see for instance Article 44 of the IDI resolution on the "Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix", Stockholm Session, 1928).

⁶ They do not fall under the legal definition of ship: see for instance the ICJ Order in the Great Belt case: *Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order 29 July 1991*, ICJ Reports, 1991, 17, para. 21.

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B. The regime of sunken warships and State vessels under Conventional Law

There is now enough conventional law dealing with submarine antiquities and sunken ships, even though not all conventions specifically address sunken warships and State vessels.

- *UNCLOS arts 303 and 149*

The Law of the Sea Convention deals with submerged antiquities in two provisions: Articles 303 and 149. They regulate objects of archaeological and historical nature found at sea and do not specifically address sunken warships and State vessels. They may fall under the abovementioned provisions in so far as they are of archaeological and historical interest, otherwise they cannot be deemed to be disciplined by law of the sea provisions dealing with submerged antiquities. The Law of the Sea Convention does not establish a date for classifying those objects which are of archaeological or historical interest. Scholars have proposed several solutions, which are open to criticism. For instance, Oxman proposes the fall of Constantinople (1453) or the discovery of the Americas (1492) as time-limit by which an object should be considered as falling under the two provisions⁷, while Caflisch prefers a more recent time-limit, for instance a hundred years⁸. Be as it may the question, as we shall see, has now been resolved by the 2001 UNESCO Convention in favour of the latter view.

While Article 149 excludes the application of salvage law and the law of finds since the objects of archaeological and historical nature found in the Area should be preserved in the interest of the humanity, Article 303 does not affect the rights of identifiable owners and the rules on the recovery of sunken items and the other norms of maritime law, including salvage law and the law of finds.

- *The 1989 Salvage Convention (Article 30, 1, d)*

Salvage is an opportunity that the law gives for recovering property in danger at sea and it is regulated both by admiralty law and by international law. Salvage of foreign State-owned vessels may conflict with the interests of the flag State wishing to maintain the ship under its exclusive control, for instance for the purpose of protecting vital information for its own security.

⁷ Bernard H. Oxman, "The Third United Nations Conference on the Law of the Sea: The Ninth Session", 75 AJIL (1981), 241.

⁸ Lucius Caflisch, "Submarine Antiquities and the International Law of the Sea", 13 *Netherlands Yearbook of International Law* (1982), 8-9.

It is the reason why the 1910 Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea does not apply to warships and government vessels operated for non-commercial purposes (Article 14). This principle has been restated by the 1989 Salvage Convention. It does not apply to warships or other non-commercial vessels owned or operated by a State and entitled to sovereign immunity (Article 4), unless the State party concerned decides otherwise. Property at sea, unless permanently and intentionally attached at the shoreline, may be object of salvage. However a State may reserve not to apply the Convention when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed (Article 30, 1, d)⁹. The Convention addresses any activity aimed at assisting a vessel in danger and does not cover all operations of salvage under the American-English tradition, according to which salvage may be applied not only to ships in peril, but also to recovery of sunken ships and their objects on board¹⁰. On the Continent the established distinction is between salvage (*sauvetage*, *salvataggio*), referring to the assistance of a ship, its cargo and persons in danger, and *ricupero* aimed at recovering a sunken ship and its cargo. Unlike salvor, the finder, under American law, acquires title to property which was never owned or has been abandoned. The difference between salvage and find is well illustrated by the Tampa Magistrate in the case of *Nuestra Señora de las Mercedes*, which will be examined below: “The law of salvage and the law of finds are mutually exclusive [...]. Under the law of salvage, a rescuer takes possession, but not title to, the distressed vessel and its contents, and can obtain an award for services rendered. The law of finds takes a more direct approach to ownership - “finders keepers”. The notion of finder, under the American law, cannot be assimilated to the one of “ritrovatore” under the Italian law, since the “ritrovatore” does not automatically acquire the property in the wreck. While the “ricupero”

⁹ The Convention does not spell out the zones of the sea-bed which may be included within a reservation formulated by the coastal State. It is obvious that a reservation may cover the seabed of the territorial sea, but cannot cover those areas that are subject to the regime of the high seas. It remains to be seen whether antiquities on the coastal State continental shelf may be covered by a reservation and excluded from salvage.

¹⁰ D.P. O’Connell, *The International Law of the Sea*, ed. by I. A. Shearer, Oxford, Vol. II, 1984, 907. See also Guido Carducci, “The Expanding Protection of Underwater Cultural Heritage: The New Unesco Convention versus Existing International Law”, in Camarda, Scovazzi (eds), *The protection of the underwater cultural heritage. Legal Aspects*, Milano, 2002, 160 et seq.

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presupposes an activity aimed at recovering the underwater object, the “ritrovamento” is a fortuitous event. The same is true for the French law and the notion of “découvreur” and “sauveteur”¹¹.

The 1980 Salvage Convention is mentioned here to point out that the notion of sovereign immunity also applies to warships in peril.

- The 2001 UNESCO Underwater Cultural Heritage Convention

The most complete instrument negotiated until now for the protection of submerged antiquities is the 2001 UNESCO Underwater Cultural Heritage Convention. The Convention has entered into force on 2 January 2009 following the ratification by 20 States. The very fact that the Convention has received only a few ratifications shows that States are not convinced of its correspondence with customary international law. The UNESCO Convention main objective is the preservation *in situ* of underwater cultural heritage and the exclusion of its commercial exploitation, since States Parties are called to preserve underwater cultural heritage for the benefit of humanity. The Convention applies to a number of objects, including vessels, provided that they have been under water for at least 100 years. As for warships and State vessels, they fall under the scope of the Convention but are subject to a special regime. The Convention will be examined in greater detail in a subsequent paragraph.

- The 2007 Nairobi International Convention on the Removal of Wrecks

Special provision for warships and governmental vessels is also embodied in the 2007 Nairobi International Convention on the Removal of Wrecks negotiated within the framework of the IMO. The Convention authorizes the coastal State within its EEZ or equivalent distance to take measures for the removal of wrecks posing a hazard to navigation. It does not apply to the territorial sea, unless the coastal State declares its willingness to submit such body of water to its regime nor to the high seas beyond the EEZ. The Convention excludes from its field of application “any warship or other ship owned and operated by a State and used, for the time being, only on Government non-commercial service”(Article 4, para. 2). However the flag State may decide otherwise.

- The 1985 Project for a Council of Europe Convention

Worthy of mention is the Project negotiated within the Council of Europe (1985) which was never in fact submitted to the Committee of Ministers due

¹¹ See, for instance, Raymond Goy, “L’épave du Titanic et le droit des épaves en haute mer”, 35 AFDI (1989), 766-767.

to opposition by Turkey which feared a negative impact on the controversy with Greece on the continental shelf. The Council of Europe project extended the power of the coastal State over the sea-bed of the contiguous zone thus making illegal the removal of cultural property without the permit of the coastal State. Article 2 of the Project is drawn from Article 303 of the Law of the Sea Convention without however establishing the legal fiction set up by Article 303, which equates the removal of antiquities from the sea-bed of the archaeological zone without the consent of the coastal State to the infringement of the laws and regulations on antiquities committed within its territory or territorial sea¹². However no provision is contained on the immunity of warships and State-owned vessels. For the notion of modern warships was extraneous to the cultural objects covered by the Project. However the Council of Europe successfully negotiated the 1992 European Convention on the Protection of the Archaeological Heritage (Revised) that, although negotiated for terrestrial archaeology, has also a marine outreach (Article 1, para. 3). It applies to the archaeological heritage located within the "jurisdiction" of the Parties (Article 1, para. 2, iii) and therefore may be deemed to apply not only to the territorial sea but also to the continental shelf and EEZ. However the Revised Convention cannot be considered as a substitute for the 1985 Project and furthermore the Revised Convention, just as the 1985 Project, does not specifically address the status of sunken warships.

Note that regionalism is addressed by Article 6 of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. It encourages States to conclude regional agreements for the preservation of the cultural heritage. Following a round table held in Sicily (Siracusa) in 2003, a draft for a regional agreement on submerged cultural heritage was prepared, completely abolishing the law of finds and the law of salvage and thus going beyond the obligation contained in Article 4 of the UNESCO Convention¹³. Moreover under the draft agreement the obligation by the coastal state to inform the flag State of vessels located in waters under its sovereignty is more stringent and should be abided by even if the vessel is

¹² Janet Blake, "The Protection of the Underwater Cultural Heritage" 45 *I&CLQ* (1996), 825.

¹³ Tullio Scovazzi, "Un futuro accordo sulla protezione del patrimonio culturale sottomarino nel Mediterraneo", in Tullio Scovazzi (ed.), *La protezione del patrimonio culturale nel Mare Mediterraneo*, Milano, 2004, 162-166. ID., "The Protection of the Underwater Cultural Heritage"- An Italian Perspective", EUI Working Papers, AEL/ 2009/9, edited by Ana Filipa Vrdoljak and Francesco Francioni, *The Illicit Traffic of Cultural Objects in the Mediterranean*, 85-86.

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located in the coastal State internal waters. Sunken cemeteries are also protected.

- The ILA Draft Convention

The ILA Draft Convention on the Protection of the Underwater Cultural Heritage (1994) applies to cultural heritage underwater for at least 100 years¹⁴. It excludes the applicability of salvage law but it pays deference to sovereign immunity, since the project “does not apply to any warship, military aircraft, naval auxiliary, or other vessels or aircraft owned or operated by a State and used for the time being only on government non-commercial service, or their content” (Article 2, para. 2).

C. *The Sovereign Immunity of Warships and State Vessels*

Warships and other government ships operated for non-commercial purposes enjoy sovereign immunity. This rule is enshrined in customary international law as well as in conventional law. Both Article 22 of the 1958 Geneva Convention on the Territorial Sea and Article 32 of the UN Law of the Sea Convention provide for sovereign immunity. Warships and government vessels should comply with certain rules indicated by those conventions, but they do not derogate from the principle of sovereign immunity. If a warship does not abide by the laws and regulations of the coastal State concerning passage in the territorial sea, the coastal State is not entitled to take any act of coercion and may only ask the ship to leave the territorial sea (Article 23 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 30 of the UN Law of the Sea Convention). In other words they are immune from the enforcement jurisdiction of the coastal State, even if they are not completely beyond its legislative/prescriptive jurisdiction when they navigate through waters falling under the competence of the coastal State. As far as the prevention of marine pollution is concerned, Article 236 of the UN Law of the Sea Convention exempts warships, naval auxiliary and government vessels from rules on the protection and preservation of marine environment. The 1972 London Convention on Prevention of Marine Pollution by Dumping of Wastes and Other Matter does not apply to ships entitled to sovereign immunity under international law. As far as the high seas are concerned, both the Geneva Convention on the High Seas (Article 8, para. 1) and the UN Law of the Sea Convention (Article 95) state that warships on the high seas have complete immunity from the jurisdiction of

¹⁴ For an overview see Janet Blake, “The Protection of the Underwater Cultural Heritage”, cit., 819 ff.

any State other than the flag State. The same is true for ships owned by a State and operated only on government non-commercial service (Article 9 Geneva Convention on the High Seas; Article 96 UN Convention on the Law of the Sea).

