

# *Legal Status of Sunken Warships “Revisited”*

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## **I. INTRODUCTION**

The origins of this paper were three texts which appeared in the international literature: the first – a normative text – was the recently adopted UNESCO Convention on the protection of the underwater cultural heritage;<sup>1</sup> the second – judicial – was a set of decisions adopted by several U.S. Courts on the ownership of two Spanish

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<sup>1</sup> Adopted by the 31st UNESCO General Conference on 2 November 2001. Text in UNESCO Doc. 31C/24, 3 August 2001, available at <[http://www.unesco.org/culture/laws/underwater/html\\_eng/convention.shtml](http://www.unesco.org/culture/laws/underwater/html_eng/convention.shtml)> [hereinafter UNESCO Convention]. The Convention has 35 articles and an Annex containing the ‘Rules concerning activities directed at underwater cultural heritage’ [hereinafter the ‘Rules’]. These Rules, under Art. 33 of the Convention, “form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.”

The drafting of the Convention was mainly inspired in the ILA Draft Convention on the Protection of Underwater Cultural Heritage [hereinafter the ILA Draft], adopted in 1994 during the International Law Association’s meeting in Buenos Aires [see the text *reprinted* in Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary law of the Sea* (1995), at p. 437], and the Rules are basically inspired in the *International Charter on the Protection and Management of the Underwater Cultural Heritage*, ratified by the 11th ICOMOS General Assembly in Sofia on 9 October 1996, at <[http://www.international.icomos.org/under\\_e.htm](http://www.international.icomos.org/under_e.htm)>. See a general comment of the Convention in Craig Forrest, ‘A New International Regime for the Protection of Underwater Cultural Heritage’, 51 *International and Comparative Law Quarterly* (2002), p. 511 *et seq.*; and in Carlos Espósito & Cristina Fraile, “The UNESCO Convention on the Underwater Cultural Heritage”, in D.D. Caron & H.N. Scheiber (eds.), *Bringing New Law to Ocean Waters* (2004), p. 201 *et seq.* (proofs pagination on file with author). See also my more resumed comment in 54 *Revista Española de Derecho internacional* (2002), p. 475 *et seq.*

shipwrecks lying off in the coast of Virginia;<sup>2</sup> and the third – doctrinal – was the most interesting article published by one prestigious scholar: David J. Bederman, Law Professor at Emory University School of Law.<sup>3</sup>

Professor Bederman concluded – after a thoughtful but “partial”<sup>4</sup> exposition of the state of the law – that “warships (at least those sunk before the 20th Century) are not subject to a special rule of express abandonment, and even if title in such vessels remains in the original sovereign, they are still subject to otherwise proper claims of salvage.”<sup>5</sup> The U.S. 4th Circuit Court of Appeals asserted, however, that “[u]nder admiralty law, where an owner comes forward to assert ownership in a shipwreck, abandonment must be shown by express acts”,<sup>6</sup> and that “Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner.”<sup>7</sup> The Court thus required

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<sup>2</sup> The first decision adopted on 22 April 1999 by the District Court for the Eastern District of Virginia, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 47 F.Sup. 2d 678 (E.D. Va. 1999) [hereinafter ‘District Decision’]; and the second adopted on appeal on 21 July 2000 by the U.S. 4th Circuit Court of Appeals, *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 221 F.3d 634 (4th Cir. 2000), *cert. denied*, 148 L. Ed. 2d 956, 121 S.Ct. 1079 (2001) [hereinafter ‘Appeal Decision’]. We will hereinafter call these precedents generically the *Sea Hunt* Case. See all the decisions and the *amicus curiae* brief of the United States in 94 *American Journal of International Law* (2000), p. 678 *et seq.*

For a preliminary analysis of these cases, see Michael White, ‘Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels’, 95 *American Journal of International Law* (2001), p. 678 *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 côtes des Etats-Unis’, 105 *Revue Générale de Droit International Public* (2001), p. 705 *et seq.*; and Mariano J. Aznar-Gómez, ‘La reclamación española sobre los galeones hundidos frente a las costas de los Estados Unidos de América: El caso de *La Galga* y la *Juno*’, 52 *Revista Española de Derecho Internacional* (2000), p. 247 *et seq.*

<sup>3</sup> David J. Bederman, ‘Rethinking the Legal Status of Sunken Warships’, 31 *Ocean Development & International Law* (2000), p. 97 *et seq.*

<sup>4</sup> Professor Bederman’s article was written before the adoption of the UNESCO Convention and also before the final decisions of U.S. Courts on the *Sea Hunt* Case (in which he served as counsel for the salvors against Spain). Therefore, I am in the awkward position of challenging a colleague’s opinion formed with partial information at the time of his writings (see also note 4 of his Article). I am sure he will understand this paper as a fruitful academic dialogue, subject itself to critique.

<sup>5</sup> Bederman, *supra* note 3, at p. 114.

<sup>6</sup> *Sea Hunt* case, Appeal Decision, *supra* note 2, at p. 641.

<sup>7</sup> *Ibid.*, at p. 647. The Court of Appeal significantly stressed that “[t]he mere passage of time since a shipwreck is not enough to constitute abandonment,” mostly since “technology has only recently become available for its salvage.” *Ibid.* This view has been also held by other U.S. Courts, e.g. the Sixth Circuit when, on remand, revised its prior opinion regarding the abandonment test in the *Fairport* case, it qualified that rule: “[W]e choose to view length of time as one factor among several relevant to whether a court may infer abandonment. . . [but] [w]e agree that lapse of time, alone, does not necessarily establish abandonment.” *Fairport International Exploration, Inc. v. The Shipwrecked Vessel, known as the Captain*

an act of express abandonment. Finally, Article 2(8) of the UNESCO Convention says that "[c]onsistent 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."<sup>8</sup>

In the present author's view, Professor Bederman's most suggestive conclusion is condensed in some of the final sentences of his work, that I reprint below *in extenso*:

"I have denominated this article as a "rethinking" of the legal status of sunken warships. I have done so because the received wisdom appears to be today that international law *requires* that the title in sunken warships be preserved for the original, owning sovereign and that such ships be absolutely immune from claims of salvage. I believe this received wisdom to be part of a larger program of interest in protecting underwater cultural heritage. The sagacity of this initiative is part-and-parcel, of course, of the wider policy dimensions of management of underwater cultural heritage [. . .] But there is another, more subversive, aspect to what has come to be regarded as the modern position as to the status of sunken warships. In order to be effective, the modern position must characterize itself as established customary international law [. . .] that a rule of express abandonment for warships is actually of ancient vintage or that a prohibition on salvage for sovereign

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*Lawrence*, 177 F.3d 491, 499, *reh'g denied* (6th Cir. 1999)(citation omitted). The Ninth Circuit held that "the lack of technology is one factor to consider in determining whether inaction constitutes abandonment." *Yukon Recovery v. Certain Abandoned Property*, 205 F.3d 1189, 1194 (9th Cir. 2000). Further, in the realm of admiralty law, courts have held that the United States has not abandoned its interests in ships sunk over a century ago during the Civil War. See *United States v. Steinmetz*, 973 F.2d 212, 222–23 (3d Cir. 1992); *Hatteras, Inc. v. The U.S.S. Hatteras*, 1984 A.M.C. 1094, 1097–1101 (S.D.Tex. 1981); *International Aircraft Recovery L.L.C. v. The Unidentified, Wrecked and Abandoned Aircraft and United States of America*, U.S. Court of Appeals-11th Cir. 17 July 2000, 2000 AMC 2345.

<sup>8</sup> For the UNESCO Convention, 'State vessels and aircraft' means "warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage" [Art. 1(8)]. This definition thus adopts an historical and functional concept of warship and State vessel that, if owned or operated (*i.e.* commissioned) by a State *and* used for non commercial purpose (*i.e.* activities labelled as *iure imperii*), fall under the category of 'State vessel'. Particularly, most Spanish vessels used in the *Carrera de Indias* – like the *Juno* or *La Galga* – were *galeones de guerra* under an official commander and inscribed in the *Lista Naval* currently available in the Naval Museum at Madrid. See the particular concerns on this issue of the Latin American States in L.O. Brea-Franco, *Report on the status of the convention for safeguarding underwater cultural heritage*, reprinted in UNESCO, *Background Materials on the Protection of the Underwater Cultural Heritage* (vol. II, 2000), p. 337 [hereinafter *Background Materials II*].

vessels is a hoary principle of maritime law [. . .] I believe there has recently been a careful and concerted effort to contrive a pattern of state practice and to pass it off as established and binding customary international law. This phenomenon of “instant” custom [. . .] is certainly problematic in a context of an historical enquiry into the legal status of objects lost at sea for extended periods of time.”<sup>9</sup>

Hence, the main criticism Professor Bederman makes against those – States and scholars – who contend that the “express abandonment rule” already exists as an international customary rule for sunken warships, is that it departs from established principles of the “nature and legitimacy of the international lawmaking process.” In Professor Bederman’s view, the express abandonment rule results from an effort “to manipulate the creation of favourable customary international law.”<sup>10</sup>

Bederman’s review of the legal status of sunken warships provides an accurate *test-case* to study how current international law’s principles, processes and actors interplay to define the legal status of a particular element – the sunken warships – upon which some of these principles, processes and actors have something to say. For my part, in this article I have the same purpose as Bederman – although in the opposite sense –, i.e. “to raise some systemic questions about the nature and legitimacy of the international lawmaking process.”<sup>11</sup> Therefore, I propose to review the principles, processes and actors in the international customary process, to demonstrate that the general rule of immunity of sunken warships is the accepted legal principle currently in force (II). Thereafter, I will try to address some particular issues on the possible legal regime of sunken warships as cultural heritage (III).

## II. THE QUEST OF THE RULE ON SUNKEN WARSHIPS

Neither the four Geneva Conventions on the Law of the Sea of 1958,<sup>12</sup> nor the UN Convention on the Law of the Sea of 1982<sup>13</sup> or general international law contain any particular, express provision on the legal status of sunken warships,<sup>14</sup> nor does there

<sup>9</sup> Bederman, *supra* note 3, at pp. 114–5.

<sup>10</sup> *Ibid.*, at p. 115.

<sup>11</sup> *Ibid.*

<sup>12</sup> Convention on the Territorial Sea and the Contiguous Zone, 29 April 1958, *United Nations Treaty Series*, vol. 516, p. 205; Convention on the High Seas, 29 April 1958, *United Nations Treaty Series*, vol. 450, p. 11; Convention on Fishing and Conservation of the Living Resources of the High Seas, 29 April 1958, *United Nations Treaty Series*, vol. 559, p. 285; and Convention on the Continental Shelf, 29 April 1958, *United Nations Treaty Series*, vol. 499, p. 311.

<sup>13</sup> 10 December 1982, *United Nations Treaty Series*, vol. 1833, p. 397 [hereinafter ‘UNCLOS’].

