

# Michigan Journal of International Law

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Volume 8 | Issue 1

---

1987

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### Recommended Citation

Elizabeth Barrowman, *The Recovery of Shipwrecks in International Waters: A Multilateral Solution*, 8 MICH. J. INT'L L. 231 (1987).

Available at: <https://repository.law.umich.edu/mjil/vol8/iss1/9>

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# The Recovery of Shipwrecks in International Waters: A Multilateral Solution

Elizabeth Barrowman\*

## I. INTRODUCTION

For the past fifteen years, commentators have urged the international community to adopt an international framework to govern questions of property rights to shipwrecks found in international waters.<sup>1</sup> Such a framework is needed to provide certainty in this chaotic area of international law, to protect submarine antiquities, and to prevent disputes arising from the salvage of military and other vessels. The legal status of objects lying on the seabed in international waters has been overlooked by jurists specializing in international law primarily because recovering shipwrecks from the seabed has, until relatively recently, been technologically impossible. Improvements in technology,<sup>2</sup> however, have made wrecks lying on the deep seabed accessible to salvors.<sup>3</sup> This accessibility, coupled with the lack of an international convention to regulate the salvage of shipwrecks found on the seabed, will likely cause international conflicts in the future.

The absence of international guidelines governing property rights to shipwrecks discovered on the seabed has produced disputes concerning the salvage of such wrecks. In 1980, for example, the discovery of the wreck of the *Admiral Nakhimov* (a Czarist warship sunk in the Strait of Korea during the Russo-Japanese War) led to a heated controversy between the Soviet Union and Japan,

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1. See Note, *Historic Shipwreck Legislation: Rescuing the Titanic from the Law of the Sea*, 13 J. LEGISLATION 92 (1986); Altes, *Submarine Antiquities: A Legal Labyrinth*, 4 SYRACUSE J. INT'L. L. & COM. 77 (1976); Note, *Archaeological and Historical Objects: The International Legal Implications of UNCLOS III*, 22 VA. J. INT'L L. 777 (1982) [hereinafter Note, *UNCLOS III*].

2. See Auburn, *Deep Sea Archaeology and the Law*, 2 INT'L J. NAUTICAL ARCHAEOLOGY & UNDERWATER EXPLORATION 159 (1973).

3. For technology used in the discovery of the Titanic, see Marbach, Katz & Pedersen, *The Sea Gives Up a Secret*, NEWSWEEK, Sept. 16, 1985, at 44. In 1981, the salvage of the *Edinburgh* became possible; although the value of the cargo was well known and the location fixed at the time of the sinking, it was only after technological advancements that its salvage became possible. See N.Y. Times, Sept. 14, 1981, at 5, col. 3, 11, col. 1.

in which the Soviet Union contended that the ship possessed sovereign immunity because it retained its character as a warship<sup>4</sup>. The American effort to salvage the wreck of a Soviet submarine that had sunk approximately 750 miles from Hawaii in 1968<sup>5</sup> provoked debate but did not stir a major controversy between the superpowers.<sup>6</sup> The 1985 discovery of the *Titanic* generated discussion about claims and property rights to the ship and any salvageable goods.<sup>7</sup> President Reagan signed a bill designating the *Titanic* a maritime memorial in an attempt to persuade the parties involved to "refrain from physically disturbing the wreck or recovering artifacts."<sup>8</sup> In October 1986, a Soviet atomic submarine sunk in international waters carrying sixteen ballistic missiles, each armed with two nuclear warheads.<sup>9</sup> Although the United States announced that it would not salvage the submarine, one can imagine many countries wanting to attempt its recovery. The technological advancements that have facilitated the discovery of sunken vessels have exposed the inadequacies of the international legal frameworks regulating the salvage of shipwrecks in international waters. The lack of international guidelines has produced several disputes in the past and will cause controversies which may escalate into international confrontations.

This Note will examine the current state of international law concerning property rights to all types of wrecks discovered in international waters. It will show that a multilateral convention is needed to establish an international framework for property rights to shipwrecks of historical and archaeological value, to wrecks of military vessels, and to wrecks of commercial ships such as the *Titanic*. There may be obstacles to the establishment of a multilateral convention, but the international community must provide certainty to ownership questions, furnish protection for submarine antiquities, and prevent disputes arising from the wrongful salvage of military vessels.

## II. EXISTING INTERNATIONAL LAW

To resolve questions concerning ownership of shipwrecks found in international waters, several sources must be examined. International law requires that a distinction be made between historically or archaeologically valuable vessels and commercial or military vessels.<sup>10</sup> Specifically, the customary international law

4. N.Y. Times, Oct. 7, 1980, at 15, col. 1; N.Y. Times, Oct. 21, 1980, at 5, col. 1.

5. Collins, *The Salvage of Sunken Military Vessels, Project Jennifer: A Dangerous Precedent*, 8 J. MAR. L. & COM. 433 (1977).

6. It is possible that a controversy did not erupt from the U.S. salvage attempt because the Soviets were embarrassed to admit that they did not have the technology to salvage it themselves. *Id.* at 435.

7. See Note, *Historical Shipwreck Legislation: Rescuing the Titanic from the Law of the Sea*, 13 J. LEGISLATION 92 (1986).