The principle of sovereign immunity is reflected in other sectors of international law. Article 16 of the 2004 UN Convention on Jurisdictional Immunities of States and their Property confirms the immunity from jurisdiction of a foreign State in relation to its warships, naval auxiliaries and government vessels (i.e. “vessels owned or operated by a State and used, for the time being, only on government non-commercial purposes”¹⁵). The same rule applies to any cargo on board of those ships. The 1926 Brussels Convention on the Unification of certain rules on State-owned vessels lays down the customary rule on warships, stating that warships “shall not be subject to seizure, attachment or detention by any legal process, nor to judicial proceedings *in rem*” (Article 3). The category also includes State-owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively on governmental and non-commercial service. The only exceptions, which most probably are not in keeping with customary law, are related to collisions, salvage and claims for repairing the ship. The 2004 UN Convention sets out immunity for the cargo on board of warships, naval auxiliaries and other government vessels as well as for “any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes” (Article 16, para. 4). The ILC Commentary includes, for instance, “cargo involved in emergency operations such as food relief or transport of medical supplies”.

The conventions on civil liability for nuclear damage by nuclear powered ships have provisions on immunity of warships only for measures of seizure and attachment¹⁶ while the 1952 Brussels Convention on the arrest of seagoing ships does not contain any provision on immunity of warships. That is the reason why a number of States parties (*inter alia*, the U.K. and

¹⁵ See Article 16, para. 2 of the 2004 UN Convention. The following examples are given in the Commentary by the ILC on Article 16, para. 2 in relation to this category of vessels: police patrol boats, custom inspection boats, hospital ships, oceanographic ships, training vessels and dredgers, owned and operated by a State and used or intended for use in government non-commercial service. See further Hazel Fox, *The Law of State Immunity*, 2nd edition, Oxford, 2008, 568-569.

¹⁶ See for instance Article X, para. 3 of the Brussels Convention on the Liability of Operators of Nuclear Ships (1962).

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the Russian Federation) made a reservation for warships and government vessels¹⁷.

Note that immunity of State-owned vessels or government vessels is enjoyed as long as they are employed solely for government non-commercial purposes. Otherwise the ordinary rules apply and, for instance, a foreign State-owned vessel may be the object of measures of attachment if it used for transport of commercial goods.

D. Are Sunken Warships or a Sunken State-owned vessels entitled to sovereign immunity? Are they ships?

Only warships and State-owned vessels used for non-commercial purposes are entitled to sovereign immunity. The question is whether sunken warships and government vessels still enjoy immunity, notwithstanding that they are no longer navigating. In other words the problem is whether a sunken ship is still a ship for the purposes of immunity.

The UN Law of the Sea Convention restates in its Article 29 the definition of warship given by Article 8, para. 2, of the Geneva Convention on the High Seas. According to the definition “warship means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline”. Both the Geneva Convention and the Law of the Sea Convention do not deal with sunken warships. Nor do they deal, in general, with sunken ships, unless they fall under the category of objects of an archaeological and historical nature found at sea. A warship enjoys foreign immunity as long as it is a warship. If a warship is cancelled from the register of the navy and it is no longer under the command of an officer duly commissioned it can no longer be classified as a warship. It is the opposite process to the conversion of a private ship into a man of war, as regulated by the Hague Convention No. VII of 1907. Moreover, the definition of warship encompasses those vehicles navigating on or beneath waters, like submarines. Article 29 of the UN Convention on the Law of the Sea refers to a ship “manned” by a crew. This means that the ship is capable of navigation or, to say the same in French words, enjoys its own “flottabilité”. One may also refer to the definition of ship according to the 1989 IMO Convention on salvage which implies that a ship is an object

¹⁷ <http://www.comitemaritime.org/ratific/brus/bru12.html>.

capable of navigating and which may be employed for transporting objects and persons. The UNESCO Convention contains a provision dedicated to sovereign immunity (Article 13). But it relates only to ships “undertaking their normal mode of operations” which are not obliged to report discoveries of underwater cultural heritage (UCH). A sunken ship cannot navigate and it is not “manned” by a crew under military discipline and it is not under the command of a duly commissioned officer. Consequently a sunken warship cannot rely on the sovereign immunity enjoyed by warships. For immunity is given to seagoing vessels, except where State practice shows that sovereign immunity is given also to sunken ships, since they continue to keep the status they had before sinking. One different but at the same time similar perspective is to see warships as a means for protecting the security and defence of the States to whom they belong. From this point of view, a sunken warship may still be of strategic importance for the flag State, since it may have on board instruments valuable for the State’s security which may be endangered if the recovery is made by another State, as the case of *Glomar Explorer* shows. For this reason it may be proposed that recently sunken warships still enjoy sovereign immunity. Moreover a recent sunken vessel might be recovered and brought again into service with the consequence that its “flottabilité” is reinstated¹⁸. As has been pointed out warships enjoy sovereign immunity and are worthy of special treatment since they are at the service of the defence of their State. Once sunk and after the elapse of a notable span of time there is no longer any reason to maintain sovereign immunity.¹⁹ As has been observed by one commentator of the UNESCO Convention, “réduits à l’état d’épaves, ces navires [i.e. warships], tout en restant propriété de cet Etat, seront naturellement dans l’incapacité d’exercer des actes de souveraineté et ne pourront dès lors continuer à bénéficier de l’immunité”²⁰

If we assume, for the sake of argument, that a sunken warship loses its immunity as “warship”, this does not mean that the flag State loses its

¹⁸ Vittorio Mainetti, “Considerazioni in tema di esercizio della sovranità archeologica da parte dello Stato costiero”, in Camarda, Scovazzi (eds), op. cit., 239-240.

¹⁹ Jerry E. Walker, “A Contemporary Standard for Determining Title to Sunken Warships: A Tale of Two Vessels and Two Nations”, in 12 *U.S.F. Maritime Law Journal* (1999-2000), 350

²⁰ Djamchid Momtaz, “La Convention sur la protection du patrimoine culturel subaquatique”, in Tafsir M. Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mersah*, Leiden, Boston: Martinus Nijhoff, 2007, 460.

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ownership. The flag State retains property rights that may be lost only if other circumstances arise, for instance the loss of title due to abandonment, the statutes of limitation or transfer of title. Immunity presupposes a link between the ship and the sovereign. If the link is severed, on the ground of abandonment or the passage of time, the ship is no longer entitled to sovereign immunity.

The above considerations are valid, *mutatis mutandis*, also for State-owned vessels operated for non-commercial purposes. Immunity is given to that kind of craft since they are operated for non-commercial purposes and as long they are operated for that purpose. The mere ownership by a State cannot endow the ship with sovereign immunity. A sunken vessel is by definition non-operated for commercial purposes. It is not "operated" at all. Therefore it cannot enjoy sovereign immunity.

Title to property is different from jurisdiction. Usually property rights and jurisdiction coexist. But it may also happen that the latter is severed from the former and that jurisdiction depends on the sea area where the sunken warship is located.

Title to property should also be distinguished from sovereign immunity. It may happen that title to property and sovereign immunity coexist, as in the case of a seagoing vessel. But it may also happen that an object remains the property of a State, even though it is no longer covered by sovereign immunity. Likewise private assets on board of a sunken ship remains property of the private owner, unless the title is lost according to the law governing the transfer/extinction of property rights.

In case of the flag State extinction the rules on State succession on moveable public property apply for determining to whom the wreck belongs.

E. Warships as Public Property of the Flag State

A different but similar perspective might consist in viewing warships as public property of the flag State and thus deserving immunity. The same is true for the cargo they are transporting. This finding is enshrined in customary international law and is supported, *mutatis mutandis*, by the 2004 UN Convention on Jurisdictional Immunities of States and their Property already referred to. Warships and auxiliary vessels as well other vessels employed for public activities are exempted from jurisdiction and from any form of coercion. Similar considerations are applicable to military assets or any other assets utilized for military purposes, such as military vehicles on board or aircraft on an air-carrier. Diplomatic bags that happen to be on board of a sunken warship might enjoy the same inviolability as they had before sinking according to Article 27 of the Vienna Convention on Diplomatic Immunities and Article 28 of the Project on the status of

diplomatic bag adopted by the ILC (1989). Personal property of the crew does not enjoy any immunity and should be transmitted to the identifiable heirs. The same is true for private property transported by a State vessel. Here the problem is to find out which legal order applies.

F. State practice, bilateral agreements and case-law on sunken warships and State vessels

State practice on sunken warships is relatively abundant. A number of bilateral treaties regulating the relations between the coastal and the flag State should also be cited. Moreover a few judgments will be of help in clarifying the issue which we have raised²¹.

The Orient. The Orient was a French warship which sank in the Bay of Aboukir at the time of the Napoleonic expedition to Egypt in 1798. In 1930 France was informed by Egypt that it intended to remove the wreck; subsequently Egypt stated that France lost its right over the wreck since it did not advance any claim at the time of the recovery. However the French Government protested asserting that France continued to be the warship owner even if the vessel sank in foreign territorial waters and was no longer listed in the French navy. Several years later a French firm tried to recover the wreck and stipulated a contract with the Egyptian authorities.

The Alabama. The Alabama was a Confederate privateer sunk by the USS *Kearsage* off the port of Cherbourg (France) in 1864 where the Alabama entered for repairs and supplies. The ship was sunk on the high seas, but when it was discovered in 1984 it was on the bed of French territorial waters, seven miles off from Cherbourg. The US, as successor of the Confederate

²¹ There are several authors who have reviewed State practice, judgments and relevant legislation. See Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, The Hague, 1995; Jerry E. Walker, op. cit., 311 et seq.; Luisa Vierucci, "Le statut juridique des navires de guerre ayant coulé dans des eaux étrangères: Le cas des frégates espagnoles Juno et La Galga retrouvées au large des cotes des Etats-Unis", 105 RGDIP (2001), 705 et seq.; Jason R. Harris, « Protecting Sunken Warships as Objects Entitled to Sovereign Immunity », in 33 *U. Miami Inter-Am. L. Rev.* (2002), 101 et seq.; Sarah Dromgoole, "Murky waters for government policy: the case of a 17th century British warship and 10 tonnes of gold coins", 28 *Marine Policy* (2004), 189 et seq.; Roberta Garabello, « Sunken Warships in the Mediterranean. Reflections on Some Relevant Examples in State Practice Relating to the Mediterranean Sea », in Scovazzi (ed.), *La protezione del patrimonio culturale nel Mare Mediterraneo*, Milano, 2004, 171; Roberta Garabello, *La Convenzione UNESCO sulla protezione del patrimonio culturale subacqueo*, Milano, 2004; Tullio Scovazzi, « Les épaves de navires d'Etat », 52 AFDI (2006), 400-417.