<sup>14</sup> For Luigi Migliorino “[it was] regrettable that the Third United Nations Conference on the Law of the Sea failed to regulate the regime of sunken warships, considering that there is no other international convention or other rules of customary international law applicable to this matter.” Luigi Migliorino, ‘The Recovery of Sunken Warships in International Law’,

exist a "general rule" on underwater cultural heritage as a whole. In the opinion of Anastasia Strati, there is "an overall absence of rules of international law, including the [Law of the Sea] Convention, on the legal regime of wrecks. As a result, this area remains subject to great uncertainty."<sup>15</sup> But, using the words and reasoning of the International Court of Justice (ICJ), "[a] body of detailed rules is not to be looked for in customary international law which in fact comprises a limited set of norms for ensuring the co-existence and co-operation of the members of the international community."<sup>16</sup> Particular rules, when not explicit, are deduced or induced from a complex set of principles and general rules. This supposes that "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part."<sup>17</sup> Sometimes, however, a rule may not exist at all.<sup>18</sup>

As was said by George Abi-Saab, rules are normally made of different "building blocks."<sup>19</sup> In our quest for a rule on sunken warships, several "building blocks" – either customary or conventional – are applicable: as warships, they may deserve the immunities granted by general international law; as wrecks, apart from their special treatment in the salvage conventions, sunken warships may be governed by the general rules of underwater cultural heritage. Depending on where the wrecks are embedded (in internal, archipelagic or territorial waters, contiguous zone, continental shelf or the International Seabed Area), rights and obligations of flag, coastal and third

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in Bodislav Vukas (ed.), *Essays on the New Law of the Sea* (1985), p. 244 *et seq.*, at p. 249.

<sup>15</sup> Anastasia Strati, *A Commentary to the Draft Convention on the protection of Underwater Cultural Heritage* (1999), at p. 21. As said by another scholar, "leaving potential 'regional' customs aside, at least no general (*erga omnes*) customary rule appears to be well rooted and to provide a detailed regime on the protection of [underwater cultural heritage]". Guido Carducci, 'The expanding protection of underwater cultural heritage: The New UNESCO Convention versus existing International Law', in Guido Camarda & Tullio Scovazzi (ed.), *The Protection of the Underwater Cultural Heritage* (2002), p. 133 *et seq.*, at p. 138. A different version of this article may be found in Guido Carducci, 'New Developments in the Law of The Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', 95 *American Journal of International Law* (2002), p. 419 *et seq.* Furthermore, as Lucius Caflisch reminds, the analysis of the legal condition of wrecks in international law has been rejected both by the *Institut de Droit International* in 1995 and by the Six Commission of the UN General Assembly in 1996. Lucius Caflisch, 'La condition des épaves maritimes en droit international public', in *Mélanges Valticos* (1999), at p. 67.

<sup>16</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. U.S.)*, *Merits*, I.C.J. Reports 1984, p. 246, at p. 299.

<sup>17</sup> *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*, *Advisory Opinion*, I.C.J. Reports 1980, p. 73, at p. 76.

<sup>18</sup> See here my approach to this question in Mariano J. Aznar-Gómez, 'The 1996 Nuclear Advisory Opinion and *Non Liquet* in International Law', 48 *International & Comparative Law Quarterly* (1999), p. 3 *et seq.*

<sup>19</sup> George Abi-Saab, "Cours général de droit international public", 207 *R des C* (1987 VII), p. 9 *et seq.*, at pp. 202–3.

States differ. There may be particular rules creating a special regime for a particular shipwreck(s).<sup>20</sup> In other cases, a more general – global,<sup>21</sup> regional<sup>22</sup> or particular<sup>23</sup> – regime may also apply to wrecks. The capture or sinking of a warship during an armed conflict may also change their legal status.<sup>24</sup> If considered “war graves”, wrecks may also deserve the special protection given by the laws of war.<sup>25</sup> Finally, their historical character may give rise to the application of the common heritage of mankind concept.<sup>26</sup>

But in any case, as I will try to demonstrate, what it is plainly clear is that the burden of proof is not on the side of the proponents of the “express abandonment rule”, as suggested by David Bederman. That rule is a corollary, and a by product – a “building block” –, of the more general and “old vintage” rule of the immunity of warships.

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<sup>20</sup> This could be the case, for example, for several wrecks with the Agreement between the Netherlands and Australia Concerning Old Dutch Shipwrecks, 6 November 1972, reprinted in UNESCO, *Background Materials on the Protection of the Underwater Cultural Heritage* (vol. I, 1999), at p. 24 [hereinafter *Background Materials I*]. Or, for a particular wreck, the Agreement between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the CSS *Alabama*, 3 October 1989, reprinted in *Background Materials II*, at p. 47.

<sup>21</sup> Including, for example, the Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954, *United Nations Treaty Series*, vol. 249, p. 240; or the Convention for the Protection of the World Cultural and Natural Heritage, 16 November 1972, *United Nations Treaty Series*, vol. 1037, p. 152.

<sup>22</sup> Such as the Inter American Convention on the Archaeological, Historical and Artistic Heritage of the American Nations, of 16 June 1976, 15 *International Legal Materials* (1976), p. 1350 *et seq.*; or the European Convention of the Protection of the Archaeological Heritage (Revised), of 16 January 1992, *European Treaty Series* No. 143.

<sup>24</sup> As we will see, this was the case alleged by Japan in the *Admiral Nakhimov* case.

<sup>25</sup> War graves must be cared for and preserved consistently with customary international humanitarian law and, particularly, with the four 1949 Geneva Conventions for the Protection of War Victims, of 12 August 1949, all in vol. 75 of the *United Nations Treaty Series*. Maritime graves in general (other than war graves) may also deserve a special regime, as was the case of the *M/S Estonia*, which sank on 28 September 1994 in the Baltic Sea. A special agreement among Estonia, Finland and Sweden was concluded in order to afford the wreck and the surrounding area an “appropriate respect”. Art. 1 of the Agreement Between the Republic of Estonia, the Republic of Finland and the Kingdom of Sweden regarding *M/S Estonia*, of 23 February 1995, text in 20 *Marine Policy* (1996), p. 355 *et seq.* Art. 2(9) and Rule 5 of the UNESCO Convention try to ensure, respectively, that “proper respect is given to all human remains located in maritime waters” and that “[a]ctivities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.”

<sup>26</sup> This particular issue will be addressed *infra* III.

## 1. Immunity of Sunken Warships and Salvage Law

That warships attract sovereign immunity has been historically accepted both by tribunals<sup>27</sup> and doctrine.<sup>28</sup> The 1926 Brussels Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships,<sup>29</sup> accords immunity from arrest and seizure to the government-owned vessels in public service. Articles 32, 95 and 236 of the UNCLOS plainly recognise that warships enjoy immunity. The 1972 European Convention on State Immunity,<sup>30</sup> also excludes "claims relating to the operation of seagoing vessels owned or operated by a Contracting State" from the doctrine of restrictive immunity (Article 30).<sup>31</sup> And, as a reflection of the possible state of current customary law, Article 16 of the 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property,<sup>32</sup> confirms that warships and naval auxiliaries and other ships owned or operated by a State and used exclusively on government non-commercial service enjoy immunity. This implies, generally speaking, that warships enjoy immunity with regard to any action brought against them before the domestic courts of other nations.

When dealing with *sunken* warships, as a principle, nothing in the legal texts suggests that they lose their immunity by the simple fact of their sinking.<sup>33</sup> A functional approach could nonetheless be argued: as soon as the sunken warship is not a "ship",<sup>34</sup>

<sup>27</sup> See Marshall, CJ, in the *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812).

<sup>28</sup> Moore, *Digest of International Law*, vol. 2 (1906), pp. 571–82.

<sup>29</sup> 10 April 1926, *League of Nations Treaty Series*, vol. 176, p. 199.

<sup>30</sup> 16 May 1972, *European Treaty Series* No. 74.

<sup>31</sup> The political position on this issue of the European Parliamentary Assembly may be seen in its Recommendation 1486 (2000), of 9 November 2000, when encouraging to Member States the conclusion of agreements "as will mitigate the *sovereign immunity which states retain over vessels of war and other state-owned vessels wherever they are sunk*, with particular regard to the high proportion of such vessels which are of significant historic value and to the high proportion which contain human remains and especially those which are war graves" (emphasis added), available at <<http://assembly.coe.int/Documents/AdoptedText/ta00/EREC1486.htm>>.

<sup>32</sup> *Yearbook of the International Law Commission*, vol. II/2 (1991), Chapter II, UN Doc. A/46/10 (1991). At its 4th plenary meeting, on 13 February 2002, the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, established by the General Assembly in its resolution 55/150, of 12 December 2000, adopted its report containing the revised text of the draft articles on jurisdictional immunities of States and their property. This text does not change the legal criteria on warships adopted in 1991 by the ILC. See *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22*, UN Doc. A/57/22 (2002), Annex.

<sup>33</sup> Nor it must be seen as such the rejection during the UN Third Conference on the Law of the Sea of the different Socialist States' proposals to grant complete immunity to warships in any case. See the proposals and discussion in Luigi Migliorino, *Il recupero degli oggetti storici ed archeologici sommersi nel diritto internazionale* (1984), at p. 204.

<sup>34</sup> For the purposes of UNCLOS, *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" (Art. 29).

it loses its functional condition and, therefore, does not deserve to retain its immunity, particularly if the warship became a wreck long time ago. Legal actions before common law domestic courts are normally directed to the *law of salvage* or the *law of finds*.<sup>35</sup> This, however, has been not only criticised by doctrine<sup>36</sup> but rejected by State practice – domestic and international – as well.<sup>37</sup> This is notably the case in U.S. domestic legislation: the law of salvage and the law of finds do not generally apply to those wrecks governed by the Abandoned Shipwreck Act (ASA).<sup>38</sup> This is

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<sup>35</sup> Generally speaking (though not uniformly), unless property is found to have been abandoned, salvage law only gives the salvor a right to compensation for the services rendered, but not title to the property salvaged. In contrast, the law of finds gives the finder the ability to maintain title against all but the rightful owner. See *infra* n. 38. Hence, the necessity of an act of abandonment for ownership to be conferred under the law of finds there is. But as Lyndel Prott and Patrick O’Keefe have said, “the international practice on this matter is confused and the law complex”, but “where there is no intention to abandon and no doubt as to who is the owner such claims to acquire title (as opposed to salvage rights) appear unfounded”, Lyndel V. Prott & Patrick J. O’Keefe, ‘International legal protection of the underwater cultural heritage’, 1 *Revue Belge de Droit International* (1978–9), p. 85 *et seq.*, at p. 95.

<sup>36</sup> There is a common understanding among nautical archaeologists that it is usually safer to leave the wrecks in the site where they have been for hundreds or even thousands of years. As said by two specialists on the subject: “As the case-law now stands, the commercial orientation of salvage law produces some most undesirable results with respect to the underwater cultural heritage.” Lyndel V. Prott & Patrick J. O’Keefe, *Law and the Cultural Heritage* (vol. I, 1984), p. 123. See also Ricardo J. Elia, ‘US Protection of Underwater Cultural Heritage Beyond the Territorial Sea: Problems and Prospects’, 29 *International Journal of Nautical Archaeology* (2000), p. 43 *et seq.* For a different view, see Geoffrey Bryce, ‘Salvage and the Underwater Cultural Heritage’, 20 *Marine Policy* (1996), p. 337 *et seq.*; and David J. Bederman, ‘Historic Salvage and the Law of the Sea’, 30 *University of Miami Inter-American Law Review* (1998), p. 99 *et seq.*

<sup>37</sup> The nature of salvage law as a *venerable law of the sea* has been also assessed from a civil law point of view: “[b]e as it may, the fact remains that the bodies of ‘the law of salvage and other rules of admiralty’, despite their immemorial tradition, are today typical of a few common law systems but are complete strangers to other domestic legal systems.” Tullio Scovazzi, ‘The 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage’, in Camarda & Scovazzi, *supra* note 15, p. 113, at p. 119. See also, in a similar sense, Carducci, *supra* note 15, at pp. 161–3.