8. N.Y. Times, Sept. 30, 1986, at B6, col. 2 (quoting Sen. Weiker).

9. N.Y. Times, Oct. 7, 1986, at 1, col. 6.

10. See Cañisch, *Submarine Antiquities and the International Law of the Sea*, 1982 NETH. Y.B. INT'L L. 3, 7-10 (1982); Altes, *supra* note 1. See, e.g., Note, *UNCLOS III*, *supra* note 1.

salvage principles apply to all shipwrecks. Shipwrecks with historical or archaeological value also are governed by the Third United Nations Convention on the Law of the Sea (UNCLOS III), which does not govern wrecks of military and commercial vessels. Both UNCLOS III and customary salvage law, however, provide inadequate international standards for the settlement of conflicts of laws and of jurisdictional disputes between states and private parties for all wrecks.<sup>11</sup>

### A. Historical and Archaeological Wrecks—UNCLOS III

The Third United Nations Conference on the Law of the Sea (UNCLOS III)<sup>12</sup> adopted in 1982, includes two provisions that expressly address marine archae-

11. The possibility of disputes is likely because of the fact that international salvage law is almost incomprehensible. *See* *Altes*, *supra* note 1. For example, U.S. courts apply the law of finds to ships found in its territorial waters while Great Britain applies a "sovereign prerogative". *See infra* note 28. While U.S. courts have not to date applied the law of finds to wrecks found in international waters, experts have suspected for many years that because the law of salvage is not uniform and U.S. courts have applied the law of finds as part of the law of salvage, U.S. courts will treat the law of finds as the applicable rule of international law. *See* Note, *supra* note 7. *See, e.g.,* Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WM. & MARY L. REV. 383 (1967).

12. The law of the sea was largely customary law, governed by the principle of freedom of the high seas until the United Nations created the International Law Commission for the purpose of codifying and developing the law of the sea. The Commission attempted to create a framework to govern unilateral claims of sovereignty over portions of the sea that arose after the Second World War. These claims began with the Truman Proclamation of 1945 in which the U.S. claimed rights to the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coast of the U.S., as appertaining to the U.S. and subject to its jurisdiction and control. *See* Note, *supra* note 1.

The result was the United Nations Conference on the Law of the Sea in 1958 (UNCLOS I). This Conference adopted four Conventions: on the Territorial Sea and the Contiguous Zone; on the High Seas; on the Continental Shelf; and on the Fishing and Conservation of the Living Resources of the High Seas. In the following decades, the proliferation of new states and other forces pressed for a recodification as well as for substantive changes in the law of the sea. UNCLOS I had failed to reach a consensus on the width of the territorial sea. UNCLOS II met in Geneva in 1960 to resolve this issue but failed to adopt a compromise. Initiatives in the UN General Assembly, beginning in 1967, to deal with resources of the seabed "beyond the national jurisdiction" resulted in the establishment of the Committee on Peaceful Uses of the Sea-bed and Ocean Beyond the Limits of National Jurisdiction. This led to UNCLOS III at which virtually the whole law of the sea was reexamined. It brought together representatives from 160 countries in an attempt to formulate a comprehensive plan including resolution to such issues as the breadth of the territorial sea, exploitation of the ocean floor, problems of overfishing and marine pollution, and scientific research. The Conference held its first meeting in 1973, but disagreements on the Convention delayed its completion. The final draft was eventually adopted in 1982 by a vote of 130 to 4 with 17 abstentions. Israel, Turkey, the United States, and Venezuela voted against the Convention. Belgium, Bulgaria, Byelorussia, Czechoslovakia, the German Democratic Republic, the Federal German Republic, Hungary, Italy, Luxembourg, Mongolia, the Netherlands, Poland, Spain, Thailand, the Ukraine, the U.S.S.R. and the U.K. abstained.

The Committee on Peaceful Uses of the Sea-bed and Ocean Beyond the Limits of National Jurisdiction (the Sea-bed Committee) was convened in 1970 to establish an international machinery with jurisdiction over the seabed and ocean floor lying beyond the limits of national jurisdiction. *See*

ology: Articles 149 and 303. Article 149, entitled “Archaeological and Historical Objects”, provides that all objects of an archaeological and historical nature found on the high seas be preserved or disposed of for the benefit of mankind as a whole, with particular regard being paid to the “preferential rights” of the state or country of origin, the state of cultural origin, or the state of historical and archaeological origin.<sup>13</sup> Several problems mar Article 149.<sup>14</sup> First, the Article, like Article 303, fails to discuss “shipwrecks” specifically and neglects to define “archaeological and historical objects.”<sup>15</sup> It does not indicate how old an artifact must be to qualify as an archaeological or historical object.<sup>16</sup> Second, although the Article originally intended that an international seabed authority preserve and dispose of archaeological objects discovered on the high seas for the benefit of all

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The Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 25 U.N. GAOR SUPP. (No. 21), Appendix, at 29, U.N. Doc. A/8021 (1970). This international machinery was designed to include an international seabed authority to supervise various activities, primarily resource exploitation on the seabed. The Authority was to have the power to regulate, co-ordinate, supervise and control all activities relating to the exploration and exploitation of the seabed’s resources. *See* 25 U.N. GAOR SUPP. (No. 21), at 65. The Committee was not originally concerned with the question of marine archaeology as an area that might require international control. It was not until 1971 that a Greek delegation submitted a working paper to the Committee proposing that Archaeological and Historical Treasures of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction be included in the list of topics to be discussed. U.N. Doc. 138/54 (1971), *reprinted in* Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor Beyond the Limits of National Jurisdiction, 26 U.N. GAOR SUPP. (No. 21), at 194, U.N. Doc. A/8421 (1971). The Report stated:

Besides the functions and powers referred to above, consideration may also need to be given to functions and powers relating to other uses of the sea-bed. While it is difficult to foresee all the other possible uses of the sea-bed which technological progress might bring about, reference may be made to the use of the sea-bed for the following purposes, each of which might be accompanied by the performance of related functions and powers by international machinery. Exploration and recovery of sunken ships and lost objects both from the point of view of archaeology — with regard to which UNESCO performs a variety of functions — and as regards salvage operations.