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States of America, stated that the *Alabama* was US property, since the wreck had never been transferred or abandoned²². It only recognized the legitimate interests of France because of the location of the wreck in its territorial sea. An agreement was concluded on 3 October 1989 between the two governments for protecting the wreck, granting France the right to establish a protective zone around the wreck and to take the appropriate measure for its conservation.

The *HMS Birkenhead*. The ship was a British troop carrier which sank in 1852 off the Cape Colony coast. On 22 September 1989 the UK and the South Africa made an agreement by exchange of notes for the disposal of the wreck of the *Birkenhead* belonging to the Royal Navy. "The British Government pledged not to enter into any salvage contract. On the other hand it did not object to any salvage contract concluded by South Africa, provided that the *Birkenhead* would be treated as a military grave and dealt with at any stage with respect"²³. The UK Government stated that the agreement reflected the British position according to which the "Crown maintains rights and interests in ships of the Royal Navy which have sunk, wherever they may be and without time limit"²⁴.

The *Old Dutch Shipwrecks*. The ships which sank off the Western Australian Coast in the 17th and 18th Centuries belonged to the Dutch East India Company. The Netherlands and Australia in 1972 entered an agreement whereby the Netherlands, as successor of the Dutch East India Company, transferred all its rights, title and interest to Australia.

The *Glomar Explorer* affair. The United States, in 1968, tried to recover a Soviet submarine sunken some 750 miles off the Hawaii, that they considered as having great military value. The US recovered only part of the wreck employing a vessel built for that purposes: the *Glomar Explorer*. The covert operation was conducted by the C.I.A. Mindful of this incident, the then Soviet bloc (Soviet Union, Bulgaria, Belarus, Czechoslovakia, German Democratic Republic, Hungary, Poland, Ukraine)²⁵ tabled a proposal at the III Conference on the law of the sea stating that sunken warships on the sea bed could only be recovered by the flag State since a sunken warship also continued to enjoy sovereign immunity. According to some commentators

²² J. Ashley A. Roach, "France concedes United States has title to *CSS Alabama*" 85 AJIL (1991), 382.

²³ See Tullio Scovazzi, « Les épaves de navires d'Etat », 52 AFDI (2006), 403-404

²⁴ 60 BYIL, 1989, 670-673

²⁵ Jean-Pierre Queneudec, « Chronique du droit de la mer », in 27 AFDI (1981), 680-681.

the secrecy of the operations shows that the US was of the view that it could not recover the vessel without the Soviet consent. Otherwise it would have acted openly.

The *Erebus and the Terror*. Both ships belonged to the Royal Navy and sank in 1848 during an Arctic expedition off the Canadian coast. The UK did not oppose that both wrecks being declared National Historical Sites by the Government of Canada but at the same time, according to an MOU signed with the Canadian government in 1997, declared that it was the owner of the wrecks and did not waive ownership or sovereign immunity with respect to the wrecks or their contents while they are on the seabed.

The *HMS Spartan*. An Agreement was concluded in 1952 for the recovery of the wreck of the ship which sank in the Italian waters during the World War II. It also covered other sunken British warships in Italian waters and obliges Italy to inform the UK government on the activities Italy intends to undertake.

The *Sciré*. The ship was an Italian submarine which sank off the Israeli port of Haifa during World War II. An understanding was concluded between Italy and Israel on the disposal of the submarine in order to protect sailors' remains, after an attempt of recovery by Israel and the US, which raised Italy's protest which considered the *Sciré* as the sailors ultimate rest²⁶.

The *U-boat 171*. The U-boat was sunk off the French Atlantic coast during the World War II. An Understanding was concluded between France and Germany on the protection of the wreck of the submarine and was followed by the enactment by the French authorities of an order not to conduct explorations around the wreck.

The *U-boat 895*. The *U-boat 895* sank in 1944 in the Malacca Strait. The High Court of Singapore held in 1980 that the submarine was still German property, since it was not captured by the enemy before sinking.

The *HMS Sussex*. This was a British ship which sank in 1694 in the Strait of Gibraltar and was lying in Spanish territorial waters. This notwithstanding, the wreck was never claimed by Spain and the UK stated that it should be considered as the owner of the ship. This is in line with the Spanish view, according to which property vested in the flag State is never lost irrespective

²⁶ Roberta Garabello, "Navi militari affondate nel Mediterraneo. Riflessioni in margine al caso del sommergibile *Sciré*", in 136 *Rivista Marittima* (2003), n. 10, 71 et seq.

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of ship location and passage of time, unless an act of abandonment or other act proving the transfer of the title is made²⁷.

The *La Belle*. *La Belle*, an auxiliary vessel of the French navy, was shipwrecked in 1686 along the coastline of Texas. The wreck was discovered in 1995 by the Texas Historical Commission and an agreement was concluded on 31 March 2003 between France and the US, granting the Texas Historical Commission the right to preserve the wreck for a period of 99 years automatically renewable. It is worth noting that France continued to claim its ownership over the vessel. Article 1 of the France-US agreement states « (1) Lors de son naufrage, *La Belle* était un navire de la marine française. (2) La République française n'a ni abandonné ni transféré son droit de propriété sur l'épave de *La Belle* et exerce toujours les mêmes droits sur ladite épave ».

Le Corossol was a French warship sank in 1693 near the Canadian coast. Canada informed France about the discovery in 1991 and France did not oppose that Canada started to conduct underwater investigation over the ship, since it was deemed as falling under the transfer of Canada province to Great Britain under the Peace Treaty of 10 February 1763. The two above cases prove, according to Le Gurun, that lapse of time does not extinguish property rights, unless a formal act of abandonment is made²⁸.

The relevant case law also refers to a few examples in which treasure hunters were involved.

The *Nuestra Señora de Atocha*. The ship was a Spanish galleon which sank in 1622 off the Florida coast with a cargo of gold coming from the Spanish colonies. The wreck was located at 10 miles from the coast. The salvor society -Treasure Salvors, Inc and Armada Research Corp -, after having located the wreck, asked the District Court for Southern Florida an injunction aimed at rendering incontrovertible its rights over the wreck. The 1976 District Court judgment was in favour of the claimant and against the US Federal Government, which was prevented from asking for the application of the Antiquities Act, since the wreck located on the continental shelf was not under US jurisdiction. At the time the United States claimed a three mile territorial sea: the *Atocha* was outside the US territorial waters but on its continental shelf.

²⁷ Mariano J. Aznar-Gomez, "Spain", in Sarah Dromgoole, *The Protection of Underwater Cultural Heritage: National Perspectives in Light of the Unesco Convention 2001*, 2nd ed., Leiden, Boston 2006, 274-275

²⁸ Le Gurun, op. cit., 92-93.

In the *Sea Hunt* case decided by the District Court of Virginia on 21 July 2000 the Kingdom of Spain claimed the property of two Spanish galleons which sank 18 miles off the Virginia coast in 1750 (*La Galga*) and in 1802 (*Juno*). The Spanish government was successful in vindicating its property rights and the claim of the Sea Hunt, Inc., a treasury sea hunter firm, was rejected. The Sea Hunt, Inc. wanted that the two galleons to be declared property of the Virginia State in order to base its claim on the US salvage law. The case was finally decided by the US Supreme Court in a judgment of 20 February 2001 that confirmed the District Court of Virginia finding.

The most recent judgment is the one delivered by a US District Court, Middle District of Florida, Tampa Division on June 3, 2009 in the case of *Nuestra Señora de las Mercedes* (sometimes named as *Black Swan* case). The ship was a Spanish frigate which sank in 1804 after an engagement with British forces. The *Mercedes*, which had on board a cargo of gold, was located in March 2007 by Odyssey Marine Exploration Inc off the Straits of Gibraltar in international waters. Odyssey sought possessory rights and ownership under the law of find and, in the alternative, a salvage awards, once the ship had been recovered. Both claims were opposed by Spain that did not agree to the recovery of the ship. The Tampa judge, after having cited the US policy in protecting sunken warships, did not endorse the Odyssey claim and stated that international law recognized Spain's sovereign interest in preserving the *Mercedes* place of rest, holding *inter alia* that the principle of sovereign immunity restricted the Court from exercising its judicial authority²⁹. The US has intervened in the proceedings in partial support of the Spain. The US brief has been opposed not only by Odyssey before the US Court of Appeals for the Eleventh Circuit, but also by a group of members of Congress in a letter addressed to the US Secretary of State Hillary Clinton on January 20, 2011.

A number of authorities are of the opinion that sunken private ships retain the law of the flag as they remain ships³⁰. This is even more so for warships.

²⁹ *The Mercedes* case is commented by Valentina Vadi, "International Law and the Uncertain Fate of Military Sunken Vessels", in 19 *IYIL* (2009), 253-277 and Mariano J. Aznar-Gomez, "Trasures hunters, sunken State vessels and the 2001 UNESCO Convention on the protection of underwater Cultural Heritage", in 25 *International Journal of Marine and Coastal Law* (2010), 209-236.

³⁰ See D.P. O'Connell, *op. cit.*, 913-914. A different conclusion may be reached if the wreck is no more a unitary object an is dispersed in several parts: see for instance Gilbert Gidel, *Le droit international public de la mer, Le temps de paix*. Tome I, *Introduction-La Haute Mer*, Chateroux, 1932, 70-71.

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However, according to Oppenheim, a shipwrecked warship abandoned by the crew is no longer a State organ even though it remains the property of the flag State³¹. He does not take a stance on the question of immunity of sunken warships. The very fact that the Soviet proposal at the III Law of the Sea Conference, quoted *supra*, was not incorporated would confirm the assumption, according to some authors, that sunken warships do not continue to enjoy sovereign immunity. But, as has been pointed out, the academic doubt as to the continued existence of sovereign immunity for sunken warships, is merely “academic” and cannot resist the text of the practice of maritime powers that proves the contrary³². For instance it is not in keeping with the Spanish practice³³ and with the US Sunken Military Craft Act (SMCA) of 2005³⁴. The SMCA states that rights and title to US sunken warships shall not be extinguished except by an express act of the United States and that the passage of time does not have any influence on the US property rights. The SMCA abolishes the law of find and salvage in respect to US sunken military vessels, wherever located, and in respect of foreign military vessels located in territorial waters or contiguous zone of the United States. Any operation on the wreck requires the consent of the flag State. The SMCA does not openly claim sovereign immunity for sunken warships, but only perpetual title of ownership, which cannot be extinguished by the mere passage of time. The SMCA is enforceable against U.S. physical and legal persons and in US waters, qualified by SMCA as internal, territorial waters or the contiguous zone. It is not enforceable in waters under the jurisdiction of foreign States. It is open to question, as we shall see later, how SMCA may be enforced in international waters, including the EEZ or the continental shelf of the US.