<sup>38</sup> 43 U.S.C. §§ 2101–06 (1994). In the United States, Courts have clarified both concepts and ASA implications: “Under maritime law, those who wish to raise sunken ships are governed by either the law of salvage or the law of finds. The law of salvage applies when the original owner retains an ownership interest in the ship; a salvor receives a salvage award, but not title to the ship. See, e.g., *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981). Where the owner has abandoned the ship, however, recent doctrine applies the law of finds, vesting title in the finder of the ship. See *Columbus-America Discovery Group v. Atlantis Mutual Ins. Co.*, 974 F.2d 450, 464 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993); *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1064–65 (1st Cir. 1987); *Treasure Salvors*, 640 F.2d 560, at p. 567. Whether the owner abandoned the ship thus determines which law applies, and, subsequently, who owns the ship. Intent on protecting the property rights of owners, admiralty courts recognize a presumption against finding abandonment. See, e.g., *Hener v. United States*, 525 F. Sup. 350,

mainly because "admiralty principles are not well-suited to the preservation of historic and other shipwrecks to which this Act applies. Abandoned shipwrecks covered by this Act are not considered [ . . . ] to be in marine peril, necessitating their recovery by salvage companies."<sup>39</sup> The same could be said, for example, about the domestic legislation of "specially affected" States,<sup>40</sup> such as Spain,<sup>41</sup> Portugal,<sup>42</sup> France,<sup>43</sup> Australia,<sup>44</sup> China,<sup>45</sup> Italy,<sup>46</sup> South Africa,<sup>47</sup> Tunisia,<sup>48</sup> Israel<sup>49</sup> and the United

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356–57 (S.D.N.Y. 1981) [ . . . ] The 1987 passage of the ASA altered this approach. The ASA transfers to a State the title to all abandoned shipwrecks embedded in the submerged lands of the State. See 43 U.S.C. § 2105. The ASA expressly rejects the application of the maritime laws of salvage and finds, if the shipwreck has been abandoned. See 43 U.S.C. § 2106(a) ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which section 2105 of this title applies.")" *Fairport International Exploration, Inc. v. Shipwrecked Vessel known as The Captain Lawrence*, 105 F.3d 1078, 1084 (6th Cir. 1997), *vacated and remanded in light of Deep Sea Research*, 118 S.Ct. 1558 (1998), *remanded in light of Deep Sea Research*, 177 F.3d 491 (6th Cir. 1999).

<sup>39</sup> H.R. Rep. No. 100–514, *reprinted in* 1988 U.S.C.C.A.N. 370, 365 and 377.

<sup>40</sup> See, for a general survey, Sarah Dromgoole (ed.), *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives* (1999).

<sup>41</sup> Art. 22 of the *Ley* 60/1962, of 24 December 1962, *que regula los auxilios, salvamentos, remolques, hallazgos y extracciones marítimos* (*Boletín Oficial del Estado*, No. 310, of 27 December 1962)) and Art. 44 of the *Ley* 16/1985, of 25 June 1985, *del patrimonio histórico español* (*Boletín Oficial del Estado*, No. 155, of 29 June 1985) which expressly makes inapplicable the general rule of the law of finds under Art. 351 of the *Código Civil*.

<sup>42</sup> Arts. 2 and 9 of the *Decreto Lei n° 164/97*, of 27 June 1997, available in Portuguese at <[http://www.policiajudiciaria.pt/html/legislacao/dr\\_obras\\_arte/DL164\\_97.htm](http://www.policiajudiciaria.pt/html/legislacao/dr_obras_arte/DL164_97.htm)> and reprinted in French in *Background Materials I*, at p. 56.

<sup>43</sup> Art. 24 of the *Décret* No. 61–1547, of 26 December 1961, *fixant le regime des épaves maritimes*, and Art. 2 of the *Loi* No. 89–847, of 1 December 1989, *relative aux biens culturels maritimes*, both reprinted in *Background Materials I*, at p. 34.

<sup>44</sup> Sect. 13 of the *Historic Shipwrecks Act 1976*, as amended in 1985, subordinates any action directed to shipwrecks to a permit issued by the Minister, available at <<http://scaleplus.law.gov.au/html/pasteact/0/100/top.htm>>.

<sup>45</sup> Art. 3 of the *Regulations of the People's Republic of China Concerning the Administration of the Work for the Protection of Underwater Cultural Relics*, Decree n° 42 of the State Council, of 20 October 1989, grants ownership of underwater cultural relics to the State, reprinted in English in *Background Materials I*, at p. 26.

<sup>46</sup> Art. 54 of the *Decreto Legislativo n. 490/1999*, of 29 October 1999 (*Gazzetta Ufficiale* No. 302, of 27 December 1999, available at <<http://gazzette.comune.jesi.an.it/302-99/229/supplemento.htm>>), includes cultural objects – *beni del demanio storico, artistico e archivistico* – within the public domain.

<sup>47</sup> Art. 3 of the *National Heritage Resources Act 1999*, Act No. 25 of 1999, also considered the heritage resources as part of the national state, Art. 38 thus requiring special permits to carry out any activity directed to that heritage, text available at <<http://www.polity.org.za/html/govdocs/legislation/1999/act25.pdf>>.

<sup>48</sup> Art. 73 of the *Loi no. 94–35*, 24 February 1994, *relative au code du patrimoine archéologique, historique et des arts traditionnels*, grants ownership to the State of all archaeological objects found in inland waters or in the territorial sea, text reprinted in *Background Materials I*, at p. 74.

<sup>49</sup> Art. 2(a) of the *Antiquities Law 5738, 1978* (Sefer Ha-Chukkim 5738, at p. 76, text

Kingdom.<sup>50</sup> The Council of Europe's Parliamentary Assembly also recommended avoiding commercial recovery operations.<sup>51</sup>

It can be well argued that the salvage law *in genere* hardly applies to vessels already sunk and therefore not in peril.<sup>52</sup> As has been said by Patrick O'Keefe and James Nafziger, "the law of salvages relates solely to the recovery of items endangered by the sea; it has no application to saving relics on land. For underwater cultural heritage, the danger has passed; either a vessel has sunk or an object has been lost overboard. Indeed, the heritage may be in greater danger from salvage operations than from being allowed to remain where it is."<sup>53</sup> Indeed, an interpretation of Article 1(a) and (b) of the 1989 International Convention on Salvage<sup>54</sup> following the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Convention plainly excludes wrecks from salvage operations since the latter "means any act or activity undertaken to assist a vessel or any other property *in danger in navigable waters or in any other waters whatsoever*" and the meaning of 'vessel' is "any ship or craft, or any structure *capable of navigation*" (emphasis added).

Looking for an established rule within international practice, it could be also argued that warships are traditionally exempted from the application of the international conventions on salvage at sea.<sup>55</sup> Article 14 of the 1910 Convention for the Unification

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*cont.*

available at <<http://www.israntique.org.il/eng/anlatext.html>> establishes the State ownership of antiquities.

<sup>50</sup> Sect. 3(3) of the *Protection of Wrecks Act 1973* [1973 c. 33] excludes from salvage those wrecks which are protected under the Act or the *Protection of Military Remains Act 1986* [1986 c. 35].

<sup>51</sup> Recommendation 1486 (2000), of 9 November 2000, § 13 (v)(vi) (*supra* n. 31).

<sup>52</sup> The generic exigency of peril in U.S. courts could be seen in *Deep Sea Research*, 102 F.3d at 383, n. 2, citing *Columbus-America*, 974 F.2d 450, at p. 459. U.S. courts have allowed however salvage claims for long-submerged wrecks too, see, e.g., *Platoro Ltd. v. The Unidentified Remains of a Vessel*, 695 F.2d 893, 901–02 (5th Cir. 1983); and, for the traditional rule, see *The Sabine*, 101 U.S. 384 (1880) where salvage law applied to the recovery of property "from actual peril or loss, as in cases of ship wreck, derelict or recapture." *Ibid.*, at p. 384.

The Spanish jurisprudence has clearly settled the requisite of marine peril in *STS* of 15 February 1988 (*RAJ* 1988/1137), confirming older jurisprudence in the same sense.

<sup>53</sup> Patrick J. O'Keefe & James A.R. Nafziger, "The Draft Convention on the Protection of the Underwater Cultural Heritage", 25 *Ocean Development & International Law* (1994), p. 393 *et seq.*, at p. 408.

<sup>54</sup> 28 April 1989, *United Nations Treaty Series*, vol. 1953, p. 165. This Convention was drafted and concluded under the auspices of the International Maritime Organization (IMO).

<sup>55</sup> For a doctrinal support of this position, see Art. 4 of the ILA Draft (*supra* note 1). For a political support, see Recommendation 848 (1978), of 4 October 1978, of the Parliamentary Assembly of the Council of Europe, available at <<http://assembly.coe.int/Documents/AdoptedText/TA78/EREC848.HTM>>.

It should also be noted that, in U.S. domestic legislation, 'Government ships appropriated exclusively to a public service' and, particularly, 'ships of war' are excluded from the terms of the U.S. Salvage Act (44 U.S.C. §§ 727–31).

of Certain Rules with Respect to Assistance and Salvage at Sea,<sup>56</sup> stated that “[t]his convention does not apply to ships of war or to Government ships appropriated exclusively to a public service.” Nevertheless, when modified by a Protocol done in Brussels on 27 May 1967,<sup>57</sup> including the possibility to be applied to “assistance or salvage services rendered by or to a ship of war or any other ship owned, operated or chartered by a State or public Authority”, its second paragraph included a clause under which, “[a] claim against a State for assistance or salvage services rendered to a ship of war or other ship which is, either at the time of the event or when the claim is brought, appropriated exclusively to public non commercial service, shall be brought only before the Courts of such State.”

But when the 1910 Convention was revised, the exemption of warships from salvage was reaffirmed: Article 4(1) of the 1989 Salvage Convention explicitly says that “this Convention shall not apply to warships or other non-commercial vessels owned or operated by a State and entitled, at the time of salvage operations, to sovereign immunity under generally recognised principles of international law unless that State decides otherwise.”<sup>58</sup> Thus, the “express abandonment” concept does appear in a legal text in force since 14 July 1996.<sup>59</sup> The inclusion of a *ratione temporis* condition – “at the time of salvage operations” – did not change the regime governing title to wrecks. It has been also submitted that the opt-out system for historical shipwrecks

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<sup>56</sup> Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, of 23 September 1910, 37 Stat. 1658; USTS 576; UKTS 1913 No. 4 (Cd. 6677); 1 Bevans 780. It has been in force since 1st March 1913 and with a widespread number of parties (82 States), including the ‘specially affected’ States (data provided by the International Maritime Council at <<http://www.comitemaritime.org/ratific/brus/bru01.html>>).

<sup>57</sup> In force since 15 August 1977 only among the following States: Austria, Belgium, Brazil, Egypt, Papua New Guinea, Slovenia, Syrian Arab Republic and the United Kingdom. Due to Art. 3(2) of the Protocol, “[r]atification of this Protocol by any State which is not a Party to the convention shall have the effect of accession to the Convention.” This makes the Syrian Arab Republic the 82nd State party to the 1910 Convention (data provided by the International Maritime Council at <<http://www.comitemaritime.org/ratific/brus/bru03.html>>).