Study of International Machinery: Report of the Secretary-General, 25 U.N. GAOR SUPP. (No. 21) at 110-11.

The tentative nature of the Committee’s decisions dealing with archaeological issues was apparent in a report submitted in 1973. *See* 28 U.N. GAOR SUPP. (No. 21, Vol. 2), at 39, U.N. Doc. A/9021 (1973). The Committee eventually failed to reach a consensus on the archaeology issue; it did formally place the matter on its agenda for further debate but, in reality, left marine archaeology for UNCLOS III, which began meeting in 1973.

13. United Nations Convention on the Law of the Sea, Article 149, U.N. Sales No. E.83.V.5 (1983). This Article does not define preferential rights.

14. *See* Note, *supra* note 1, at 791.

15. *See* Cafilisch, *supra* note 10, at 26. The author wrote a criticism of the draft articles of UNCLOS III, which seemed to have made a difference, since the words as changed in the final draft indicate the drafters utilized his comments.

16. *See, e.g.,* Note, *supra* note 1, at 779.

mankind, the Article, as adopted, does not specify such an entity.<sup>17</sup> Furthermore, Article 149 fails to define or establish priorities between the state or country of origin, the state of cultural origin, and the state of historical and archaeological origin.<sup>18</sup>

Article 303 permits coastal states to regulate the recovery of historical and archaeological wrecks discovered in their territorial waters and in their contiguous zones. Article 303 of the Law of the Sea Treaty reads as follows:<sup>19</sup>

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

2. In order to control traffic in such objects, the coastal state may, in applying Article 303, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage, or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Paragraph two of the Article extends coastal state jurisdiction on matters of marine archaeology to the contiguous zone<sup>20</sup> and "allows the coastal state to benefit from a legal fiction by enabling it to presume that the removal of an object from its contiguous zone has taken place within its territorial sea."<sup>21</sup> Recovery of an object from the bed of the contiguous zone without the coastal state's approval is considered an infringement of that state's customs and fiscal regulations.<sup>22</sup> Paragraph two of Article 303 provides guidelines for wrecks found in the territorial waters and contiguous zones of coastal states, but the principle of the freedom of the high seas applies beyond the contiguous zone, on the continental shelf, and on the high seas. Freedom of the high seas means that the open sea is not, and never can be, under the sovereignty of any state.<sup>23</sup> Since the high seas are not the territory of any state, no state has, as a rule, the right to exercise legislation, administration, jurisdiction or police power over parts of the high seas,<sup>24</sup> and no state can assert property rights over any objects, including ship-

17. There was no consensus in favor of an authority fulfilling this function, but an alternative was never proposed. See Caffisch, *supra* note 10, at 29.

18. Note, *supra* note 1, at 808.

19. United Nations Convention on the Law of the Sea, Article 303, U.N. Sales No. E.83.V.5 (1983).

20. The contiguous zone is 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. See United Nations Convention on the Law of the Sea, Article 33, U.N. Sales No. E.83.V.5 (1983).

21. Caffisch, *supra* note 10, at 20.

22. *Id.* at 19.

23. L. OPPENHEIM, INTERNATIONAL LAW 468 (1928).

24. *Id.* at 468-69.

wrecks, found in high seas. Thus, the recovery of archaeologically and historically valuable shipwrecks on the deep sea-bed remains essentially unregulated by Article 303.<sup>25</sup> As a result, under paragraph three of the Article, the freedom to salvage historical and archaeological wrecks from the sea-bed beyond the contiguous zone is limited only by the rights of identifiable owners, by the rules of admiralty, and by the salvage laws of flag states of ships engaged in the search for and recovery of submarine antiquities.<sup>26</sup>

While the Third United Nations Conference on the Law of the Sea afforded the international community an opportunity to devise a legal framework for the salvage of submarine antiquities, the opportunity was squandered. UNCLOS III is inadequate in many respects.<sup>27</sup> As noted above, the failure to discuss “shipwrecks” specifically and to define “objects of an archaeological and historical nature” are serious flaws. In addition, the Treaty never addresses wrecks of military vessels or commercial vessels such as the *Titanic*. Finally, since UNCLOS III does not affect the rights of identifiable owners or the law of salvage and does not limit the freedom of the high seas, the Treaty fails to regulate the recovery of archaeological and historical vessels sunk in the high seas beyond the contiguous zones of coastal states. UNCLOS III, therefore, fails to provide adequate international guidelines for property rights to historical and archaeological wrecks. The customary law of salvage, as interpreted by national courts, still governs the recovery of military and commercial vessels and the recovery of archaeological and historical shipwrecks.<sup>28</sup>

### *B. The Law of Salvage*

The law of salvage remains of the utmost importance in determining the disposition of property salvaged from all types of shipwrecks. Unfortunately, the law of salvage is in a state of chaos. One commentator calls salvage law a “legal labyrinth,”<sup>29</sup> and this description is justified for several reasons. First, the law of salvage, in its present state of complexity, defies uniform application. Second, perhaps as a result of the first problem, the law of salvage has evolved differently

25. The only restrictions provided by UNCLOS III are those established by paragraphs 1, 3, and 4 of Article 303 and those resulting from the laws of the flag states of ships engaged in the search for and recovery of submarine antiquities. See Cafisch, *supra* note 10, at 25.