For warships and State-owned vessels nationality and property coincide. The flag State is also the owner of the craft which is public property. Practice shows that property is claimed by the owner, unless the sunken ship has been

³¹ *Oppenheim's International Law*, 9th ed., Jennings and Watts (eds), Vol. 1, 1165.

³² Sarah Dromgoole, “United Kingdom” in Dromgoole, *The Protection of Underwater Cultural Heritage* cit., 339, n. 142. One may also quote the most recent legal literature, taking stance for immunity of sunken warships: Wolff Heintschel von Heinegg, “Warships”, *Max Planck Encyclopedia of Public International Law*; J. Ashley Roach, “Warships, Sunken”, *ibid*.

³³ Mariano J. Aznar-Gomez, “Spain”, in Dromgoole, *The Protection of Underwater Cultural Heritage* cit., 275.

³⁴ The SMCA (2005) is reprinted and commented by David J. Bederman, “Congress Enacts Increased Protection for Sunken Military Craft”, in 100 *AJIL* (2006), 649-663.

abandoned. Abandonment is usually a unilateral act by the owner, either expressly stated or implied. The mere passage of time usually does not deprive the owner of its title and there is legislation, as that enacted by the US, that clearly affirms that the mere passage of time does not extinguish the title, unless an act of abandonment is adopted. Ownership may be transferred by treaty or also by an act of private nature.

G. *The Law Regulating the Ownership and Other Rights over the Sunken Vessels and Their Cargo*

Which law should the judge apply if a question of property over the wreck or objects on board is brought to its attention?

The substantive regulation depends on the legal order competent according to the rules of private international law.

Goy affirms that the following legal orders might come into consideration³⁵:

- a) The law of the flag of the ship, even though it is doubtful that a sunken ship keeps its nationality;
- b) The law of the flag of the ship which is recovering the sunken vessels;
- c) The *lex loci*, i.e. the law of the State on whose territorial sea or continental shelf the wreck is lying;
- d) The law of the State in whose port the wreck has been transported after having been recovered.

The same findings apply to the objects on board of the ship. A foreign court might choose to apply the laws under a),b),c) or d) according to its system of conflict, provided it has competence for adjudicating the case.

H. *Flag State and the Law of Naval Warfare*

The leading case is that of *Admiral Nakhimov*, a Russian ship which sank in the Strait of Korea after it was captured by the Japanese navy during the Japanese-Russian war of 1904-1905. The Soviet Union protested against the recovery of the ship by a Japanese private corporation, claiming its rights over and sovereign immunity of the ship. However the protest was rejected by the Japanese government, since *Admiral Nakhimov*, being a warship, became property of Japan immediately upon capture, without necessity of prize adjudication. The Japanese position was expressed in the following note:

³⁵ Goy, *op.cit.*, 763-765.

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“Admiral Nakhimov had been captured by Japanese Navy before it sank [...]. In accordance with international law, the right with respect to the captured enemy warships and property aboard them are transferred immediately and finally to the Captor State, therefore, all the rights of the Russian side with respect to Admiral Nakhimov became extinct at the time when the vessel was captured by Japanese Imperial Navy”³⁶.

The Japanese assumption was correct and in conformity with the law of naval warfare, that imposes prior prize adjudication for transfer of property only in relation to private shipping. The same is true for auxiliary vessels. The ship should be captured in order to become property of the captor State. The title it is not transferred and the warship remains property of the flag State if it is sunken during a military engagement without being captured.

In the case of *Alabama*, already cited, a confederate raider sunk by the *USS Kearsarge* in 1864 off the Normandy coast, the US claimed the property of the wreck not for having destroyed the *Alabama* during a military engagement, but as successor of the Confederate States of America. The rule according to which the property of a sunken warship remains with the flag State, unless captured by the enemy belligerent, was confirmed by the High Court of Singapore in the case already cited of the German submarine *U – boat 895* which sank in 1944 in the Strait of Malacca. The Court held that, lacking capture by the enemy, the wreck of the submarine remained property of Germany³⁷.

The US SMCA of 2005 excludes from its sphere of application naval warfare, since the Act is not deemed “to alter the international law of capture or prize with respect to sunken military craft”.

I. Sunken warship as a cemetery and the special respect for war graves

It is a common use of marine tradition that deference is due to deceased persons and war graves should be respected. As Bederman points out “naval traditions of respecting shipwreck sites as war graves enjoy considerable observance”³⁸. In 2000 also the Virginia Court of Appeals in the case of *Juno* and *La Galga* stated that “interference with sunken military vessels,

³⁶ 28 *The Japanese Annual of International Law* (1986), 185.

³⁷ See Mariano J. Aznar-Gomez, “Legal Status of Sunken Warships ‘Revisited’”, 9 *Spanish Yearbook of International Law*, 2003, 80.

³⁸ David J. Bederman, op. cit., 662. See also Jason R. Harris, “The Protection of Sunken Warships as Gravesites at Sea”, in 7 *Ocean and Coastal Law Journal* (2001), 75.

especially those with deceased individuals, is improper”³⁹. The Court of Appeals judgment was confirmed by the US Supreme Court. However on this point there is no international legislation. The fourth Geneva Convention and Additional Protocol I of 1977 (Article 34) deal with remains of deceased persons. They do not apply to sea warfare and deal only with human remains on land. The second Geneva Convention in its Article 19 deals with shipwrecked and dead persons at sea for the purpose of their identification and disposal of their effects, but is silent on the recovery of ships. The U.K., for instance, does not consider war graves as a “burial” under the 1986 Protection Act⁴⁰. According to Roach, sunken State vessels “are...entitled to special respect as war graves and must not be disturbed without the explicit permission of the sovereign”⁴¹. Worth citing is a joint declaration, made in 1995, by France, US, Germany, Japan Russian Federation and UK on sunken warships stating that they “...may be the last resting places of many sailors..., who died for the service of their nations”⁴². The 2001 Presidential Declaration by the US also refers to the special treatment deserving sunken warships as gravesites⁴³. The respect due to military gravesites of warships does not imply an immunity from salvage, unless there are other impediments⁴⁴. Are gravesites of warships entitled to special respect, while the same treatment is not accorded to other sailors? The assumption is that special respect is due to all deceased persons, be they members of a military or civilian crew. In this connection, Article 2, para. 9, of the 2001 UNESCO Convention, obliging States Parties to ensure that proper respect is given to all human remains located in maritime waters, should be mentioned. The same is true for Rules concerning activities directed at underwater cultural heritage which form an integral part of the Convention. Rule 5 states that activities undertaken shall avoid “the unnecessary disturbance of human

³⁹ *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634, 4th Cir. 2000, (para. 20).

⁴⁰ HC Deb 26 June 2000 vol. 352 cc414-6W.

⁴¹ J. Ashley Roach, “Sunken warships and military aircraft” in 20 *Marine Policy* (1996), 352.

⁴² The passage is quoted by Roberta Garabello, “Sunken Warships in the Mediterranean. Reflections on Some Relevant Examples in State Practice Relating to the Mediterranean Sea”, in Scovazzi (ed.), *La protezione del patrimonio culturale nel Mare Mediterraneo*, cit., 186.

⁴³ “Statement on United States Policy for the Protection of Sunken Warships”, *Weekly Compilation Presidential Document*, N° 195192, 22 January 2001.

⁴⁴ David J. Bederman, Brian D. Spielman, “Refusing Salvage”, 6 *Loyola Maritime Law Journal* (2008), 54.

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remains". For instance an activity aimed at the preservation *in situ* of the wreck might not be considered an "unnecessary disturbance".

J. The Jurisdiction of the coastal State over foreign sunken warships and State-owned vessels

The jurisdiction of the coastal State extends over its internal and territorial waters and, where applicable, over its archipelagic waters. The jurisdiction covers all uses of the sea-bed under those waters, since they are subject to the territorial sovereignty of the coastal State. As far as the sea-bed areas lying beneath the contiguous zone are concerned, they are not under the sovereignty of the coastal State, but part of the continental shelf where coastal States only enjoy sovereign rights. Article 303 of the Law of the Sea Convention imposes a general duty to protect objects of an archaeological and historical nature and it may be presumed that their removal without the consent of the coastal State is equivalent to an infringement committed in its territory or territorial sea. This presumption may be applied only to sea-bed areas lying within the outer limit of the contiguous zone. Off that zone and until the outer limit of the continental shelf the coastal State has only the generic duty to protect and co-operate, but no sovereign rights, since they encompass only the natural resources of the continental shelf and sedentary or moving in contact with the sea-bed living resources. Archaeological and historical objects lying in the Area are not under the jurisdiction of the coastal State and Article 149 of the Law of the Sea Convention mentions only the State or country of origin or the State of cultural origin or the State of historical and archaeological origin as the States to whom particular regard should be paid.

Thus the jurisdiction of the coastal State is complete over the sea-bed beneath internal, territorial and archipelagic waters. An archaeological zone over the sea-bed beneath the contiguous zone may be proclaimed. But in this case the coastal State jurisdiction may be exercised not on every warship wreck but only on those which may be classified as having archaeological and historical nature. It should be added that Article 303 does not make any prejudice the right of identifiable owners, with the consequence that the rights of the State to whom the warship belongs are preserved. Article 303 does not make any prejudice to the law of salvage and other rules of admiralty and thus a conflict may arise with such legislation, as for example the US SMCA, which exclude the law of salvage for sunken warships. It may also conflict, as will be pointed out, with the UNESCO Convention.

The Law of the Sea Convention contains a vacuum as regards the sea bed lying between the outer limit of the contiguous zone and the inner limit of the Area. We believe that in that sea-bed portion the principle of the freedom

of the high seas should be applied, including also the recovery of ships. However, the UNESCO Convention contains a different regulation that will be illustrated later. Recent doctrinal attempts have been made in order to submit archaeological survey and recovery of sunken objects to the regulation of marine scientific research as provided by Article 246 of the Law of the Sea Convention and thus conferring proper powers to the coastal State⁴⁵.