<sup>58</sup> Art. 29 further states that “[u]nless the State owner consents, no provision of this Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings in rem against, non-commercial cargoes owned by a State and entitled, at the time of the salvage operations, to sovereign immunity under generally recognised principles of international law.” The same could be said in the case of arrest of ships, which “shall not apply to any warship, naval auxiliary or other ships owned or operated by a State and used, for the time being, only on government non-commercial service”, Art. 8(2) of the International Convention on Arrest of Ships, of 12 March 1999, text in UN Doc. A/CONF.188.6, not yet in force.

<sup>59</sup> And in force (as to 1st January 2003) for the following numerous, widespread and “specially affected States”: Australia, Canada, China, Croatia, Denmark, Dominica, Egypt, Estonia, France, Georgia, Germany, Guinea, Greece, Guyana, Hong Kong, Iceland, India, Iran, Ireland, Italy, Jordan, Kenya, Latvia, Lithuania, Marshall Islands, Mauritius, Mexico, Netherlands, New Zealand, Nigeria, Norway, Oman, Romania, Russia, Saudi Arabia, Sierra Leone, Sweden, Switzerland, Syria, Tunisia, United Arab Emirates, United Kingdom, United States and Vanuatu.

adopted in the Convention through the reservation procedure foreseen in Article 30(1)(d) “means that the 1989 Convention would, in the absence of a contracting State making reservation, apply to salvage of historic shipwrecks.”<sup>60</sup> This was not however the opinion of the IMO: as expressed during the drafting of the UNESCO Convention, “because of the private-law, non mandatory character” of the 1989 Salvage Convention, “the right to exclude the application of salvage law existed even without express reservation.”<sup>61</sup> Furthermore, this seems to be nowadays the opinion within the IMO: Once the inadequacy of the 1989 Salvage Convention to wrecks had been realised, the IMO begun to draft a *Wreck Removal Convention*,<sup>62</sup> which is intended to provide international rules and to clarify rights and obligations regarding the identification, reporting, locating and removal of hazardous wrecks, in particular those found beyond territorial waters; and this draft, again, expressly leaves aside the removal of sunken warships otherwise decided by the flag State (Article 4).<sup>63</sup>

It may be presumed that, today, along with these conventional rules, there does exist a general customary rule of international law which excludes the application of the law of salvage to warships unless otherwise expressly decided by the flag State because the mandatory rule expressed in Article 4 of the 1989 Salvage Convention – which creates an exception for warships, sunken or not – still governs that general private-law regime. And now that some criticism has been made in U.S. literature,<sup>64</sup>

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<sup>60</sup> Bederman, *supra* n 36, at p. 111. However, the following States, representing almost the totality of the ‘specially affected States’ (United States missing), have made this reservation: Australia, Canada, China, Croatia, Estonia, France, Germany, Iran, Mexico, Netherlands, Norway, Russia, Saudi Arabia, Sweden, Tunisia and the United Kingdom. Spain (not a party), at the time of signature of the Convention, did the same reservation. The Netherlands decided to apply the Convention to its warships or other vessels described in paragraph 1 of Art. 4 of the Convention but under several domestic law conditions (Source: International Maritime Organisation, Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General performs depositary or other functions as to Dec. 31, 2001, IMO Doc. J/8114, at pp. 347–354).

<sup>61</sup> Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage, UNESCO Doc. CLT-96/CONF. 605/6, at p. 12, par. 48.

<sup>62</sup> IMO Doc. LEG 85/3, 17 August 2002.

<sup>63</sup> As it does with historical or cultural wrecks in general. See the commentary to Art. 1(6): “As regards the comment to add ‘underwater cultural heritage’ to the definition of ‘Related interests’, it is considered that the provisions of the UNESCO Convention on the Protection of the Underwater Cultural Heritage (November 2001) provide the necessary safeguards for traces of human existence having cultural, historical or archaeological character; more in particular the articles 3, 5, 9 and 10.” *Ibid.*, Annex 2, at p. 3.

This seems to be also the position of the *Comité Maritime International*: see its ‘Memorandum on the draft Protocol to the Salvage Commission 1989 (by the late Geoffrey Brice Q.C.) designed to protect historic artefacts found beneath the sea’, available at the internet site of the British Maritime Law Association at <<http://www.bmla.org.uk/>>.

<sup>64</sup> Along with David Bederman’s writings, see *ad ex.* Carla J. Shapreau, ‘Extension of Express Abandonment Standard for Sovereign Shipwrecks in Sea Hunt, Inc. et al., Raises Troublesome Issues Regarding Protection of Underwater Cultural Property’, 10 *International Journal of Cultural Property* (2001), p. 276 *et seq.* For an opposite view, see Sarah Dromgoole &

it should be recalled that this has been the traditional and longstanding legal position of the United States. In 1965, answering a question raised by the U.S. Embassy at Port-of-Spain, Trinidad regarding salvage rights to a wrecked vessel carrying Lend-Lease cargo, the Department of State replied that:

"where ownership to vessels or cargoes resided in US Government at time of sinking, the US retains title thereto subject to explicit transfer or abandonment. In the absence of transfer or abandonment of US interests, therefore, salvage of such cargoes or hulks requires US consent."<sup>65</sup>

Other cases also disclose a clear pattern of conduct of different States concerned with salvage: the *Admiral Nakhimov*, the *USS Panay* or the *Sea Hunt* case are crystal-clear examples of that.<sup>66</sup> Let us summarize them briefly.

On 28 May 1905, in the course of the battle of Tsushima in the Japan Sea, Japanese cruisers *Sadomaru* and *Shiranui* found Czarist cruiser *Admiral Nakhimov* in a surrender position: the bow was water-logged, the crew were escaping from the vessel and hoisting a white flag. Some hours later, the *Sadomaru* boarded the Russian warship and hoisted at the foremast the flag of the Japanese Imperial Navy, thus capturing the vessel under the law of war at sea. The captors were unable to keep the ship afloat and she sank one hour later.<sup>67</sup>

When the Soviet government became aware of the salvage activities being carried out by a Japanese company upon the remains of the *Admiral Nakhimov*, on 3 October 1980 it made a representation stating that "[i]n accordance with international law a sunken warship is completely immune from the jurisdiction of any State other than the flag State." The Japanese response was as follows: "In accordance with international law, the rights with respect to the captured enemy warships and property abroad 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 the Japanese Imperial Navy." (emphasis added)

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Nicholas Gaskell, "Who has a right to historic wrecks and wreckage", 2 *International Journal of Cultural Property* (1993), p. 217 *et seq.*

<sup>65</sup> Secretary of State Rusk to the U.S. Embassy, Port-of-Spain, airgram No. A-27, of 29 April 1965, MS. Department of State, file DEF 19.3 U.S., reprinted in Whiteman, 9 *Digest of International Law* (1986), p. 221 *et seq.*

<sup>66</sup> Another example of cooperative salvage respecting the sovereign rights of the flag States may be seen in the Exchange of Notes Constituting an 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*, of 6 November 1952, *United Nations Treaty Series*, vol. 158, p. 432.

<sup>67</sup> See all the data and paragraphs cited below in 29 *The Japanese Annual of International Law* (1986), pp. 185–87.

The USS *Panay* case arose when, on 22 April 1938, the Japanese Foreign Office delivered a note to the U.S. Embassy at Tokyo accompanied with a check for US\$ 2,214,007.36.<sup>68</sup> With this amount, Japan tried to settle the claims arising from loss of property and for death and injury of U.S. citizens as a result of the attack on 12 December 1937, by Japanese naval airplanes on the U.S. warship *Panay* and other U.S. merchant private owned vessels, some of them (including the USS *Panay*) finally sunk in the Yangtze River. Japan understood that having paid the indemnification, it acquired property rights in the wrecks. The Department of State delivered two diplomatic notes<sup>69</sup> admitting the transfer of ownership of the private vessels with some conditions (first Note) but rejecting salvage of the U.S. gunboat since, “after being carefully examined”, the U.S. Government found “no authority in law for acceding in any case to such a request” of salvage (second Note).

Finally, the *Sea Hunt* case has been already mentioned: two Spanish frigates sank in Virginia waters in 1750 (*La Galga*) and 1802 (*Juno*) and they were located by a maritime salvage company – Sea Hunt, Inc. – which obtained permits to conduct salvage operations and to recover artefacts from the two wrecks from the Virginia Marine Resources Commission under the ASA in 1998. The District Court, applying erroneously the *Columbus-America* standard of an “express abandonment act”,<sup>70</sup> found

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<sup>68</sup> See all the data and paragraphs cited below in Whiteman, 9 *Digest of International Law* (1968), pp. 221–22.

<sup>69</sup> On 25 April 1938 and 6 May 1938.

<sup>70</sup> *Sea Hunt* case, District Decision, *supra* n. 2, at p. 689. The *Columbus-America* standard later correctly applied by the Court of Appeals implies that “[s]uch abandonment must be proved by clear and convincing evidence, though, such as an owner’s express declaration abandoning title. Should the property encompass an ancient and long lost shipwreck, a court may infer an abandonment. Such an inference would be improper, though, should a previous owner appear and assert his ownership interest; in such a case the normal presumptions would apply and an abandonment would have to be proved by strong and convincing evidence” (*supra* n. 52, at pp. 464–65).

It has been submitted, both by doctrine and courts that application of the *Sea Hunt* and *Columbus-America* standard “would render the ASA a virtual nullity”, Shapreau, *supra* n. 64, at p. 277, citing the *Fairport* case precedent. This criticism is particularly unfounded in the case of sunken warships since a *public* interest is at stake. In *Fairport*, the Court was dealing with a private vessel – the *Captain Lawrence*, built in 1898, originally christened the *Alice*, which served as a training vessel for the Sea Scouts (a branch of the Boy Scouts) from 1925 to 1931 when she sank in deep water of Lake Michigan. The Court limited its holding “to vessels formerly owned by private parties, and expressed no view as to the application of the express abandonment test to vessels initially owned by the United States. See, e.g., *United States v. Steinmetz*, 973 F.2d 212, 222–23 (3d Cir. 1992), *cert. denied*, 507 U.S. 984 (1993); cf. *United States v. Pennsylvania & Lake Erie Dock Co.*, 272 F. 839, 843 (6th Cir. 1921) (explaining that, once the government acquires title to land, it cannot abandon it without an express congressional declaration)”. *Fairport*, 177 F.3d 491, at p. 500.

In the other case oft cited, the *Deep Sea Research* case, when the U.S. Supreme Court remanded the case, it simply declined “to resolve whether the *Brother Jonathan* is abandoned within the meaning of the ASA” leaving “that issue for reconsideration on remand,

that Spain had abandoned its title to *La Galga* when it signed the 1763 Definitive Treaty of Peace Between France, Great Britain and Spain (still in force between Spain and the United States).<sup>71</sup> The Fourth Circuit Court of Appeals reversed the District Court decision, upholding Spanish title to both wrecks and denying salvage awards.<sup>72</sup> The Court of Appeals further underlined that:

"matters as sensitive as these implicate important interests of the executive branch. Courts cannot just turn over the sovereign shipwrecks of other nations to commercial salvors where negotiated treaties show no sign of an abandonment, and where the nations involved all agree that title to the shipwrecks remains with the original owner. Far from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding. Nothing in the law of admiralty suggests that Spain has abandoned its dead by respecting their final resting place at sea."<sup>73</sup>

It must be said that this case gave the United States the opportunity to state, again, its legal position on the matter: in its *amicus curiae* intervention, it plainly held that "the United States recognizes [. . .] the international law rule that warships and their associated artefacts, whether or not sunken, are entitled to sovereign immunity".<sup>74</sup> At the very end of the litigation, through informal understandings Spain loaned the artefacts recovered from the wrecks to the *National Park Service* center in Assateague Island – near where *La Galga* was lost – in order for the artefacts to be displayed for visitors under a cooperative approach to the final use of underwater cultural heritage.