26. See Cafisch, *supra* note 10, at 25.

27. See generally Note, *supra* note 1; Note, *supra* note 7; Cafisch, *supra* note 10.

28. This is consistent with the last prefatory paragraph of the Preamble to the Convention which provides that matters not regulated by the Convention continue to be governed by the rules and principles of general international law. Thus, perhaps it could be argued that Article 303 is saved because it allows for the application of principles of general international law when questions arise beyond its scope. Even if this is the case, the applicable rules beyond Article 303 are those of the customary international law of salvage.

29. Altes, *supra* note 1, at 77.

in different states.<sup>30</sup> Third, the law of salvage does not specify the degree of deference that should be given to the original owner of a salvaged wreck, and it is unclear how long the original owner retains his special rights to the vessel. Finally, in the absence of an original owner, salvage law fails to determine which party—the finder, the finder's country, or another party—has superior rights to a vessel.<sup>31</sup>

The principle of salvage has been recognized by all maritime nations and is regarded as part of the *jus gentium*.<sup>32</sup> Specifically, salvage is “the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture.”<sup>33</sup> As the definition suggests, two distinct elements are encompassed in the term “salvage”: the act of salvage itself and the reward for that act. The act of salvage is one of assistance; it is a voluntary service rendered to avert or avert damage at sea.<sup>34</sup> Reward for the act of salvage is not paid on the principle of *quantum meruit*<sup>35</sup> but is given as an award for perilous services, voluntarily rendered, and as an inducement to seamen to save life and property.<sup>36</sup> A salvor saves property with the expectation that he will be compensated. Rights of ownership in distressed vessels or cargo are not prejudiced by the services of a salvor, and the original owner's title to such property is not lost by sinking or the subsequent salvage operation, unless the wreck is deemed “abandoned.”<sup>37</sup> Even if a sunken vessel has been abandoned by the owner, the salvor does not obtain ownership rights in the vessel, because abandonment does not give title in the property to any other person.<sup>38</sup> Instead of acquiring ownership or title to the salvaged property, the salvor obtains a right of possession.<sup>39</sup> The salvor acquires a lien on the property as a reward for his services enabling him to maintain an *in*

30. The best example of this is the divergence between the so-called “British rule”, which states that in the absence of the original owner, property recovered from the sea belongs to the sovereign, and the “American rule”, which holds that, absent the original owner, property recovered at sea belongs to the finder. See Kenny & Hrusoff, *The Ownership of the Treasures of the Sea*, 9 WILLIAM & MARY L. REV. 383 (1967).

31. See generally *id.* at 383.

32. M. NORRIS, *THE LAW OF SALVAGE* 22 (1958). *Jus gentium* is the law of nations. This classification reflects a judicial awareness that the perils of the sea are not confined by national boundaries and, perhaps, that the acceptance of international uniformity in this context is particularly desirable. G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 444 (1957).

33. The “Sabine,” 101 U.S. 384 (1879).

34. *The Blackwall*, 77 U.S. (10 Wall.) 1, 12 (1869).

35. “As much as he deserved.” BLACK'S LAW DICTIONARY 1408 (4th ed. 1968).

36. *The Blackwall*, 77 U.S. 1, 14 (1869).

37. See Collins, *supra* note 5, at 439.

38. See *id.*

39. M. NORRIS, *supra* note 32, at 246. Salvors are obliged to bring successfully salvaged property before an admiralty court where the owner will be given an opportunity to claim the property. If the property has been abandoned, the titleholder will also be determined by the court.



rem action against the salvaged property in a court of admiralty.<sup>40</sup> Recent court decisions applying the law of finds to salvaged property, however, have complicated the concept of abandonment and the law of salvage in general.

According to the law of finds, title to abandoned property vests in the person who possesses that property.<sup>41</sup> The finder of a lost article does not acquire an absolute property right in the article, but he does acquire a right superior to all except the rightful owner.<sup>42</sup> Therefore, the application of the law of finds to a vessel discovered in international waters may give the finder ownership of an abandoned vessel, whereas the application of the law of salvage entitles the salvor only to a right of possession and the possibility of a reward, not ownership.

To determine property rights to sunken vessels and their cargo, the courts of most nations have adhered to the principles of salvage law, in part because application of the law of finds, by rewarding treasure hunters with ownership of abandoned property, encourages the looting of shipwrecks.<sup>43</sup> Conversely, the courts of the United States have chosen to use the law of finds and, by applying the law of finds to recovered shipwrecks, have significantly complicated international salvage law.<sup>44</sup> In *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>45</sup> for example, the plaintiffs claimed title to property recovered from a wreck on the basis of the law of finds. The circuit court agreed, arguing that the application of either salvage law or the law of finds would produce the same result because a salvage award could include the entire derelict property.<sup>46</sup> The court recognized the dispute concerning which theory should be applied, but found that American case law supported the application of the law of

40. Norris, *Misconduct of Salvors*, 18 BROOKLYN L. REV. 247, 260 (1952). A court determines a reasonable compensation based on the following criterion: (1) the labor expended by the salvors; (2) the promptitude, skill and energy shown by the salvors; (3) the value of the property used by the salvors in rendering the service and the amount of danger the property was exposed to; (4) the risks encountered by the salvors in their work; (5) the value of the salvaged goods; and (6) the degree of peril from which the property was rescued. Collins, *supra* note 5, at 438.