K. The Jurisdiction of the flag State over sunken warships and State-owned vessels

Even if one assumes that a sunken warship is no longer entitled to sovereign immunity, it nonetheless remains property of the flag State, unless abandoned or because the title has been transferred. What kind of jurisdiction may the flag State have over an object which is no longer entitled to sovereign immunity? Does a sunken warship lose its nationality in addition to losing its sovereign immunity? The question is not without purpose, since a ship on the high seas is subject to the exclusive jurisdiction of the flag State. It is open to question whether sunken vessels maintain the flag they had when navigating and thus remain under the exclusive jurisdiction of the flag State. The provisions of the Law of the Sea Convention on the awarding, retention and loss of nationality are dictated for ships and not for wrecks. The same is true for reflagging and change of nationality. Moreover, the provisions of the Law of the Sea Convention on jurisdiction over ships are laid down for sailing ships and nothing is said on wrecks. The jurisdiction over them depends on the section of the sea bed where they are located. For instance, jurisdiction on foreign wrecks situated in the territorial sea belongs to the coastal State. It has only to abide by the provisions on foreign property. The same is true *mutatis mutandis* for the high seas. The wreck is subject to the principle of the freedom of the high seas. However the salvor should respect the rights of identifiable owners. Once recovered, and maybe even when the salvage operation is set in motion, the wrecks transit under the jurisdiction of the State to whom the salvor belongs. The Nairobi Convention on the removal of wrecks does not apply to warships, unless the flag State decides otherwise. However it contains useful indications for our purposes. For wrecks located within the EEZ or a similar zone, action aimed at their removal should be taken by the

⁴⁵ See in particular Sarah Dromgoole, "Revisiting the Relationship between Marine Scientific Research and the Underwater Cultural Heritage", 25 *International Journal of Marine and Coastal Law* (2010), 33-61.

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coastal State and the costs of the removal should be borne by the registered owner, as defined in Article 1, para.8 of the Nairobi Convention, and not by the State where the ship is registered which is only informed by the State on whose EEZ the wreck is located.

On the contrary, the UNESCO Convention contains a number of provisions referring to the flag State of a sunken ship and thus presupposes that wrecks have a nationality. For instance, Article 7, para. 3, states that a Party should inform the flag State party of State vessels (i.e. warships and other vessels operated by a State and used, at the time of sinking, only for government non-commercial purposes) discovered in its internal waters, archipelagic waters and territorial sea. Likewise Article 10, para. 7, affirms that activities directed at State vessels in the EEZ or on the continental shelf shall be conducted with the agreement of the flag State. Consent of the flag State is required for carrying out activities concerning State vessels in the Area (Article 12, para. 7).

The UNESCO Convention strikes a balance between the interests of the coastal State and those of the flag State. Following this line of reasoning is open to question whether the flag State may claim certain rights vis-à-vis the coastal State, for instance asking that nobody should interfere with the flag State sunken warships on the premise that they retain sovereign immunity.

L. The National Legislation: the US 2005 SMCA

The US has recently legislated on sunken warships with the enactment, in 2005, of the Sunken Military Craft Act (SMCA) which has innovated previous legislation and policy, such as the 1987 Abandonment Shipwreck Act (ASA) and the Statement on the United States policy for the Protection of Sunken Warships, released by President Clinton on 2001⁴⁶. The SMCA provisions are contained in Title XIV of the National Defence Authorization Act for Fiscal Year 2005. The Act covers sunken warships, auxiliary vessels and government vessels operated on military non-commercial service at the time of sinking. The content of those vessels are also covered.

The main features of the Act are as follows:

⁴⁶ David J. Bederman, "Congress Enacts Increased Protection for Sunken Military Craft", cit., 649 et seq.

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- The title of the US over its sunken warships shall not be extinguished by passage of time and an express act of abandonment is required for this effect. The location of the warship does not matter.
- The law of finds shall not apply to any US sunken warship wherever located and to the foreign sunken warships located in US internal waters, territorial sea and contiguous zone.
- Salvage law is not banned, however its exercise requires the consent of the State owner of the ship.
- Any activity directed at sunken vessels should be duly authorized.

A critical stance has been taken by Bederman, who for instance asserts that foreign warships on the US continental shelf are not covered by SMCA, with the consequence that salvage law and the law of finds are not excluded. A further problematic aspect is connected with the application of SMCA to US sunken warships in foreign waters or the possibility of enforcing the SMCA provisions to sunken warships lying on the continental shelf of another country.

M. Are the notions of warship and State-owned vessel applicable to old ships, such as the Spanish galleons? The case of treasure hunting

The modern notion of warship is difficult to apply to ancient ships, for instance to Spanish galleons. The modern notion of warship has been construed according to the 1856 Declaration of Paris which abolished privateering and the Hague Convention VII of 1907 on the conversion of private vessels into warships. The Hague Convention dictates the following conditions for the conversion of a private vessel: it should be placed under the direct authority, immediate control, and responsibility of the State whose flag it flies; should bear the external marks distinguishing warships of their nationality; the commander must be in the service of State and duly commissioned and his name should figure on the list of officers of the fighting fleet; the crew must be subject to military discipline and the converted ship should observe the laws and customs of war. The 1907 requirements are at the basis of the definition of warship, embodied both in the 1958 Geneva Convention on the High Seas (Article 8, para. 2) and in the UN Law of the Sea Convention (Article 29). The ship, to be classified as warship, should belong to the naval forces of a State (Article 8, para. 2) or, as Article 29 affirms, to the “armed forces of a State”.

Did ancient warships comply with those distinctive features of modern warships? Not necessarily. For instance, ships belonging to privateers cannot be classified under the notion of modern warships. The same is true for ships, like the Spanish galleons, transporting goods from the colonies.

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Maybe they were under the command of a Crown officer and had on board a light armament to defend the ship from pirates. But they were not manned by a crew under a regular military discipline. East India Company ships could not be considered as warships, since they did not belong to the Dutch State.

Also the notion of government ships operated for non-commercial purposes seems in most cases inappropriate. Most certainly it does not cover ships belonging to the Dutch East Companies but its application to Spanish galleons is also questionable as it is in general for all ships sunk between 15th and 18th centuries.

N. Sunken warships and State-owned vessels as cultural heritage

A brief commentary on the UNESCO Convention has been already given. Now it should be expanded from the perspective of cultural heritage. The Convention on the Protection of the Underwater Cultural Heritage, adopted under the auspices of UNESCO in 2001, is aimed at dictating a regime for underwater cultural objects which, according to the majority of commentators, is a step forward in comparison with the provisions on submerged cultural objects regulated by the Law of the Sea Convention. The UNESCO Convention declares that underwater cultural heritage shall be preserved for the benefit of humanity and to this end the preservation *in situ* shall be considered as the first option before its recovery and disposition on land. Moreover, no commercial exploitation is permitted and salvage and find are severely curtailed and permitted only in accordance with the principles laid down in the Convention. Underwater cultural heritage covers 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. Vessels and their cargo are included. The UNESCO Convention does not deal with ownership. While private shipping follows the ordinary regime, special rules are dictated for sunken warships and State-owned vessels. Their content proved to be very controversial since the major maritime powers wanted to reaffirm their traditional policy⁴⁷. The UNESCO Convention contains a kind of saving clause, aimed at preserving the sovereign immunity of warships and State

⁴⁷ A-juan Zhao, "The relationship among the Three Multilateral Regimes concerning the Underwater Cultural Heritage", in James A.R. Nafziger and Tullio Scovazzi (eds), *Le patrimoine culturel de l'Humanité*, Académie de droit international de La Haye, 2008, 634. See also Markus Rau, "The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea", 6 *Max Planck Yearbook of United Nations Law* (2002), 387 et seq.

vessels. Article 2, para. 8, embodies a compromise formula which mediates between the interests of maritime powers that preferred not to have warships covered by the Convention and the Group of 77 striving for the opposite view⁴⁸. The result has been the usual “constructive ambiguity” clause which leads to uncertainty over the status of sunken warships. For Article 2, para. 8 affirms: “Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State’s rights with respect to its State vessels and aircraft”⁴⁹. It has been affirmed that the clause recognizes the principle of sovereign immunity and the property of the flag State, even though the only provision respectful of those principles is the one related to the Area (Art. 12, para. 7), while those concerning the territorial sea, the continental shelf and the EEZ undermine the principle of sovereign immunity, since they give extensive powers to the coastal State⁵⁰.

The Convention does not allow reservations, except as for its geographical scope (Article 30), and this prohibition does not encourage its ratification by great maritime powers⁵¹. At the time of its adoption, they voted against or abstained since the articles on warships and State vessels proved to be unsatisfactory. This was for instance the position taken by France, the U.K. and the United States. Also the Russian Federation stated that the Convention undermined the principle of inviolability of sunken warships. The Netherlands and the United States pointed out that the Convention was

⁴⁸ Craig Forrest, “An International Perspective on Sunken State Vessels as Underwater Cultural Heritage”, in 34 ODIL (2003), 56.

⁴⁹ According to the Convention “State vessel” means both warships and State vessels owned or operated at the time of sinking only for non-commercial purposes (Article 1, para. 8). Note that the UNESCO Convention defines State vessels as those operated *only* for non-commercial purposes, while the Law of the Sea Convention does not qualify commercial purposes with the adverb « only » in Article 32 while it does in Article 96, when dealing with the immunity of such kind of vessels on the high seas. Does it mean that a dual use employment renders the vessel subject to the UCH ordinary regime? See: Seline Trevisanut, “Le régime des épaves des navires d’Etat dans la Convention UNESCO sur la protection du patrimoine culturel subaquatique”, in James A.R. Nafziger and Tullio Scovazzi (eds), op. cit., 643 et seq. See also Sarah Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage* cit. and the national contributions therein contained.

⁵⁰ Gwénaelle Le Gurun, “France”, in Dromgoole, *The Protection of Underwater Cultural Heritage* cit., 80-82. See also the criticism raised by Roach, “Warships, Sunken”, cit paras 36-40.

⁵¹ A State may declare that the Convention does not apply to “specific parts” of its territory, internal waters, archipelagic waters or territorial sea, but it is encouraged to withdraw the reservation as soon as possible (Article 29).

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not to be considered as reflecting customary international law. On the contrary other States, such as Colombia and Greece found the provisions on the right of the coastal State too weak and considered the duty to inform the flag State a kind of infringement of its territorial sovereignty⁵².

The compromise reached is not an example of clarity as often happens when negotiators are obliged to have recourse to “constructive ambiguity” in order to lay down acceptable rules. The regime envisaged for sunken warships and State-owned vessels varies according to the sea areas where wrecks lie. If a vessel is discovered in its territorial sea or archipelagic waters, the coastal State, with a view to cooperating on the best methods of protecting the vessel, *should* inform the flag State with respect to the discovery. The coastal State should also inform the other States with a cultural, historical or archaeological link (Article 7). As far as the EEZ and the continental shelf are concerned, any activity on warships and State-owned vessels requires the agreement of the flag State and the collaboration of the Coordinating State, which is almost always the coastal State on whose continental shelf the vessels are located (Article 10, para. 7). For warships in the Area, the consent of the flag State is required (Article 12, para. 7). The UNESCO Convention does not deal with sunken warships in internal waters. They therefore fall under the general regime under Article 7, para. 1, which gives the coastal State the exclusive right to regulate and authorize activities directed at underwater cultural heritage. Nor there is a special provision for warships in the contiguous zone. However, the regime of the continental shelf applies, for Article 10 is preserved by Article 8 regulating the underwater cultural heritage in the contiguous zone. Thus the UNESCO Convention recognizes only a tenuous interest of the flag State in foreign territorial waters, since it should only be informed about the discovery. Moreover, the coastal State has only an hortatory obligation as proven by the conditional tense employed. This, according to the UNESCO Convention, is in conformity with the exercise of sovereignty of the coastal State and with the general practice among States, as stated in the opening sentence of Article 7, para. 3. On the contrary, the rights of the flag State increase where the wreck is located off the territorial waters. Those rights are greater in the case of vessels on the continental shelf, since any activity on them is permitted only with the agreement of the flag State. As for the Area, the flag

⁵² The proceedings on the explanation of the vote are reported by Roberta Garabello and Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage Before and After the 2001 UNESCO Convention*, Leiden and Boston, 2003, 241-253.