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*cont.*

with the clarification that the meaning of 'abandoned' under the ASA conforms with its meaning under admiralty law." *California v. Deep Sea Research*, 523 U.S. 491, 508, 118 S.Ct. 1464, 1473, 140 L.Ed.2d 626 (1998). But, for the Supreme Court, *Deep Sea Research* was inapposite because it involved a privately-owned steamship with privately-insured cargo. *Ibid.*, at p. 495, 118 S.Ct. at p. 1467.

<sup>71</sup> 10 February 1763, *Parry's Consolidated Treaty Series*, vol. 42, p. 320. The District Court did not hold the same respect of *Juno* because she sunk in 1802, and the 1763 Treaty did not apply. *Sea Hunt* case, District Decision, *supra* n. 2, at p. 688, n. 15.

<sup>72</sup> *Sea Hunt* case, Appeal Decision, *supra* n. 2, at p. 634. The Court of Appeal also denied the salvage award to *Sea Hunt*, *Ibid.*, at pp. 647–48, n. 2.

<sup>73</sup> *Ibid.*, at p. 647.

<sup>74</sup> Statement of Interest of the United States Department of State, at p. 7, para. 17(a). On file with the author. It must be kept on record that, within the U.S. legal system, the opinion of the State Department on questions of international law is of great importance. As viewed by the U.S. Supreme Court, "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Arica, Inc. V. Avagliano*, 457 U.S. 176, 184, 185 (1982); *United States v. Stewart*, 489 U.S. 353, 369 (1989).

## 2. Suken Warships as Public Property

Even if one were to assume that sunken warships might be ships no more (a still controversial position),<sup>75</sup> this does not imply that the wrecks have ceased to be the *public property* of the flag State.<sup>76</sup> Consent of the flag State to any action upon them may continue to be required. As asserted by Anastasia Strati:

“With respect to sunken State-owned vessels and warships, it must be accepted that they do retain their status as public State property so that their recovery may require the consent of the flag State.”<sup>77</sup>

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<sup>75</sup> See a selected bibliography pro and contra this issue in Strati, *supra* n. 1, at p. 220, notes 28 and 29. As said by a prominent commentator on the law of the sea when analysing the *Alabama* case, “[I]a transformation d’un navire en épave n’a jamais pour effet de faire disparaître *ipso facto* le droit du propriétaire de navire [. . .] Ce qui vaut pour les épaves de navires en général vaut *a fortiori* encore plus pour les épaves de navires publics [. . .] le droit de propriété d’un Etat sur l’épave d’un de ses navires de guerre subsiste aussi longtemps que cet Etat n’a pas expressément renoncé à son droit ou ne l’a pas volontairement transféré, sauf dans le cas où l’on peut établir qu’il y a eu capture de la part d’un autre Etat dans l’exercice du droit de belligérance”, Jean-Pierre Queneudec, “Chronique du droit de la Mer”, 36 *Annuaire Française de Droit International* (1990), p. 751.

<sup>76</sup> Following Art. 5 of the 1958 High Seas Convention (*United Nations Treaty Series*, vol. 450, p. 82) each State governs the grant of its nationality and decides how to maintain or relinquish that link of jurisdiction over the ship. In two well known cases in the aftermath of the U.S. Civil War – the *Stonewall* and the *Shenandoah* –, the transfer of public property to the succeeded State was clearly done by the Spanish and British authorities, see Moore, 1 *Digest of International Law* (1906), pp. 64–5.

However, in the political, non legal realm, Latin American and Caribbean countries have asserted that underwater cultural heritage “is the property of the State in which it is found and through this it is the heritage of the Humanity.” Santo Domingo Declaration, of 16 June 1998, resulted from the First Meeting of the Technical Commission on Underwater Cultural Heritage of the Forum of Ministers of Culture and Officials Responsible for Cultural Policy of Latin American and Caribbean (webpage at <<http://www.UNESCO.org/cu/foroministros/foro.htm>>), reprinted in *Background Materials II*, at pp. 341–2.

A legal controversy has recently arisen between Spain and Uruguay on the alleged remains of the Spanish frigate *San Salvador*, sank with her crew on 31 August 1812 in Maldonado Bay, Uruguay. Applying its *Real Decreto n° 14.341*, of 21 March 1976, and the *Decreto 692/986*, of 28 October 1986, Uruguay considers that title over the wreck reverted to Uruguay. Spain, however, reiterated its *Note verbale* of 8 February 2000 which referred to another Spanish wreck embedded in Uruguayan waters (*Nuestra Señora del Pilar*). In both cases, Spain manifestly expressed that it had not abandoned the vessel and that, in the particular case of the *San Salvador*, human remains should be treated with particular respect. Spain has further proposed that Uruguay conclude a general agreement in order to cooperate on a friendly basis in the preservation of common underwater cultural heritage (Documentation provided by Spanish authorities on file with the author). For an archaeological analysis of the case, see 30 *The International Journal of Nautical Archaeology* (2001), p. 279.

<sup>77</sup> Strati, *supra* n. 1, at p. 222.

Being objects still of a military character (documents, instruments, weapons, etc.), they clearly deserve immunity since they maintain the *jure imperii vocatio*.<sup>78</sup> On the other hand, even without that military character or if it is replaced by an historical, spiritual or archaeological character (old guns, human graves, charts, etc.), they deserve different legal treatment which, as we will see later, does not necessarily impede the application of State immunity since States are still owners of these artefacts, precluding the reversion of title to the finder since a rightful owner always exists unless an express abandonment act has been proven. In the US, under admiralty law, an old vintage rule states that when “articles are lost at sea the title of the owner in them remains.”<sup>79</sup> This long standing position has been plainly asserted in existing U.S. case law: as expressed in the *Columbus-America* case, “should an owner appear in court and there be no evidence of an express abandonment,” title to the shipwreck remains with the owner.<sup>80</sup> A court might infer abandonment but “[s]uch an inference would be improper, though, should a previous owner appear and assert his ownership interest [ . . . ].”<sup>81</sup>

The particular status of sunken warships as public property has been elucidated in numerous cases around the world: the CSS *Alabama* case, the HMS *Birkenhead* case, the HMS *Erebus* and HMS *Terror* case, the German *U-boats* case, the *Old Dutch Shipwrecks* case or the HMS *Sussex* case. Let us review them briefly.

The first is a well known matter between France and the United States on the wreck of the confederate ship *Alabama*.<sup>82</sup> After a battle with the USS *Kearsarge*, the *Alabama* sank seven miles off the Normandy coast of Cherbourg on June 19, 1864.

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<sup>78</sup> See, for example, Section 1611 (b) (2) of the U.S. Foreign Service Immunities Act (90 Stat. 2891, 28 U.S.C.).

<sup>79</sup> *The Akaba*, 54 F. 197, 200 (4th Cir. 1893).

<sup>80</sup> *Columbus-America Discovery Group v. Atlantic Mutual Ins. Co.*, 974 F.2d 450, at p. 461. Further, when “a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment.” *Ibid.*, at p. 467–68; see also *Hener v. United States*, 525 F.Supp. 350, at pp. 356–57.

<sup>81</sup> *Ibid.*, at pp. 464–65. This is the general approach followed by the US Circuits of appeals. See *ad ex.*: the First Circuit in *Martha's Vineyard*, 833 F.2d 1059, at p. 1065; the *Fifth Circuit* noting that “salvage of a vessel or goods at sea, even when the goods have been abandoned, does not divest the original owner of title or grant ownership rights to the salvor, except in extraordinary cases.” *Treasure Salvors*, 640 F.2d 560, at p. 567; or the *Sixth Circuit* in *Fairport*, emphasizing that “[p]roof by inference still requires proof, not conjecture – a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment.” *Fairport*, 177 F.3d 491, at p. 500.

<sup>82</sup> See the comments in *Annuaire Français de Droit International*, 37 (1990), p. 747, and in *American Journal of International Law*, 75 (1991), p. 381. With respect to the CSS *Alabama* case, there must be also cited the “Alabama bell case” before the U.S. Courts. *U.S. v. Richard Steinmetz*, 763 F.Supp. 1293, 1294, (D.N.J 1991) *affd*, 973 F.2d 212, (3rd Cir. 1992) *cert. denied*, 113 S.Ct. 1578 (1993). In this case, the court applied the doctrine of sovereign immunity to property – the bell from CSS *Alabama* – formerly owned by the Government of the Confederacy and held that the United States rightfully succeeded to the property of the former.

The wreck was located by French divers in 1984 and the United States asserted title to the ship, claiming it as successor to the Confederate States of America.<sup>83</sup> The United States maintained their longstanding position<sup>84</sup> through a note issued to the French Embassy reaffirming “the inherent right of the United States Government in property which vests in it and title to which it has never transferred or abandoned”. Furthermore, and this is a very important question surrounding the legal title on sunken warships embedded on territorial waters, the United States:

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<sup>83</sup> In the opposite sense, the case of *La Belle*, sunk in 1684 in United States territorial waters and discovered in 1995 by the Texas Historical Commission could be cited. See 45 *Annuaire Français de Droit International* (1998), p. 768 *et seq.* France had claimed the wreck as an *Armée Royale* ship and negotiations to manage the shipwreck and to address ownership issues begun in 1998. Finally, an agreement has been reached between France, the U.S. and the State of Texas: France is recognised as the owner of the ship and Texas is appointed the custodian of the artefacts, so they will remain in Texas. There is also a provision for France to have access to the artefacts if France wants to use them for exhibitions. But this case gave both countries another occasion to remember, as “an important principle of international law”, that “title to identifiable sunken State vessels remains vested in the Sovereign unless expressly abandoned, and is not lost by the passage of time.” Joint public Declaration: “U.S.-France la Belle Agreement Signed”, Media Note, Office of the Spokesman, Washington D.C., 1st April 2002, available at <<http://www.state.gov/r/pa/prs/ps/2003/19237pf.htm>> (visited on 7 May 2002)

<sup>84</sup> The U.S. official policy may be seen in J. Ashley Roach, “Sunken Warships and Military Aircraft”, 20 *Marine Policy* (1996), p. 351 *et seq.* This position is rooted in customary international law, see 8 *Digest of U.S. Practice in International Law* (1980), pp. 999 and 1006. A House of Representatives’ Report letter contained in the ASA’s legislative history further stresses that “[t]he U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment. The same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State.” H.R. Rep. No. 100–514, reprinted in 1988 U.S.C.C.A.N. 370, at p. 381. From the legislative history of the ASA it might be inferred that abandonment can be implied “as by an owner never asserting any control over or otherwise indicating his claim of possession.” H.R.Rep. No. 100–514(I), at p. 2 (1988), reprinted in 1988 U.S.C.C.A.N. 365, at p. 366. The legislative history suggests that sovereign vessels must be treated differently from privately owned ones. The House Report incorporated a State Department letter stating that “the U.S. only abandons its sovereignty over, and title to, sunken U.S. warships by affirmative act; mere passage of time or lack of positive assertions of right are insufficient to establish such abandonment” and “the same presumption against abandonment will be accorded vessels within the U.S. territorial sea that, at the time of their sinking, were on the non-commercial service of another State.” H.R.Rep. No. 100–514(II), at p. 13 (1988), reprinted in 1988 U.S.C.C.A.N. at p. 381.