41. *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 n. 11 (5th Cir. 1978).

42. 1 AM. JUR. 2D *Abandoned Property* § 19 (1962).

43. See generally Altes, *supra* note 1, at 77.

44. See generally Kenny & Hrusoff, *supra* note 29, at 383.

45. *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978). This case involved the finding of the Spanish galleon, the *Nuestra Senora de Atocha*. The *Atocha* sank in the sea off the Marquesan Keys in 1622 while en route to Spain laden with bullion extracted from the mines of the New World. As the fleet entered the Straits of Florida, it was met by a hurricane which drove it into the reef-laced waters of the Florida Keys. 550 persons perished and cargo with a contemporary value of \$250 million was sunk. In 1971, Mel Fisher, with Treasure Salvors, Inc., located the *Atocha* and retrieved some of the treasure. At this time, the wreck was thought to be in the territorial waters of Florida. Litigation ensued concerning title to the wreck. See Shallcross & Giesecki, *Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks*, 10 SYRACUSE J. INT'L L. & COM. 371 (1983).

46. *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

finds in cases involving abandoned vessels.<sup>47</sup> Thus, title to the wreck should vest, according to the court, in the person who possessed that property.<sup>48</sup>

Martin J. Norris, a leading authority on salvage law, disagrees with the approach taken by the American courts. He contends that, under traditional salvage law, the abandonment of property at sea does not divest the owner of title because a find differs from salvage service.<sup>49</sup> Even when a marine property has been affirmatively and publicly abandoned by its owner, it should not be regarded as a find with title vesting in the salvor. The policy of maritime law has been and should be that salvors look to the admiralty courts for reward, for the settlement of disputes, and for the ultimate disposition of the recovered property. The admiralty rules with respect to possessory rights of salvors are designed to provide an orderly procedure for the protection and disposition of salvaged property.<sup>50</sup> Norris argues:

Were publicly abandoned marine property discovered on the high seas—international waters—regarded at law as a “find” it could well be that violent and lawless acts of the eager or desperate “finders” would be thus encouraged.<sup>51</sup>

For these reasons, Norris objects to the application of the law of finds in shipwreck cases and believes that American courts should, like the courts of a majority of other states, use salvage law principles to determine the disposition of recovered vessels.<sup>52</sup>

Regardless of whether they apply the law of salvage or the law of finds to shipwrecks, the courts of all nations must determine if the vessels have been abandoned, because abandonment can determine who may legally recover a vessel and when a vessel becomes legally recoverable.<sup>53</sup> Abandonment may

47. *Id.* at 330.

48. *Id.* at 337. The court also supplied a policy justification for its decision, stating that the “[d]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths.”

49. M. NORRIS, *supra* note 32, at 150.

50. M. NORRIS, *supra* note 32, § 158 (Supp. 1979).

51. *Id.*

52. The dispute between the law of finds and salvage law and the policy considerations behind each may have led to United States House Report 3194 entitled the “Abandoned Shipwreck Act” which would, in effect, codify salvage law by giving a sovereign prerogative to the state in whose territorial waters a wreck is found. H.R. 3194 was introduced in the U.S. House on June 2, 1983, along with two other bills in the 98th Congress on historic shipwrecks, H.R. 69 and S 1504. H 563–25 Abandoned Shipwreck Act, July 6, 1984, in H.R. REP. NO. 98–889, 98th Cong., 2nd Sess., pt. 1, at 1 (1984) recommends the passage with an amendment in the nature of a substitution of H.R. 3194 the Abandoned Shipwreck Act to provide for state jurisdiction over protection, salvage, and studies of historic shipwrecks or structures located on the ocean floor or beneath navigable waters of a given state, and to relinquish federal rights to historic shipwrecks.

53. In the recent sinking of the Soviet submarine, the Vice Admiral Powell Carter said that the United States did not plan to try to recover parts or all of the submarine. The State Department said, “under international law, the flag state of a sunken warship retains jurisdiction over the vessel unless the flag state abandons it.” N.Y. Times, Oct. 7, 1986, at 1, col. 6.

occur by deliberate desertion, as when objects are cast away, or by relinquishing a search after an unintentional loss.<sup>54</sup> To analyze the relationship of abandoned property to an owner, the law classifies abandoned property into three categories.<sup>55</sup> First, property can be *res nullius* (the property of no one) because (1) all *ayants-droit* (interested parties) are known to be dead, (2) the property never had an owner, or (3) the property is *res derelictae* (truly abandoned). Second, property can be owned by an unknown party but still be private property. Finally, property never formally abandoned by its owners may, even after a long lapse of time, be subject to its owner's rights.<sup>56</sup> The question of abandonment can turn upon the length of time that the property has been unclaimed, but the period of time that must pass before property can be deemed abandoned is not clearly established. This uncertainty creates difficulties in determining whether a vessel has been legally abandoned.

Despite these difficulties the issue of abandonment must be addressed by national courts in cases applying the law of salvage or the law of finds to all vessels. For example, if a state uses the law of finds to establish property rights to a sunken commercial vessel, the determination of whether the vessel is abandoned will be crucial. If the vessel is abandoned, the finder has best title, but if the vessel is not abandoned, the original owner has best title, and the finder is only entitled to a reward if the owner chooses to give one. Alternatively, if the state applies the law of salvage, the salvor is entitled only to a salvage award, regardless of whether the vessel is abandoned.<sup>57</sup> The amount of the award, however, will be influenced by the presence or absence of an original owner. If the vessel is abandoned, the salvage award is potentially much greater and may include title to the vessel.<sup>58</sup>

Establishing legal abandonment also is relevant to the recovery of vessels of historical and archaeological value. The determination of abandonment may be related to the determination that a vessel is one of historical value. If a state has rights to a shipwreck, the wreck is less likely to be treated as one of historical and archaeological value. It will probably be treated as property of that state. Whether a state has property rights in a historical shipwreck is related to the question of when and if the vessel was abandoned.