State enjoys full rights, since any activity directed at the wreck requires its consent. Thus it has been said that the main concern for maritime powers is the treatment of sunken warships in territorial waters, since in this case the coastal State has only a tenuous obligation (“should”) to inform the flag State⁵³.

The preamble to the Convention does not contain any clause on sunken warships and State vessels. The drafters of the Convention deemed it opportune to insert proper obligatory language, when drafting the “objectives and principles” section of the Convention in order to qualify the regime of sunken warships with a general provision (Article 2, para. 8).

Sovereign immunity is referred to in other parts of the UNESCO Convention. Article 13, entitled “Sovereign immunity”, exempts warships and State-owned vessels employed in their normal mode and not engaged in any activity directed at the discovery of cultural heritage from the duty to report any discovery as set out in the provisions of the Convention.

The meaning of the Article 2, para. 8 is rather confusing. According to its letter, if the Convention’s provisions are at odds with the existing practice and rules, the latter prevail. The rules of the Convention are respectful of the rights of the flag State. The only provision which seems to deviate from the existing practice is the one on territorial sea, since the rights of the coastal State prevail over those of the flag State, that should only be informed.

It may be possible that a sunken warship or State vessel qualifies as cultural heritage and this notwithstanding that it is still under the cover of sovereign immunity. In other words the passage of the time is not in itself an element which carries as a consequence the loss of sovereign immunity.

O. The issue of State responsibility

Wrecks of warships or State vessels may cause damage in different ways. It may happen that oil spills from the wreck or the cargo on board represents a danger, for instance if the ship carries on WMD or simply is powered by a nuclear engine or being an auxiliary vessel plenty of oil or other dangerous/toxic fuel⁵⁴. Chemicals may represent a danger even if they are not CWs, for instance asbestos. Environmental concerns are thus to be taken

⁵³ Ole Varmer, “United States of America”, in Dromgoole, *The Protection of Underwater Cultural Heritage* cit., 381-382.

⁵⁴ Henrik Rak, “Liability for Pollution from Shipwrecks”, in Henrik Rak and Peter Wetterstein (eds.), *Shipwrecks in International and National Law*, Papers from a Seminar 13-17 June 2007. Kasnas, Finland, 2007, Uniprint, Turku, 2008, 55-56.

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into account. A wreck may also constitute a danger for navigation, if it is not removed. The same is true for gas or oil pipelines as the danger represented by warships sunken in the Baltic in the 1940s. demonstrates. Several warships lie on the bottom of Pacific Ocean as remnants of the World War II engagements⁵⁵.

As a rule, treaty law on the subject exempts warships and State vessels from its sphere of application. This does not mean that the flag State is *legibus solutus* and that customary law does not regulate the matter.

Article XI of the 1969 International Convention on Civil Liability for Oil Pollution Damage, as amended by the 1992 Protocol, states that the Convention does not apply to warships and State vessels (Article XI).

Article 1, para. 2, of the 1969 International Convention relating to Intervention on the High Seas in cases of Oil pollution Casualties affirms that no measure shall be taken under the Convention against warships and State vessels.

The 1973 London International Convention for the Prevention of Pollution of Ships (MARPOL) excludes from its realm of application warships and State vessels, but imposes to State parties the duty to ensure, as far as it is reasonable and practicable, appropriate measures (Article 3, para. 1).

The Law of the Sea Convention embodies a provision on sovereign immunity in Part XII dedicated to the protection and preservation of the marine environment. According to Article 236 Part XII rules do not apply to warships, naval auxiliaries and State vessels. However the provision goes on in saying that States shall ensure that those vessels abide as far as is reasonable and practicable in conformity with the Convention. Malta and the Bangladesh submitted a declaration, according to Article 310 of the Law of the Sea Convention, stating that "Article 236 does not exonerate a State from such obligation, moral or otherwise, in accepting responsibility and liability for compensation and relief in respect of damage caused by pollution of the marine environment by any warship".

The clauses on warships contained in the above conventions are merely hortatory. However they testify the importance that also warships abide by the principles therein embodied.

⁵⁵ Leanne McKay, "An Unwanted Legacy of War: Sunken Warships in the Pacific, The Environmental Threat", 13 *Asia Pacific Law Review*, 2005, No. 2, 115-146; Sarah Dromgoole and Craig Forrest, "The Nairobi Wreck removal Convention 2007 and hazardous historic shipwrecks", *Lloyd's Maritime and Commercial Law Quarterly*, 2011, 108-109.

The other option is to enter the obligations on warships on voluntary basis.

This has been done with the most recent conventions.

The 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage states that it does not apply to warships, auxiliary vessels and State vessels (Article 4, para.2). However a State may decide to apply the Convention to its warships, auxiliary vessels and State vessels through appropriate notification to the IMO Secretary-General.

The other convention to be mentioned is the 2007 Nairobi Convention on wrecks removal, already commented upon. It follows the model of the Bunker Convention, since it excludes from its field of application warships and State vessels, but contains a provision on the application of the Convention to those vessels if the flag State so decides through notification to the IMO Secretary-General.

Directive 2004/35 EC of the European Parliament and the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage should also be cited. The Directive does not apply to activities the main purpose of which is to serve national defence or international security (Article 4, para. 6).

A relevance should be given to the WMD conventions.

For CWs the 1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction sets out a number of rules pertinent for our subject. Article I obliges States parties to destroy all CWs that are located in any place under their jurisdiction. The coastal State should destroy all CWs located in its territorial waters and on its warships or State ships. For CWs abandoned in foreign territorial waters the 1993 Convention obliges the abandoning State to destroy the CWs it abandoned. It is obvious that the destruction requires the co-operation of the territorial State. For warships located on the continental shelf or the EEZ, the responsibility to destroy belongs to the abandoning State and the Technical Secretariat of the OPCW (Organization for the Prohibition of Chemical Weapons) should be duly informed. This conclusion is based both on Article I of the Convention read in conjunction with Part IV (B) on the Annex to the Convention concerning "Old Chemical Weapons and Abandoned Chemical Weapons".

We assume that the threat represented by sunken warships to the environment may be approached from a dual perspective: (a) from the standpoint of the protection of the environment per se or (b) from the standpoint of human rights protection.

(a) The ICJ, in its advisory opinion on the threat or use of nuclear weapons asserted that "States must take environmental considerations into account

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when assessing what is necessary and proportionate in the pursuit of legitimate military objectives”⁵⁶. This statement, even though related to the use of nuclear weapons, may be applied to any military activity, including the navigation of warships in peacetime. Moreover, the proper reading of the UN Law of the Sea Convention provisions and the other conventions on pollution cited above that States are required to ensure, as far as possible, the prevention of damage to the marine environment caused by pollution. In other words one may construe an obligation of due diligence implying that the flag State should take all measures necessary to remove any serious environmental threat to the coastal State and/or to the marine environment. One can also construe a duty of information, should the threat be actual and capable of creating a potential harm to the environment. If the flag State does not abide by its duty to remove the environmental threat the coastal State should be allowed to take the necessary measure to cope with the danger. The doctrine of state of necessity might be of assistance in this regard.

If a ship is flying a flag different from the one of the State operating it, the due diligence obligation should be abided by both by the flag State and the State operating the ship. This proposal should meet the concern that States charter private owned vessels and operate them for government service (for instance a tanker for refuelling warships).

(b) The other perspective is that of human rights. A serious oil leak or other hazardous substances may threaten the health of human beings and even human life directly or indirectly, for instance when inhabitants are depending on fisheries that are reduced or destroyed by pollution, as it was the case of US *Mississinewa* and the oil leak in the Ulithi Lagoon in Federated States of Micronesia⁵⁷. Article 12 of the International Covenant on Economic, Social and Cultural Rights sets out the right to health which, according to the General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, encompasses inter alia “the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental conditions that directly or indirectly impact

⁵⁶ ICJ, *Reports 1996*, 242, para. 30.

⁵⁷ The *US Mississinewa* was a military oil tanker which sank during the World War II. The US agreed to extract the oil, but made clear that it did not have an obligation to do so: see McKay, *op cit.*, 129, note 38.

upon human health”⁵⁸. Article 6 of the International Covenant on Civil and Political Rights (Right to life) has been interpreted by General Comment No. 6 as encompassing also the obligation to take the necessary measures to protect such a right. It is also possible to construe the right to a healthy environment as a right stemming from the right to life under Article 2 of the European Convention on Human Rights as developed by the case-law of the European Court of Human Rights since its judgment on *Oneryildiz v. Turkey*⁵⁹ where the Court considered environmental degradation as a threat to life. In this connection also a procedural duty of information to avoid dangers from pollution might be construed as part of the obligation of due diligence attributable both to the coastal and the flag State⁶⁰. It is obvious that the obligations stemming from the human rights treaties are incumbent on the territorial State. However there may also be responsibility on the part of the flag State when its organs are employed abroad as in the case of warships or State-owned vessels.

P. Provisional Conclusions

Practice shows that States are asserting rights over wrecks of their warships either by claiming sovereign immunity or as owner of wrecks affirming that ownership is not lost by mere passage of time, except in cases where there has been an act of abandonment or transfer of the title. When interests of both the coastal State and the flag State come into play, a compromise is sought by reaching an agreement. Conventional law, including the UNESCO Convention, dictates a special regime for sunken warships and State vessels.

Taking into account State practice and recent developments in conventional law the trend does not go in the direction of having a uniform regulation for all sunken warships and State vessels. A modern regulation of the matter should take into account the fact that sunken warships and State vessels may qualify under the notion of UCH even though the regime of sunken warships should be differentiated from that of ordinary wrecks of merchant vessels.

For that reason, a distinction should be made between sunken warships which may be considered as submerged antiquities and those that may not, since they are recently sunken. While the former category has been the

⁵⁸ General Comment No. 14 (2000), The right to the highest attainable standard of health (Article 12 of the International Covenant on Economic, Social and Cultural Rights), EC 12/2000/4, 11 August 2000, para. 15, 5.