Recently, the official U.S. opinion has been clarified in the affidavits of the U.S. Department of State and the U.S. Department of Defense, of 18 December 1998, with the *Statement of Interest of the United States of America in the Sea Hunt Case* (on file with the author). Finally, the *Statement by the President of the United States of America on the U.S. Policy for the Protection of Sunken Warships* of 19 January 2001 must be also seen. President Clinton plainly said that “[t]he United States recognizes the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with

"in no way purports to dispute the fact that, although the CSS *Alabama* sank in 1864 on the high seas, the final resting place of the vessel is now within the territorial sea of France. The United States recognizes the legitimate interests of France resulting from the location of the CSS *Alabama*. However, this in no way extinguishes the ownership right of the United States."<sup>85</sup>

Though France originally challenged the United States assertion of ownership,<sup>86</sup> after the U.S. Department of State clarified the United States position, France changed its position and, on October 3, 1989 both States signed in Paris an Agreement<sup>87</sup> concerning the shared protection and study of the wreck "on a basis of equality".

The second selected case began in February 1852, when HMS *Birkenhead* sank off Cape Colony in South Africa.<sup>88</sup> The *Birkenhead* was a Royal navy troop carrier and, when it sank, she was carrying 445 people on board and reputedly 240,000 gold sovereigns. Several salvage missions were attempted and finally, on September 22, 1989, an Exchange of Notes took place between the UK Ambassador in South Africa and the South African Foreign Minister concerning the regulation of the terms of settlement of the salvaging of the wreck.<sup>89</sup> The agreement safeguarded the wreck's status as a military grave and, in particular, did not prejudice the UK legal position regarding ownership of the wreck. In a Press Release issued on the same day of the Agreement, the Foreign and Commonwealth Office stated that the latter reflected "HMG's position that the Crown maintains rights and interest in ships of the Royal Navy which have sunk, wherever they may be and without time limit."<sup>90</sup>

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*cont.*

the law of the foreign flag State [. . .] Further, the United States recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea", reprinted in Camarda & Scovazzi, *supra* note 15, at p. 447.

Once the United States withdrew this position in the *Glomar Explorer* incident, critiques arose among the U.S. doctrine. See Alfred P. Rubin, "Sunken Soviet Submarines and Central Intelligence; Laws of Property and the Agency", 69 *American Journal of International Law* (1975), p. 855 *et seq.* See also Frederic A. Eustis, 'The 'Glomar Explorer' Incident: Implications for the Law of Salvage', 75 *Virginia Journal of International Law* (1975), p. 177 *et seq.*

<sup>85</sup> Note to the Embassy of France, of 26 February 1988, Department of State File No. P89 0132-0379, reprinted in 85 *American Journal of International Law* (1991), p. 382 *et seq.*

<sup>86</sup> France applied its Law No. 71-1060 of 24 December 1971 (55 *Bulletin Législatif Dalloz* (1972), p. 18 *et seq.*), under which the wreck remains in the French territorial sea. See the Note of the French Ministry of Foreign Affairs, No. 18 DJ/MFW/DE, of 5 January 1988, and the U.S. reply in the Department of State File No. P89 0132-0373. France finally conceded that title remained in the United States on 19 May 1989.

<sup>87</sup> Text reprinted in *Background Materials II*, at p. 52.

<sup>88</sup> See all the data and paragraphs cited below in 60 *British Yearbook of International Law* (1989), pp. 671-2.

<sup>89</sup> *U.K. Treaty Series* no. 3 (1990).

<sup>90</sup> Texts reprinted in *Background Materials II*, at pp. 58-60.

The third case relates to HMS *Erebus* and HMS *Terror*. Both ships were part of a Royal Navy expedition sent in 1845 to look for new arctic maritime routes in Canadian waters. In 1848, after several problems caused by the ice and extreme temperatures, the *Erebus* sank in the Victoria Strait, north-east King William Island and the *Terror* sunk close to O'Reilly Island, south-east King William Island. In 1992 Canada declared both wrecks as National Historical Sites under the 1985 Historic Sites and Monuments Act.<sup>91</sup> Under Section 5 of this Act, the Historic Sites and Monuments Board of Canada recommended the Minister of Canadian Heritage to negotiate and conclude an agreement with the United Kingdom to preserve the wrecks. Finally, the case was solved in 1997 by the Memorandum of Understanding Between the Government of Great Britain and Canada Pertaining to the Shipwrecks HMS *Erebus* and HMS *Terror*.<sup>92</sup> In paragraph 2 of the Memorandum it was said that:

“Britain, as *owner of the wrecks*, hereby assigns custody and control of the wrecks and their contents to the Government of Canada, and acknowledges Canada and its agent for purposes of this Understanding. In so doing, *Britain does not waive ownership or sovereign immunity with respect to the wrecks or their contents while they are on the seabed*, but accepts that any site investigation, excavation or recovery of either of the wrecks or their contents will be under Canada’s custody [emphasis added].”

Two *U-boats* cases should also be noted: one before the Norwegian courts and the other before the Singapore courts. The first case dealt with the *U-76*, sunk in January 1917 off the northern coast of Norway. An unsuccessful salvage attempt was made in 1923 by a private Norwegian society. In 1945, all German properties in Norway were seized by the Norwegian Government and in 1957 all German vessels and wrecks were sold to another private society: Hovding Shipbreakers. Due to different salvage claims, a case finally arose before the Norwegian courts, which had the opportunity to reaffirm that title to the property rested with Germany until 1945.<sup>93</sup>

Another case relates to the *U-859* case.<sup>94</sup> The *U-895* sank in 1944 with a cargo of mercury in the Strait of Malacca. Once recovery actions took place and a controversy on the ownership arose, the High Court of Singapore held that “the German State has never ceased to exist despite Germany’s unconditional surrender in 1945 and whatever was the property of the German State, unless it was captured and taken away by one of the Allied Powers, still remains the property of the German State . . .”<sup>95</sup>

<sup>91</sup> Historic Sites and Monuments Act, R.S. 1985, c. H-4, available at <<http://laws.justice.gc.ca/en/H-4/text.html>>.

<sup>92</sup> 8 August 1997. Text reprinted in Camarda & Scovazzi, *supra* note 15, at p. 442.

<sup>93</sup> See Sjur Brækhus, “Salvage of wrecks and wreckage: legal issues arising from the Rund Find”, *Scandinavian Studies in Law* (1976), p. 37 *et seq.*

<sup>94</sup> See the case before the High Court of Singapore: *Simon v. Taylor*, 56 *International Law Reports* (1980), p. 40 *et seq.*

<sup>95</sup> *Ibid.*, at pp. 46–47.

The *Old Dutch Shipwrecks* case relates to the ownership of the wrecks of the *Vereenigde Oostindische Compagnie* (V.O.C., the Dutch East India Company) lying off the western Australian coast since the 17th and 18th Centuries. The Netherlands – legal successor of the V.O.C. – claimed ownership of several wrecks that have been discovered, contrary to the Australian position which deemed these ships abandoned. The controversy was finally settled by the 1972 Agreement between The Netherlands and Australia Concerning Old Dutch Shipwrecks,<sup>96</sup> according to which:

“The Netherlands, as successor to the property and assets of the V.O.C., transfers all its rights, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and to any articles thereof to Australia which shall accept such right, title and interest [Article 1].”<sup>97</sup>

It has been said that the Agreement, as such, does not clarify the nature and extent of Dutch title over the wrecks and, therefore, does not explicitly recognise the transferred title as sovereign.<sup>98</sup> Nevertheless, *nemo dat quod non habet*.<sup>99</sup> The Agreement plainly recognises that “the Netherlands, by virtue of article 247 of the 1798 Constitution of the Batavian Republic, is the present legal successor to the V.O.C.” (Preamble), and cooperation appears as the yardstick of the management of a third country wreck in sovereign waters.

The last case to be summarized, the HMS *Sussex* case, arose when a Florida company – Odyssey Marine Exploration – allegedly working with the British government in a project initially covered under the nick-name “Project Cambridge”, claimed to find within Spanish territorial waters in the Strait of Gibraltar the wreck of what it supposed to be HMS *Sussex*,<sup>100</sup> sunk on 19 February, 1694 when sailing with ten

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<sup>96</sup> 6 November 1972, *Australian Treaty Series* No. 18 (1972), entered into force on 6 November 1972.

<sup>97</sup> Australia, on its part, recognises in Art. 4 “that The Netherlands has a continuing interest, particularly for historical and other cultural purposes, in articles recovered from any of the vessels referred to in article 2 of this Agreement”.

<sup>98</sup> Patrick O’Keefe, “International Waters”, in Dromgoole, *supra* note 40, p. 226 *et seq.*, at p. 226.

<sup>99</sup> A medieval vulgarisation of the general principle *Nemo plus juris ad alium transferre potest, quam ipse haberet*, Ulpiano, *Ad edictum*, vol. 46, D50.17 § 54. Anyway, some doubts arise when reading §20 of the Australian Historic Shipwreck Act of 1976 (reprinted in *Background Materials I*, p. 1) since it allows Australian authorities, when necessary, to declare the ownership of a specified Dutch shipwreck to be vested in a specified Australian or Dutch authorities.

<sup>100</sup> Doubts have arisen however regarding whether the Odyssey Company actually discovered the rests of a British ship since that company were given permission to raise only diagnostic artefacts to the extent necessary to determine if it might be the *Sussex*. Furthermore, the one cannon they raised – currently under archaeological analysis in the *Museo Nacional de Arqueología Marítima y Centro Nacional de Investigaciones Arqueológicas Submarinas* of Cartagena, Spain – were not British but Dutch.

tons of gold with which Britain tried to retain the Duke of Savoy as an ally against France during the Hapsburg Wars in Europe. Britain asserted its title over the wreck<sup>101</sup> and Spain never claimed title over the British flagship and *Odyssey*, through a Spanish law firm, always asked Spanish permission for access to the wreck which was given under severe conditions.<sup>102</sup> Once some of these conditions were violated by the Company, Spanish authorities withdrew the permission to carry out further exploration within its sovereign waters. The private company and the British Government – as owner of HMS *Sussex* – signed an agreement made effective the 27 September 2002 to manage the exploration, conservation and the recovery of the remains and artefacts from the alleged *Sussex*.<sup>103</sup> But, as far as this author knows though not entirely confirmed, the British authorities might be rethinking their *joint venture* with *Odyssey* and turning to the Spanish authorities in order to publicly cooperate in the preservation of the shipwreck, avoiding any interference of private operators.