The concept of abandonment also applies to the salvage of military vessels.

54. Note, *Cultural Resources Preservation and Underwater Archaeology: Some Notes on the Current Legal Framework and a Model Under Water Antiquities Statute*, 15 SAN DIEGO L. REV. 623, 629 (1978).

55. See Matysik, *Legal Problems of Recovery of Historical Treasures from the Sea-Bed*, in SCIENTIFIC & TECHNOLOGICAL REVOLUTION AND THE LAW OF THE SEA 146 (1974).

56. *Id.* at 146. Matysik argues that wrecks and other property found on the sea-bed of the high seas cannot be considered *res nullius* because they bear the marks of being transformed by human hand and this proves *eo ipso* that it was someone's property.

57. See generally M. NORRIS, *supra* note 32, at 155.

58. See *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

States hesitate to salvage a sunken warship of another state unless that state has clearly abandoned the vessel.<sup>59</sup> Of course, when and how the abandonment actually occurs remains a mystery. If the definition of abandonment were unambiguous, then no state could justify an attempt to recover another nation's warship under the mistaken belief that the ship had been abandoned by the flag state. Therefore, a clear definition of abandonment could prevent potentially dangerous disputes from arising over the salvage of sensitive military vessels that have not actually been abandoned by the flag state.

Because of its existing state of complexity and its conflicts with the law of finds, the salvage law does not provide an adequate source of law to determine the ownership of wrecks discovered in international waters. International salvage law does not currently encompass one legal theory that can be uniformly applied. Instead, national courts have applied the law of salvage and the law of finds differently, thereby producing inconsistent decisions in cases concerning ownership disputes.<sup>60</sup> A uniform law of salvage applicable specifically to shipwrecks found in international waters would best be achieved through multilateral action because of the complexities of the law of salvage and the difficulties involved with the determination of "abandonment". The prevention of international disputes and the preservation of archaeologically and historically valuable wrecks require a multilateral effort to provide international guidelines for the recovery of wrecks in international waters.

### III. POSSIBLE SOLUTIONS

Existing salvage law must be revised because the complexities and inadequacies of UNCLOS III and customary salvage law have produced disputes concerning the salvage of vessels in international waters in the past and will likely cause similar conflicts in the future. Existing law could be reformed through amendment of UNCLOS III, through treaties between individual nations, or through amendment of the 1910 Brussels Salvage Convention.<sup>61</sup> In this section I argue that the most satisfactory solution would be a new multilateral convention, perhaps based on the Brussels Convention, that provides guidelines for the recovery of all types of vessels imperiled or lost at sea. UNCLOS III does not provide adequate guidelines for the salvage of vessels in international waters, but could,

59. Collins, *supra* note 5, at 436.

60. See generally Altes, *supra* note 1, at 77; Caffisch, *supra* note 10, at 3; Note, *supra* note 7, at 92.

61. The Brussels Salvage Convention was signed by the United States, Germany, the Argentine Republic, Austria-Hungary, Belgium, the United States of Brazil, Chile, Cuba, Denmark, Spain, France, Great Britain, Greece, Italy, Japan, the United Mexican States, Nicaragua, Norway, the Netherlands, Portugal, Roumania, Russia, Sweden and Uruguay and provided for the unification of certain rules of law with respect to assistance and salvage at sea. 1910 Brussels Salvage Convention, 37 STAT. 1658 (1913). See *infra* notes 66-70.

perhaps, if it were amended or reformed. However, it seems unlikely that UNCLOS III could be amended or reformed in the near future. The Treaty was discussed and debated for ten years, and, although a final draft was eventually adopted, most of the major seafaring countries either abstained or rejected it.<sup>62</sup> Therefore, though UNCLOS III could provide a basis for international salvage guidelines, amendment would be highly impractical.

The disposition of salvaged property could also be governed by individual treaties negotiated by the parties involved in specific disputes. This bilateral approach has commonly been used by nations when the possibility of a conflict has arisen.<sup>63</sup> The bilateral approach is, however, far too narrow. An agreement governing the distribution of salvaged property resolves problems with the disposition of a particular vessel, but a situation may arise where the parties cannot agree. Conflicts could arise, for example, if several states asserted interests,<sup>64</sup> if private parties, instead of governments, were involved, or if the states could not agree on a fair distribution of the salvaged property. Finally, bilateral agreements or treaties are an *ex post* approach; an agreement is formed only after a wreck is discovered.<sup>65</sup> A multilateral agreement would provide certainty before any conflicts arise. Bilateral agreements have played an important role in resolving past disputes and will continue to be useful in the future, but a broader source of international law should govern.

Existing salvage law could, alternatively, be reformed through the establishment of a new multilateral convention. Such a convention could be based on the 1910 Brussels Salvage Convention, which was convened to unify "certain rules of law with respect to assistance and salvage at sea."<sup>66</sup> The Convention failed to achieve this goal primarily because contracting states differed in their incorporation of the Convention into national law.<sup>67</sup> The Convention has subsequently been

62. See R. CHURCHILL & A. LOWE, *THE LAW OF THE SEA* 14 (1985).

63. The discovery of the *Edinburgh* prompted the U.K. and the Soviet Union to sign an agreement governing the distribution of the salvaged goods.