⁵⁹ ECtHR Rep (2005-IV) 255, paras 89-90.

⁶⁰ cf. Francesco Francioni, “International Human Rights in an Environmental Horizon”, 21EJIL (2010), 48-51.

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object of regulation, the latter has not, if one excepts the IMO Convention on the removal of wrecks. Thus it might be expedient to hold sunken warships which qualify as submerged antiquities separate from those which cannot be defined as historical wrecks, since they have recently sunk. The critical date is not fixed by any convention, but the one promoted by UNESCO that covers objects submerged for at least 100 years. That date may also be adopted in this report for distinguishing sunken warships with historical value from the modern ones. The following proposals are suggested:

1) Sunken warships and State-owned vessels qualifying as submerged cultural heritage

Both Articles 303 and 149 of the Law of the Sea Convention regulate objects of historical value but do not contain any special provision for sunken warships. Moreover it is by no means clear whether they are declaratory of customary international law. Article 303, para. 3, preserves the right of identifiable owner, the law of salvage and other rules of admiralty. Thus also the law of find is preserved. Article 149 is more respectful of cultural objects, since they should be preserved or disposed for the benefit of mankind as a whole, even though particular regard should be paid to countries having a link with the object found at sea. A gap does exist in the regulation of those ships which sank between the outer limit of the contiguous zone and the outer limit of the continental shelf and it is to believe that the freedom of the high seas applies, with the consequence that they may be freely recovered, unless the flag State is entitled to claim its jurisdiction. The UNESCO Convention pays deference to the historical nature of warships, prohibiting, as for other submerged cultural heritage, recovery for commercial purposes and restricting salvage. The flag State maintains only nominal powers in foreign territorial and archipelagic waters, while for the warships on the continental shelf and in the Area any activity should be carried out with its agreement or consent. For foreign territorial waters, the UNESCO Convention is not in conformity with the State practice, under which the consent or the agreement of the flag State is necessary for any activity directed at the ship. On the other hand, such an activity cannot be undertaken without the consent of the territorial State that enjoys full jurisdiction over its territorial waters. Thus the practice shows that there is a shared competence between the flag State and the coastal State in foreign territorial waters. This proposal cannot be replicated for the continental shelf and the Area. However State practice is scant. The best solution is to submit any activity directed at sunken ships to the consent of the flag State, that has title to intervene as the owner of the ship. If the owner is no longer identifiable or the ship has been abandoned, the wreck should be subjected to the ordinary regime of submerged property. One may also take

stance for the abolition of salvage and the law of find and the prohibition of any activity for commercial purposes. But this solution is conventional law (the UNESCO Convention) and not customary law.

Note that the Mining Code adopted by the Seabed authority to conduct activities in the Area sets out an obligation that the prospector or the contractor should carry out. They have to notify the Secretary-General in writing any finding in the Area of archaeological or historical nature. The Secretary-General will transmit the information to the UNESCO Director-General⁶¹. A standard clause of this kind should be included in the contract for exploration stipulated between the Seabed Authority and the contractor⁶².

2) Recent sunken warships and State-owned vessels

The starting point is that the ship continues to be in the ownership of the flag State. The problem is whether it should be also given sovereign immunity. The practice is scant even though worth of being taken into account. It relates to warships which sank during World War II and more recent examples. The time limit of 100 years may adopted as dividing line between ancient and recent warships/State-owned vessels.

As for sunken warships in foreign territorial waters the practice shows that any activity directed at the ship requires the joint action both of the coastal State and the flag State. Failing agreement, is the coastal State prohibited from taking any measure in regard to the sunken ship? A comparison may be made with the legal regime concerning innocent passage. If the foreign vessel does not abide by rules on innocent passage, the coastal State may ask the ship to leave the territorial sea immediately, if the ship disregards the laws and the regulations of the territorial State. It may also take more effective measures and in particular may take the necessary steps in order to prevent passage which is not innocent. Thus immunity of warships is not absolute. A fortiori sunken vessels could not enjoy absolute immunity, if one takes stance for the immunity. One must consider that the wreck may constitute a danger for navigation and even to the marine environment if, for instance, it is the wreck of a nuclear powered ship or if there is danger of oil-spill-over. The coastal State may ask the flag State to remove the wreck. If the latter does not comply with the request, the former is entitled to take protective measures, even though the ownership of the wreck as foreign

⁶¹ ISBA/6/A/16, 20 July 2000, Decision of the Assembly of the International Seabed Authority relating to the regulation on prospecting and exploration for the polymetallic nodules in the Area, Annex., Articles 8 and 34.

⁶² *ibid.*, Annex 4, Standard clauses for exploration contract, Article 7.

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property should be respected. One may take the stance for a limited immunity provided that the warship was lawfully present in foreign territorial waters at the time of sinking.

A danger may also be represented by a wreck containing WMD. For CW, the 1993 CWC establishes a procedure for declaration of the presence of and destruction of abandoned CW on the territory of a State party (Art. III, 1 b and Part IV b, para. 8 of the Verification Annex). The Convention only addresses the territory, but this formulation covers also the territorial waters of the coastal State. The territorial State and the abandoning State should cooperate for the destruction of CWs.

The property of wrecks lying on the continental shelf or beyond its outer limit belongs to the flag State, unless abandoned or relinquished. May it also be submitted that the wreck enjoys sovereign immunity? For the doctrine of immunity one may quote the following:

- the Soviet countries proposal to insert an ad hoc provision in the Law of the Sea Convention. The proposal was not incorporated but it is not clear whether its rejection was motivated by the opposition to the doctrine of sovereign immunity or only by the view that the subject was not ready for the codification;
- the *Glomar Explorer* expedition was carried out in secrecy by the US administration. It may be implied that the secrecy of operation was due to the perception that the conduct of the US was not in keeping with international law. The Soviet Union protested;
- The field of application of the Nairobi Convention on the Removal of Wrecks covers the exclusive economic zone of the coastal State which has the duty to take a number of measures concerning the wreck in view of its removal. However, the Convention does not apply to warships unless the flag State decides otherwise;
- The wreck may contain sensitive technology, as the case of *Glomar Explorer* shows, and sovereign immunity is a means of protection;
- The ship may be recovered and be capable of navigation again after the necessary repairs.

In addition exclusion clauses contained in treaties regulating the status of sunken vessels are relevant. As a rule, sunken warships are exempted from the regime established by the treaty or a special regime is dictated (the 1989 Salvage Convention, the 2001 UNESCO Convention, the 2007 Nairobi Convention).

Even if we assume that warships sunken on the high seas enjoy sovereign immunity, the danger represented by the wreck should not be

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overlooked, for instance nuclear pollution coming from a nuclear powered ship. The due diligence obligation of the flag State should be the starting point for construing a regulation.

Another point is whether we have to differentiate between warships and other State vessels. One opinion suggests a differentiation. A different view is that a differentiation is not advisable since also State vessels may have on board equipment affecting the security of the flag State.

3) *New conventional law for sunken warships which do not qualify as underwater cultural heritage?*

Since State practice is uncertain it is difficult to formulate a rule reflecting customary international law. For warships that qualify as submerged antiquities the situation is regulated by the UNESCO Convention and the main problem is that the Convention has obtained a low number of ratifications up till now. It is proposed that the same path be followed, i.e. to draft new conventional law, for warships which do not qualify as submerged antiquities. However, new codification should be based on a set of principles which may be extracted from the existing practice. An additional question should consist in individuating the body that should take the lead, for instance an organization involved in maritime affairs such as the IMO or other universal organization.

Q. Questions

- *Should sunken warships and State-owned vessels operated for non-commercial purposes be subject to a special regime different from the one dictated for UCH? May we differentiate according to the time of sinking (for instance more than 100 years) ?*
- *Should sunken warships and State-owned vessels operated for non-commercial purposes be exempted from salvage and find rules?*
- *Should sunken warships and State-owned vessels operated for non-commercial purposes retain sovereign immunity? If the answer is yes, for how much time will sovereign immunity persist?*
- *Should sunken State-owned vessels operated for non-commercial purposes be differentiated from sunken warships as far as immunity is concerned?*
- *Should sunken warships as a resting place for dead sailors deserve special respect?*
- *Should sunken warships and State-owned vessels operated for non-commercial purposes remain the property of the flag State, even though they do not possess sovereign immunity?*

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- *Should the property over sunken warships and State-owned vessels operated for non-commercial purposes belong to the flag State wherever the wreck is located and notwithstanding the passage of time, unless expressly abandoned?*
- *Should the flag State be responsible for any damage caused to the environment and/or navigation?*
- *Should IDI's draft resolution recommend the negotiation of a Convention on the status of wrecks of warships and State-owned vessels?*

II. DELIBERATIONS DE L'INSTITUT

Dixième séance plénière

Vendredi 9 septembre 2011 (matin)

La séance est ouverte à 11 h 40 sous la présidence du Troisième Vice-Président, *M. Mahiou*.

Le *Président* invite le Rapporteur, M. Ronzitti, à présenter le Rapport de la Neuvième Commission.

The *Rapporteur* expressed that he was pleased to study the topic at hand before noting that he had received comments on the draft from Mr Morin, Lady Fox, Mr Lowe, Mr Francioni and Mr Caflisch, along with oral comments from Members of the Commission at its earlier meeting. He began by indicating that his Report was devoted to two classes of ships, warships and State vessels, underscoring that the former category was defined in the United Nations Convention on the Law of the Sea. He further observed that the latter class of ship was defined, both in the Law of the Sea Convention and in other instruments, as vessels owned or operated by States solely or only for non-commercial purposes (e.g. during a violent catastrophe, goods can be shipped through this channel). He pointed out that the Report tackled the problematic definition of 'wreck', and highlighted that several international conventions offered guidance on this front, such as the 2007 International Convention on the Removal of Wrecks and the important 2009 Convention on the Protection of Underwater Cultural Heritage. He underscored that the scope of the Report not only addressed wrecks of warships and State vessels, but also encompassed both the cargo onboard a ship, which in principle belonged to a State, and private items onboard the wreck.

Given the abundance of treaty-based definitions of 'wreck', the Rapporteur admitted favouring the language of 'sunken warships and State vessels' to accurately define the issues covered in the Report. He went on to identify the relevant provisions of the United Nations Convention on the Law of the Sea regulating cultural heritage and items of historical value, namely Articles 303 and 149, and concluded that they applied to sunken warships and State vessels to the extent that those ships can be considered to be of archaeological value and historical interest under that instrument. The

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Rapporteur observed that, while it dealt with this problem, the 1989 Salvage Convention failed to apply to warships, thereby excluding them from the purview of the Report. He remarked that the 2001 UNESCO Underwater Cultural Heritage Convention dealt with vessels that had been under water for at least 100 years and contrasted it with the United Nations Convention on the Law of the Sea, which did not set a fixed term. He also pointed out that the 2001 Convention confined warships to a special regime, as that instrument acknowledged the special status of such vessels.