### 3. The practice of States as evidence of the rule

As is well known, international custom is one of the two main formal sources of public international law. As the International Court of Justice has constantly repeated, the substance of international custom must be looked for “primarily in the actual practice and *opinio juris* of States.”<sup>104</sup> Both elements being indispensable, it is also true that international custom has derived from a “coutume sage” to a “coutume sauvage.”<sup>105</sup> The relative weight of both elements have changed: the law may evolve

<sup>101</sup> As stated in paragraph 5(d) of the Memorandum (see *infra* n. 103), «[t]he [British] Government shall at all time be considered the owner of the shipwreck.»

<sup>102</sup> The conditions were imposed by the Ministry of Culture and Education on 20 April 1999, and repeated to the U.S. Embassy in Madrid by a *Note verbale* issued by the Foreign Affairs Ministry of 5 October 1999. Personnel of the *Museo Nacional de Arqueología Marítima* and of the Spanish Navy were onboard during some expeditions to the wreck (Documentation provided by Spanish authorities on file with the author).

<sup>103</sup> Agreement Concerning the Shipwreck HMS *Sussex*, of 27 September 2002. This agreement has been kept secret by both parties. Only a “Partnering Agreement Memorandum” has been made public in the *Odyssey* marine Exploration’s webpage at <<http://www.shipwreck.net/pam>>. Paragraph 12 of the Memorandum explicitly says that “[t]he Agreement contains a confidentiality clause governing the release of information concerning the Agreement and all documents relating to its execution.” The partnership supposes to split the profits or appraised values of the recovered coins on a sliding scale that favors *Odyssey* at first and then the British government. *Odyssey* is to get 80 percent of the proceeds up to \$45 million, 50 percent from \$45 million to \$500 million and 40 percent above \$500 million. The British government gets the rest.

<sup>104</sup> *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, *Merits*, *I.C.J. Reports* 1985, p. 13, at p. 29; *Legality of the Threat or Use of Nuclear Weapons*, *Advisory Opinion*, *I.C.J. Reports* 1986, p. 226, at p. 253.

<sup>105</sup> See René-Jean Dupuy, “Coutume sage et coutume sauvage”, in *Melanges Rousseau* (1974), p. 75 *et seq.*

more rapidly now than in antiquity,<sup>106</sup> and *opinio juris* must be shared generally, "including that of States whose interests are specially affected."<sup>107</sup>

In the present author's view, the practice of States and the status of international conventions currently in force has confirmed the view that the rule of immunity still applies on sunken warships, both as State vessels (sunken or not) and as public property. What seems to be "consistent with State practice and international law" is the rule that States retain title over their sunken warships even when located in territorial waters of another State. The difference between the position in the territorial sea and that in other marine zones is, logically, the need to respect the "legitimate interest" of the coastal State, which must authorize any intervention directed to the wreck.<sup>108</sup> Hence, cooperation – as shown in the cases summarized above – is the landmark feature in these cases, adding a new "building block" to the general rule of immunity of sunken warships.<sup>109</sup>

As stated by the Department of State in its affidavit to the *Sea Hunt* case of Dec. 18, 1998:

<sup>106</sup> For a survey of general approaches to international custom from different point of views and different moments, see Charles De Visscher, "Coutume et traité en droit international public", 59 *Revue Générale de Droit International Public* (1955), p. 353 *et seq.*; Michael Akehurst, "Custom as a Source of International Law", 47 *British Yearbook of International Law* (1974), p. 1 *et seq.*; Georges Abi-Saab, "La coutume dans tous ces états", *Melanges Ago* (vol. 1, 1982), p. 53 *et seq.*; and Gregory Tunkin, "Is General International Law Customary Law Only?", 4 *European Journal of International Law* (1993), p. 534 *et seq.*

<sup>107</sup> *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, *Merits*, *I.C.J. Reports 1969*, p. 3, at p. 43.

<sup>108</sup> As noted by Robert S. Neyland, "the governments of France, Germany, Japan, The Russian Federation, The United Kingdom, Northern Ireland, and the United States issued a joint statement in September 1995 to be used as guidance when dealing with issues related to sunken state vessels and aircraft (Department of State (DOS) 1995). States with ownership of title are referred to as the 'flag states,' while those states with foreign-owned sunken vessels located in their waters and subject to their jurisdiction are identified as the 'coastal states.' The six nations acknowledge the property rights of the flag states over their vessels, that the sunken vessels under their jurisdiction are 'historical artefacts of special importance and entitled to special protections,' and acknowledge that, 'these ships and aircraft may be the last resting places of many sailors and airmen who died in the service of their nations.' It is accepted that disturbance of a ship or aircraft wreck site is a destructive process and that these sites hold a special significance for scientific discovery. Thus, any proposed recovery or excavation must provide a research design, site surveys, minimal site disturbance consistent with research requirements, adequate financial resources, preparation of professional reports, and a comprehensive conservation plan." R.S. Neyland, *Sovereign Immunity and the Management of United States Naval Shipwrecks*, at <<http://www.history.navy.mil/branches/org12-7h.htm>> (visited on 28 February 2003).

<sup>109</sup> This kind of cooperation could be seen recently implemented by Australia and Turkey on the wreck of First World War Australian submarine *AE2*, sunk in 1914 in Turkish waters during the Gallipoli campaign. See, M. Spencer, "Exploring the Australian WW1 Submarine *AE2*", 26 *Journal of the Australian Naval Institute* (2000), p. 27 *et seq.*

“The practice of nations confirms the well-established rule of international law that title to such vessels is lost only by an express act of abandonment, gift or sale by the sovereign in accordance with relevant principles of international law and the law of the flag State governing abandonment of government property, or by international agreement or by capture or surrender during battle before sinking.”<sup>110</sup>

This could be a good summary of the current complex rule on sunken warships. As we have seen, the main proposition is still the sovereign immunity of the wreck under international law and that title remains in the flag State and is governed by its domestic law.<sup>111</sup> Its component “building blocks” might include: (1) Title may be only lost or transferred by: (a) express abandonment,<sup>112</sup> either unilateral<sup>113</sup> or conventional,<sup>114</sup> or (b) capture or surrender under the laws of war.<sup>115</sup> (2) Special circumstances may give the wreck a particular status when it is either considered: (a) a human grave,<sup>116</sup> and/or (b) a historical or cultural site.

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<sup>110</sup> Statement of Interest of the United States Department of State, at p. 7, para. 17(c) (on file with the author).

<sup>111</sup> A particular regime might be created, however, when the flag State cannot be fully asserted or when the flag State does not still exist anymore. The latter relates either to the particular situation of (i) cases of succession of States and (ii) cases of such ancient wrecks that are older than the modern concept of State. Although we will address these cases *infra* III *in fine*, it could be advanced that the notion of cooperation again arises as a landmark feature managing those wrecks.

<sup>112</sup> Lucius Cafilisch adds the possibility of an implied abandonment : “[l]’immunité survivait ainsi au navire tant que l’Etat du pavillon manifeste, par des mesures concrètes, son intention d’enlever l’épave; dans le cas contraire, la juridiction passerait, suivant le cas, à l’Etat côtier ou à l’Etat du pavillon du récupérateur.” Cafilisch, *supra* n. 15, at p. 84.

<sup>113</sup> Like the case of the U.S. schooners *Hamilton* and *Scourge*, sunk in Lake Ontario during the War of 1812, and transferred to the City of Hamilton (Canada) through the Royal Ontario Museum in 1978 by the Secretary of the U.S. Navy, authorised under the Constitution (U.S. Const. art. IV, § 3, cl. 2) which provides that Congress and those authorized by Congress can legally dispose of U.S. property. Following this ‘Property Clause’, US courts have consistently recognized that the federal government cannot abandon property absent an affirmative act authorized by Congress. See *Royal Indem. Co. v. United States*, 313 U.S. 289, 294, 61 S.Ct. 995, 997, 85 L.Ed. 1361 (1941).

<sup>114</sup> Using again a case involving the United States, it may be seen the transfer to the Government of the Marshall Islands of the warships sunk during the atomic bomb tests at Bikini and Kwajalei Atoll (in accord with Sec. 177 of the 1982 Compact of Free Association, see *Public Law* 99–239 of 14 January 1986 for the official text).

<sup>115</sup> As was the case of the Russian cruiser *Admiral Nakhimov*, which sank after being captured by the Japanese Navy.

<sup>116</sup> *Ad.ex.*, in the *Sea Hunt Case*, once it learned that Virginia had issued a permit for commercial exploitation of the *Juno* and *La Galga*, Spain issued a Diplomatic Note protesting disturbance of these military graves and seeking to ensure that the remains of these vessels were treated as maritime graves (see Diplomatic Note No. 43/48, of 8 May 1998, on file with the author).

See also the examples of the USS *Tulip* and the USS *Tecumseh* summarized in Nayland, *supra* n. 108.

This paper will now turn briefly to the particular issues of possible changes in this legal status, either *de lege data* and *de lege ferenda*, in the special cases of sunken warships that may have become underwater cultural heritage.

### III. SUNKEN WARSHIPS AS CULTURAL HERITAGE

When a sunken warship is considered of cultural, archaeological or historical value, its position acquires a new legal approach since a new *interest* is in motion.<sup>117</sup> As we have seen in the preceeding pages, immunity of sunken warships is legally preserved unless particular circumstances arise (express abandonment, capture, surrender, etc.). It is true that sunken warships, "at least those sunk before the 20th Century" – using David Bederman's words –, might deserve a different legal treatment. In these cases, however, problems arise when dealing with the current legal framework to canvas their protection. The inadequacy of UNCLOS led to the new UNESCO Convention as an effort to define a legal regime for underwater cultural heritage, including sunken warships when suitable.

#### 1. The Legal Regime of UNCLOS

UNCLOS regulation of the underwater archaeological and historical sites is elusive, vague and inconclusive in critical respects.<sup>118</sup> As a matter of principle, it does not affect the general regime of immunities of warships (sunk or not), as is established in its Articles 32, 95, 96 and 236. Indeed, UNCLOS does not even clarify the legal regime of any wreck. As was said by one specialist:

"The only two articles (Articles 149 and 303) which do refer to archaeology are extremely problematic to interpret and provide very patchy protection since they do not cover the area between the outer limits of the 24-mile contiguous zone and the international sea area beyond national jurisdiction. In other words, the protection under the 1982 [UNCLOS] does not extend to one of the main maritime zones in which the underwater archaeological heritage is located-on or under the seabed in the continental shelf zone".<sup>119</sup>

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<sup>117</sup> As expressed by Louis Balmond when analyzing the protection given by French domestic law, "la pris en compte de l'intérêt général devient le centre de gravité de ce régime juridique". Louis Balmond, "L'épave du navire", in *S.F.D.I. Toulon Colloque* (1992), p. 69 *et seq.*, at p. 70.

<sup>118</sup> A sound edited commentary of the UNCLOS finds that "[t]he regimes for underwater archaeology resulting from the Convention are complicated and not complete." Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982 – A Commentary* (vol V, 1985), p. 281. For a different, quite optimistic approach, see Maria Cristina Giorgi, "Underwater Archaeological and Historical Objects", in René-Jean Dupuy & Daniel Vignes (eds.), *A Handbook on the New Law of the Sea* (1991), p. 561.