64. See Note, *supra* note 7, at 109. The author argued for U.S. legislation to be passed concerning rights to the *Titanic*. This would provide specific legislation for a specific wreck, and the author herself points out the many possible claims arising from the situation.

65. While bilateral treaties made in advance of the discovery of shipwrecks are possible in theory, nations have, in practice, negotiated such treaties only after the discovery of a specific wreck. For example, an agreement between the U.S.S.R. and Great Britain concerning the goods of the *Edinburgh* was only entered into after its salvage became possible. See *N.Y. Times*, Sept. 14, 1981, at 11, col. 1. See also Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Italy Regarding the Salvage of H.M.S. *Spartan*, November 6, 1952, 158 U.N.T.S. 431.

66. 1910 Brussels Salvage Convention, 37 STAT. 1658 (1913).

67. The Convention was to be applied when all the vessels concerned—or when either the salvaging vessel or the vessel salvaged—belonged to a contracting state. The drafters of the Convention intended that the contracting states incorporate the provisions into their national legislation. The purpose was to bring about complete uniformity in the law of collisions and salvage with respect to the rules enacted

viewed as embodying general principles of salvage law rather than providing directly applicable, explicit rules.<sup>68</sup> Because of the generality of the Convention, it has played little part in the development of international salvage law and has almost never been construed, discussed, or cited.<sup>69</sup> Moreover, the Convention has other substantive weaknesses; it does not apply to military vessels and does not establish binding standards to determine property rights in wrecked vessels.<sup>70</sup> The Convention can, however, provide the basis for a new multilateral convention. It embodies the policy of encouraging assistance to lives and property endangered at sea as an international concern.<sup>71</sup> A new multilateral convention could update the Brussels Convention with provisions concerning the salvage of all types of wrecks discovered in international waters.

#### IV. PROPOSALS FOR A MULTILATERAL CONVENTION

To resolve the problems of international salvage law, a new multilateral convention must address the most serious weaknesses of existing salvage law. Currently, the law of salvage applies indiscriminately to all types of wrecks, even though policy considerations demand that historical, archaeological, commercial, and military wrecks be treated differently. A new convention must, therefore, include provisions dealing with the salvage of all types of wrecks while recognizing the need to establish different guidelines for the various categories of vessels.

In provisions concerning archaeological and historical wrecks, the convention must, first, provide guidelines for determining which wrecks possess "historical and archaeological value." It has been suggested that archaeological objects in the strict sense must be at least several hundred years old.<sup>72</sup> Such a definition of "archaeological object" is debatable, and the controversy created by setting a legal time limit was probably the reason that no definition was included in Article

in the Convention. Unification would result when the contracting states applied the Convention's provisions apart from municipal law, and the provisions themselves would become municipal law.

The Brussels Convention did not achieve its goal. France and Belgium subsequently incorporated the provisions verbatim into their national law. In Germany and the Netherlands, however, the provisions were not adopted in a literal translation. The semantic variances caused divergences in the application of the Convention. The British argued that the Convention was a reflection of English maritime law and thus did not need to be affirmed by legislation since the rules already existed in case law. The American view was essentially the same as the British view. I. WILDEBOER, *THE BRUSSELS SALVAGE CONVENTION* (1965); Eleazer, *The Recovery of Vessels, Aircraft, and Treasure in International Waters*, in *SOME CURRENT SEA LAW PROBLEMS* (Sea Grant Publication UNC-56-7506 (February 1975)).

68. Eleazer, *supra* note 67, at 29.

69. G. GILMORE & C. BLACK, *supra* note 32, at 445.

70. Eleazer, *supra* note 67, at 30.

71. *Id.* at 2.

72. Note, *supra* note 1, at 779.

149 or Article 303 of UNCLOS III.<sup>73</sup> A new convention should determine an appropriate definition. The definition of a wreck with historical and archaeological value should be made considering the reasons for so classifying a vessel and should require the wreck to be at least one hundred years old.<sup>74</sup>

Once a wreck is determined to be of historical and archaeological value, UNCLOS III provides that the country of origin be given preferential rights. This policy should be retained but made more specific. Currently, many states give to the coastal state from whose territory salvage or research operations are directed the authority to govern all matters concerning recovered wrecks.<sup>75</sup> The coastal state then generally uses its national procedures to determine the salvage awards and property rights.<sup>76</sup> This, unfortunately, cannot occur when a wreck is found in international waters because the absence of a coastal state precludes giving preferential rights to any particular state. Therefore, the country undertaking the salvage or, in the case of a private party, the country where the salvor resides should have the authority to use its national procedures to determine salvage awards and property rights. This country should be required to give preferential rights to the country of origin, if possible.

In addition, the new convention should resolve conflicts between the law of salvage and the law of finds. The new convention should continue to provide incentives for salvors to find and salvage archaeological and historical wrecks.<sup>77</sup> It must weigh the desire to provide incentives for finding wrecks with the desire to preserve wrecks that have intrinsic historical or archaeological value. To preserve historically valuable wrecks and protect them from looting, the law should require that once a wreck is located the traditional salvage methods be used<sup>78</sup> in the admiralty courts of the country of the salvor. The country of origin, if known, should be given first opportunity to purchase the rights to the wreck or the cargo. If the country of origin is unknown or uninterested, the admiralty court should have discretion in granting the salvage award, which may include title to the wreck.<sup>79</sup> This procedure would furnish incentives for private salvors to hunt for sunken vessels yet would prevent irresponsible looting of historically valuable shipwrecks.