The Rapporteur called attention to the fact that the 2007 Nairobi International Convention on the Removal of Wrecks enabled coastal States within their exclusive economic zone or equivalent distance to undertake measures for the removal of wrecks posing a hazard to navigation. He highlighted that this Convention excluded warships from its field of application unless the flag State decided otherwise. He concluded that the problem resided in the sovereign immunity pertaining to warships, as that issue was regulated by well-established provisions in both treaty law and customary international law. In particular, he pointed out that the 1958 Geneva Convention on the Territorial Sea, the United Nations Convention on the Law of the Sea, and the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property were all relevant to the topic at hand, with the last one setting out immunity for the cargo onboard a ship in addition to the vessel itself. In short, he observed that this instrument granted sovereign immunity to public property located on sunken warships.

The Rapporteur queried whether sunken warships and State-owned vessels were still entitled to sovereign immunity when they were no longer navigating and were therefore precluded from serving the interests of the State. He identified a problem stemming from the relationship between sovereign immunity and property, observing that in the eventuality that a flag State was stripped of sovereign immunity for its sunken warship, the property onboard the ship could be lost pursuant to the practice and applicable statutes of limitations. Turning to state practice on this front, he underscored that the notion of property prevailed and that the recovery of a sunken warship was usually carried out with the agreement of the flag State. He invoked the ongoing *Nuestra Señora de las Mercedes* case of the Florida District Court, now under appeal, in which a Spanish frigate sank in 1804 after an engagement with British forces in the international waters of the Straits of Gibraltar, before its wreck was located in 2007 by Odyssey Marine Exploration. He noted that Odyssey attempted to recover the ship and derive possessory rights over the ship, with a view to securing a judgment in its favour from the Tampa tribunal. He observed that the tribunal ruled that Spain was entitled to sovereign immunity and that Odyssey had no valid title

over the discovered wreckage and vessel. Further, the Rapporteur indicated that the U.S. State Department had intervened in the proceedings in partial support of Spain.

The Rapporteur then turned to the U.S. Sunken Military Craft Act of 2005. He underscored that this legislation dealt more with property than immunity and stated that rights and title to U.S. sunken warships shall not be extinguished, save by an express act of the U.S. (e.g. abandonment), and that the passage of time did not alter the U.S. property rights. What is more, the Rapporteur highlighted that this Act abolished the law of find and salvage with regard to U.S. sunken military vessels, wherever located, and in respect of foreign military vessels located in territorial waters or the contiguous zone of the U.S. He added that the recovery of a sunken vessel required the agreement of the flag State.

Turning to the law of prize, the Rapporteur described the facts surrounding the leading case of *Admiral Nakhimov*, whereby a Russian ship was captured and sunk by the Japanese navy during the Japanese-Russian war of 1904-1905. He underscored that this case unequivocally stood for the proposition that, according to the law, property was automatically transferred to the capturing State without the necessity of resorting to prize adjudication.

The Rapporteur raised the question of sunken warships as cemeteries of war, as ships were often sunk with all personnel onboard. He observed that several countries treated such war graves with deference. He underscored that no international convention regulated this situation, as the fourth Geneva Convention and Additional Protocol I of 1977 dealt with remains of deceased persons and failed to encompass sea warfare. On this point, the Rapporteur invoked the 2000 Virginia Court of Appeals decision in the *Juno* and *La Galga* case, in which the Court declared that war graves should be afforded due deference.

The Rapporteur then pondered what kinds of competing jurisdictions might come into play in this setting. First, he observed that coastal States derived some rights pursuant to Article 303 of the United Nations Convention on the Law of the Sea, namely through the establishment of an archaeological zone. Moreover, the Rapporteur indicated that flag States might have had a claim on the basis of sovereign immunity or, even if such immunity was removed, to the property of the ship unless it was captured.

The Rapporteur recalled that the 2001 UNESCO Convention established a fixed term of 100 years, which meant that a wreck older than 100 years belonged to the cultural heritage pursuant to that instrument. He further highlighted that this treaty provided for a special regime regulating warships and State vessels. He observed that, should a coastal State have found a ship

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in its territorial sea, it should have informed the flag State of the discovery. He went on to note that, if the ship was located in the exclusive economic zone or the continental shelf of the coastal state, an agreement between the coastal State and the flag State was required. With respect to the relevant area, he underlined that the flag State was entitled to rights over its sunken warships and that the consent of that State was always required with respect to that area.

The Rapporteur then raised the question of the relationship between state responsibility and the protection of the environment. He acknowledged that wrecks of warships and State vessels could engender damage to the environment in various ways. For instance, he noted that oil spills from a wreck or the cargo on board represented a danger if the vessel was carrying hazardous materials, such as in the case of a nuclear submarine or the transportation of nuclear substances on a sunken State vessel for peaceful purposes. He noted that the only partially relevant treaty regulating sunken ships with chemical weapons on board was the Chemical Weapons Convention, which imposed an obligation upon abandoning States to destroy chemical weapons on board, and that the destruction of a vessel containing chemical weapons located on the continental shelf or the exclusive economic zone required the cooperation of the coastal State. The Rapporteur referred to general international law and suggested that flag States had a due diligence obligation to take all measures necessary to remove any serious environmental threats to coastal States and/or the marine environment. He further posited that, from a human rights perspective, chemicals and other hazardous substances might endanger the populations of coastal States and that States had to respect human life pursuant to provisions of the United Nations Covenants on Human Rights.

The Rapporteur concluded by stating that the Commission recommended that discussion be offered on those aspects of the topic that are certain, such as the law of the prize, and that relevant rules had to be identified in the corpus of customary and international law. Taking stock of those provisions, he argued that a coherent regime had to be built, which not only engaged the law of the sea but also state immunity for public property and the rules governing state succession. He pointed to a case from World War I to underscore problems in identifying the owners of ships lying on the continental shelves when States had disappeared. He further alluded to the controversial question of defining 'underwater cultural heritage' and noted that, while the 2001 UNESCO Convention defined those terms, many preferred relying on the provisions enshrined in the United Nations Convention on the Law of the Sea. He stated that the problem, however, was that this latter treaty failed to set a date for the purposes of defining

underwater cultural heritage, an eventuality envisaged by the 100-year period applicable to the conversion of warships into cultural heritage under the UNESCO Convention.

He further explored the problem of property and pondered which regime applied when sunken warships became cultural property. On this point, he reiterated that the 2001 UNESCO Convention abolished the law governing the salvage and find of wrecks and addressed the issue of the responsibility to locate ships, which lied with either States or private enterprises, noting that the law of the find was difficult to abolish in this latter case. The Rapporteur called attention to the need to address the question of sunken warships and State vessels, along with the cargo on board, not only from the perspective of immunity of the flag State, but also from the standpoint of public property of the flag State and whether it was entitled to immunity. He also queried which legal regime applied to private property found on board vessels, such as the private belongings of crew members.

The Rapporteur concluded by endorsing the recommendation of the Commission that he should prepare another report containing a draft structure of the items that will serve as the basis of a resolution to be adopted at a later stage. Upon completion of that first stage, the Rapporteur indicated that he would then submit a complete report with a draft resolution for the consideration of the plenary.

Le Président invite les membres à commenter ce rapport.

Mr *Francioni* congratulated the Rapporteur for his work. He highlighted that the report assumed that the meaning of 'warship' was clear, although it did not specify the criteria used to define the term. He recalled that the definition of 'warship' might in some cases find its source in an agreement reached between the coastal State and the flag State. Mentioning the case of *Nuestra Señora* which was the object of a dispute between Spain and Peru, he pointed out that an analysis on State succession should be integrated in the Report. He also considered that development of the human rights dimension of the topic would be suitable. Finally, he opined that the regional approach prevalent in the 2001 UNESCO Convention would merit further consideration in the Report.

Mr *Degan* recalled the 1709 Battle of Poltava when under the command of Peter the Great, Russia sank Swedish warships which were now exhibited in Saint Petersburg. He queried whether Sweden would be entitled to claim immunity over these warships or even request their return.

Mr *Broms* congratulated the Rapporteur for the presentation of his Report and considered that the Commission should be granted an extension of the term for their work.

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Mr *Tyagi* joined his colleagues in thanking the Rapporteur and praised the methodology and exhaustiveness of his work. He queried which forum would be the most appropriate for negotiating an eventual Convention on the subject (International Law Commission, UNESCO or some other venue), a possibility that had been endorsed in the Report.

Mr *Hafner* associated with his colleagues in congratulating the Rapporteur. He first asked whether wrecks and warships found in internal waters, such as lakes and rivers, fell outside of the scope of the Report. Recalling the case of a Austro-Hungarian submarine that had been sunk during World War I in the Northern Adriatic Sea and was recovered in the 1960's, and which was then brought to Austria, he questioned how the Report would deal with the issue of State succession. He further asked how the Report would respond to situations when a successor State was not in a position to comply with obligations purporting, for instance, to environmental protection. He also pondered whether wrecks of vessels used for commercial purposes would be covered by the Report.

M. *Mahiou* se rallie à ses collègues pour remercier le Rapporteur. Il estime qu'il convient de distinguer les situations impliquant des navires d'États de celles impliquant des navires de guerre et qui peuvent soulever des questions ayant trait, *inter alia*, à des problèmes de secrets relevant de la défense nationale.

Mr *Ronzitti* replied to the observations raised by his colleagues. With regard to Mr Francioni's suggestions, he acknowledged that the issue of State succession would deserve consideration in the Report, as well as the range of solutions that could rise from the integration of a regional approach to the subject. He then replied to Mr Tyagi's question by indicating that the International Maritime Organization should be taken into account as a possible forum for negotiating an eventual Convention on the subject, for that body had already served as a forum for the adoption of the Nairobi International Convention on the Removal of Wrecks. Referencing in particular the work of Professor Derek Bowett, he also stated that the International Law Commission had been taking the subject into consideration, though no codification process had been initiated within this institution. As to Mr Degan's query, he declared that the law of prize clearly provided that the ownership of a warship could only be obtained through its capture. Had this condition not been met, the warship remained under the ownership of the flag State. In response to Mr Hafner, he explained that for the sake of simplification, the Commission had decided not to include wrecks and warships found in internal waters, consequently dealing with the Law of the Sea exclusively. Finally, he agreed with Mr Mahiou that the topic under study could entail serious implications for the environment. He

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acknowledged the importance of relying on general rules of international law, purporting in particular to State succession and State responsibility.

Mr *Degan* responded that the law of prize applied only to merchant wrecks which, contrary to warships, were not entitled to State immunity.

Mr *Ronzitti* concluded his intervention by positing that the difference between Mr *Degan*'s position and his own was only a matter of semantics.

La séance est levée à 12h45.