The convention must also resolve conflicts of the law of finds and the law of salvage as they pertain to the wrecks of commercial vessels. Since the salvage of a commercial vessel will usually be undertaken to recover the ship's cargo,

73. Note, *supra* note 1, at 794. See also Caffisch, *supra* note 10, at 20–22.

74. See Note, *supra* note 1, at 796.

75. Altes, *supra* note 1, at 77.

76. *Id.* at 94–96.

77. For a good analysis of the salvors' perspective, see Note, *Rights in Recovered Sea Treasure; the Salvors' Perspective*, 3 N.Y.J. INT'L L. & COM. 271 (1982).

78. See Norris, *supra* note 40, at 247.

79. See *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337 (5th Cir. 1978).

application of the law of finds to commercial wrecks may be justified.<sup>80</sup> To promote uniformity, however, all salvage operations should be regulated by an admiralty court, which may and should decide, if appropriate, that the salvage award is title to the salvaged property. The provision of a clear definition of abandonment would, as previously discussed, favor the uniform application of salvage law to commercial vessels. The time period constituting abandonment should be agreed upon and should be no longer than five years.<sup>81</sup> A five year definition would provide certainty to owners of commercial vessels and to the salvors who undertake its recovery.

The convention's guidelines concerning the salvage of military vessels must address different policy considerations. In general, the salvage of military vessels will be undertaken by states and not by private salvors. Usually, a military vessel is salvaged for intelligence<sup>82</sup>, for the vessel itself, or for the weapons it carries. The lack of binding international standards regulating salvage operations on the high seas could cause a dangerous dispute if one nation attempted to salvage the military property that another nation desired to protect.<sup>83</sup> Guidelines are therefore needed to answer questions concerning the immunity of military vessels from salvage, to provide a definition of abandoned property, and to establish a uniform approach that will eliminate misconceptions about rights to such property. The convention must decide whether military vessels should be completely immune from salvage or whether any party should be allowed to salvage the property after a certain period of time. The convention must also determine whether the property is subject to a lien with title remaining in the owner or if the salvor is entitled to full ownership of the property he salvages.

Because the salvage of military vessels is a particularly sensitive subject, consensus among all parties to the convention may be impossible to achieve.<sup>84</sup> For this reason, a convention might provide only broad guidelines concerning military salvage. If a consensus is reached, however, the convention should

80. Unlike the application of the law of finds to historical or archaeological wrecks, the application of the law of finds to commercial vessels should not be objectionable because such application would not encourage the plunder of intrinsically valuable historical vessels. Most commercial vessels are valuable only because of the cargo they carry, so the convention should encourage salvors to recover the cargo of such ships. Application of the law of finds to commercial vessels would provide this incentive.

81. Cf. Braekhus, *Salvage of Wrecks and Wreckage: Legal Issues Arising from the Runde Find*, 20 SCAN. STUD. L. 37, 42 (1975). The author gives a reason why a definition of abandonment is needed: "among mariners the world over there is a widespread belief that the shipowner loses his property in a vessel that is abandoned on the high seas by all on board her."

82. See Collins, *supra* note 5, at 433.

83. This, for example, could arise in the situation of the American salvage attempt of the wreck of a Soviet submarine in 1968. See Collins, *supra* note 5, at 433. Furthermore, the sinking of the Soviet submarine in October, 1986, illustrates the increasing possibility of such a dispute.

84. For example, a nation might prefer that all military vessels be immune from salvage if that nation believed that it did not possess the technology to salvage the wreck but that other nations did.



specify the remedies for parties harmed by an improper salvage and sanctions to punish parties guilty of misconduct in salvage operations.<sup>85</sup> Such a provision may deter illegal military salvage.

## V. CONCLUSION

A new multilateral agreement establishing a framework for the recovery of historical, archaeological, commercial and military vessels would prevent conflicts involving the salvage of vessels in international waters. Because the recovery of all types of wrecks will become more common as technology improves, disputes concerning the salvage of vessels probably will increase in the future. Therefore, the practical hurdles involved in formulating international guidelines to regulate the salvage of all types of vessels can and should be overcome. The new agreement should protect wrecks with historical and archaeological value from looting and destruction while continuing to provide incentives for their discovery. Guidelines regulating the salvage of commercial and of sensitive military vessels are needed to avoid conflict on the high seas. Finally, the enactment of a multilateral salvage convention will provide certainty and uniformity in a currently chaotic area of international law.

A multilateral convention must provide guidelines for determining which wrecks are historically and archaeologically valuable. While the task of defining "archeological object" may not be easy, the considerations in giving preferential treatment to such wrecks require that the wreck be at least one hundred years old. The state of original origin should be given preferential rights to the historical wreck. The new convention must also resolve the conflict between the law of salvage and the law of finds by requiring that traditional salvage methods be used in the admiralty courts of the salvor. If an original owner cannot be identified or is uninterested, the salvage award may be title to the wreck, thus encouraging salvors to find and salvage valuable wrecks. The convention must determine an appropriate definition of abandonment for the salvage of commercial wrecks which should be no longer than five years. Finally, the convention must address the sensitive area of the salvage of military vessels. Guidelines are needed to answer questions concerning the immunity of military vessels from salvage, to provide a definition of abandonment as it relates to military vessels, and to establish remedies for parties harmed by an improper salvage.

85. See generally Collins, *supra* note 5, at 433.