<sup>119</sup> Janet Blake, "The Protection of the Underwater Cultural Heritage", *International &*

Article 149 (“Archaeological and historical objects”) simply states that “[a]ll objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” UNCLOS does not clarify the rules applying to archaeological or historical objects situated within the exclusive economic zone (EEZ) or continental shelf since coastal States are only expressly given rights concerning the exploration and exploitation of natural resources (Article 77(1)).<sup>120</sup> Though some decisions have tried to assimilate wrecks to natural resources,<sup>121</sup> the ILC’s commentary to Article 68 of its Draft of the late 1958 Convention on the Continental Shelf plainly says that “[i]t is clearly understood that the rights of the coastal state do not cover objects such as wrecked ships and their cargoes (including bulling) lying on the seabed or covered by the sand of the subsoil.”<sup>122</sup>

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*cont.*

*Comparative Law Quarterly*, 45 (1996), p. 819, at p. 824. See also Tullio Treves, ‘Stato costiero e archeologia marina’, *Rivista di diritto internazionale*, 76 (1993), p. 698. For a recent appraisal, see Eke Boesten, *Archaeological And/Or Historical Shipwrecks In International Waters: Public International Law and What It Offers* (2002).

By implication, Art. 33 of the UNCLOS also should apply to the regime of wrecks embedded on the contiguous zone (see *infra* note 123). During the negotiation of UNCLOS, an Informal proposal was submitted by Cape Verde, Greece, Italy, Malta, Portugal, Tunisia and Yugoslavia (UN Doc. A/CONF.62/C.2/Informal Meeting/43/Rev.3) under which “[t]he coastal State may exercise jurisdiction, while respecting the rights of identifiable owners over any object of an archaeological and historical nature on or under its continental shelf for the purpose of research, recovery and protection. However, particular regard shall be paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical or archaeological origin in case of sale or any other disposal, resulting in the removal of such object out of the coastal State.”

For the practice of some States that have unilaterally extended their jurisdiction over shipwrecks located on their respective continental shelves or the EEZ, see Strati, *supra* n. 1, at pp. 269–71.

<sup>120</sup> It must be recalled, however, what Art. 59 of UNCLOS states: “In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”

<sup>121</sup> See *Subaqueous Exploration and Archaeology, Ltd. And Atlantic Ship Historical Society, Inc., v. The Unidentified, Wrecked and Abandoned Vessel et al.*, 577 F.Supp. 597 [D. Md. 1983], *aff’d*, 765 F.2d 139, 4th Cir. 1985. Here, the U.S. District Court, District of Maryland, applying the Submerged Lands Act (67 Stat. 29, 43 U.S.C. Sec. 1301–1315) held in 1983 that “the remains of abandoned, two hundred year old shipwrecks, which have lain undisturbed for centuries under an undetermined amount of sand, reasonably can be characterized as natural resources for the purposes of the federal Act.” *Ibid.*, at p. 613. See an analysis of this approach in Roberta Garabello, ‘Will Oysters and Sand Save the Underwater Cultural Heritage? The Santa Rosalea Case’, in Camarda & Scovazzi, *supra* note 15, at p. 73.

<sup>122</sup> *Yearbook of the International Law Commission*, vol. II, 1956, p. 298, UN Doc. A/3159 (1956).

Article 303 ("Archaeological and historical objects found at sea") also reflects a rather contradictory and inadequate regime.<sup>123</sup> A severe critique has been already made, mostly of its paragraphs 2 and 3,<sup>124</sup> with which I fully agree. Paragraphs 1 and 4 of Article 303 underline that, first and foremost, States have the *duty* to protect underwater heritage and to *cooperate* when necessary and also provide the application of a *lex specialis* referred to underwater cultural heritage. The latter could be either (a) more general conventions on protection of cultural heritage, when applicable, (b) any regional or other specific conventions or agreements regarding the preservation of underwater heritage, and (c) the recent UNESCO Convention, which seems to fill in the gap in UNCLOS but, as emphasized by the UN General Assembly, is "in full conformity with the relevant provisions of the [UNCLOS]."<sup>125</sup> The core principles of the UNESCO Convention seem to be in conformity not only with UNCLOS but with customary international law, particularly when dealing with sunken warships.<sup>126</sup>

## 2. The New Regime and its Impact on Sunken Warships

The UNESCO Convention includes twofold references to State vessels:<sup>127</sup> as objects of protection<sup>128</sup> and as means of protection.<sup>129</sup> Article 1(8) states that sunken warships

<sup>123</sup> This article reads as follows: "1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed 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 "

<sup>124</sup> Scovazzi, *supra* note 15, particularly at pp. 114–120.

<sup>125</sup> Paragraph 30 *in fine* of GA Res. 54/31, of 18 January 2000, on "Oceans and the Law of the Sea". Art. 3 of the UNESCO Convention saves this conformity and, as said by Guido Carducci, "the [UNESCO] Convention stand as a sort of *lex specialis* for the specific purpose of [underwater cultural heritage] while the UNCLOS remains the fundamental and authoritative *lex generalis* for the law of the sea", Carducci, *supra* note 15, at p. 143. Therefore, Art. 30 of the Vienna Convention on the Law of Treaties, of 23 May 1969, plainly applies. Moreover, Art. 311 of UNCLOS also foresees this situation. See Maria C. Ciciriello, "Il progetto di Convenzione UNESCO sul patrimonio culturale subacqueo: Una nuova sfida al principio della libertà dei mari?", 55 *La Comunità Internazionale* (2000), p. 611 *et seq.*, at p. 617.

<sup>126</sup> Art. 6(3) of the Convention also provides that the Convention "shall not alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adoption, and, in particular, those that are in conformity with the purposes of this Convention."

<sup>127</sup> For a general survey of all different aspects addressed below, see the two complete analyses of Forrest, *supra* note 1, and Carducci, *supra* note 15.

<sup>128</sup> Art. 1(8). See *supra* note 8.

<sup>129</sup> Art. 13 states: "Warships and other government ships or military aircraft with sovereign

are covered by the Convention when they “meet the definition of underwater cultural heritage”. Therefore, following the definition given in Article 1(1)(a), only warships “which have been partially or totally under water, periodically or continuously, for at least 100 years” would fall under the legal regime established by the UNESCO Convention.<sup>130</sup> This leaves to one side the possible problem of recently sunken warships. For the rest, the UNESCO Convention does not clarify the legal status of sunken warships. As said by an insider of the UNESCO Convention’s drafting, Art. 2(8) “simply maintains the uncertainty *status quo*.”<sup>131</sup> As we already saw, its Article 2(8) only states that “[c]onsistent 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.” Furthermore, its Article 3 states that:

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immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of this Convention.” Because this question is incidental for the purposes of this paper, I will only focus on *sunken* warships, i.e. the object of protection.

<sup>130</sup> It must be kept in mind that the wording of this article does not refer to cultural heritage that has been under water *during the last* 100 years but for *at least* 100 years. Natural or artificial movement of lands, desiccation of former marine or fluvial zones, alterations on tides due to climatic changes, etc. can bring to the surface objects that have been under water (or even under land) during several centuries. As well, an earthquake in 1962 submerged beneath the waters the trading town and pirate stronghold of Port Royal in Jamaica, other earthquakes in the Gulf of Cádiz, Spain, made remnants of this tri-millennarian port and city – the Phoenician *Gadez* – appear over the waves during XIX and XX Centuries. Another case may be found in Argentina where, because of the erosion by the River San Javier, one third of the original surface occupied by the city founded in 1573 as Santa Fe *La Vieja*, remains submerged in the waters but some other parts have recently come to the surface. More problematic could be, for example, the application of the UNESCO Convention to the sixteen Etruscan and Roman wrecks discovered in December 1998, during the works carried out on the Italian railway-complex of Pisa-San Rossore.

<sup>131</sup> Forrest, *supra* note 1, at p. 528. The ILA Draft explicitly excluded its application to “warships, 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 services, or their contents” (Art. 2(2), see *supra* note 1). It is also true is that the final text of 2001 does not contain any reference to “abandonment” as did the 1998 Draft (art. 1(2)) nor does it include – it must be also said – the Spanish proposal to add a paragraph as follows: “The property and remains of a shipwrecked vessel whose national flag is known to be of a State Party shall not be deemed abandoned unless the said State explicitly declares its intention to abandon them” (both texts in Strati, *supra* note 15, at pp. 14–8). Furthermore, in a Chairman’s text of March 2001, it was proposed but finally rejected to include warships within the UNESCO Convention’s *champ opératoire*, but including the “express abandonment act” (see the text in UNESCO Doc. CLT-2001/CONF.203/INF.3).

"[n]othing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea".

Dealing in particular with wrecks embedded in the exclusive economic zone and on the continental shelf, Article 10(7) simply states that "no activity directed at State vessels and aircraft shall be conducted without the agreement of the flag State." The same can be said with regard to the International Seabed Area in which, under Article 12(7), "[n]o State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State." The legal position of the flag State is therefore not affected but reinforced.

The UNESCO Convention does not however address explicitly the particular situation of sunken vessels embedded in internal waters, territorial waters or the contiguous zone.<sup>132</sup> This does not automatically mean that title lies with the coastal State. On the contrary: title of the flag State continues since the Convention does not modify "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".<sup>133</sup> It is true that Article 7(1) of the Convention says that "States Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea." But this relates only to the regulation and authorisation of activities directed to the wrecks and does not give title over them to the coastal State. Nor can paragraph 3 of the same Article be seen as a reversion of title on warships from the flag State to the coastal State: the latter "should inform the flag State Party [...] with respect to the discovery of such identifiable State vessels and aircraft".<sup>134</sup> Yet, this does not relate to the title of the sunken warship but simply adds a recommendation for the coastal State "with a view to cooperating on the best methods of protecting

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<sup>132</sup> It must be said that this absence was one of the reasons for the abstention or the negative vote to the Convention of several States, including the United States, France, Russian Federation and the United Kingdom. See their Statements on vote during debates in Commission IV on Culture, 29 October 2001, 31st Session of the UNESCO General Conference, reprinted in Camarda & Scovazzi, *supra* note 15, at p. 426.

<sup>133</sup> As said by one scholar, "[e]ven if the UNESCO Convention, in its present formulation, entered into force, the regime of wrecks found within the territorial sea of a State party would not change by much". Guido Aquaviva, 'The Case of the *Alabama*. Some Remarks on the Policy of the United States Towards Underwater Cultural Heritage', in Camarda & Scovazzi, *supra* note 15, p. 31, at p. 46.

<sup>134</sup> This article also includes the recommendation to inform, if applicable, "other States with a verifiable link, especially a cultural, historical or archaeological link" of the discovery of the wrecks. This poses a different problem that needs to be solved with a different approach that I will address in the last part of this chapter.

State vessels and aircraft".<sup>135</sup> An exception to the general rule stated in Article 7(1) – the coastal State's exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea – is the immunity of sunken warships, an exception allowed by Article 2(8) and 3 of the same Convention and confirmed by the practice and *opinio juris* of States as confirmed by their practice.<sup>136</sup> Without flag State consent, it must however be admitted that coastal States might otherwise adopt (i) urgent measures to protect the wreck (including measures against the "salvage" of the wreck) and (ii) sovereign measures relating to the safety of navigation which could damage the wreck. It is preferable, however, that as far as possible these urgent measures be taken once the flag State has been informed (and if possible with the collaboration of the flag State), and taking in consideration the "Rules" annexed to the Convention.<sup>137</sup>

### 3. Sunken Warships and Underwater Cultural Heritage Core Principles

Once it is appreciated that the UNESCO Convention does not radically change the regime of immunities granted to sunken warships by general international law, it can be assessed whether its core principles – preservation, cooperation and technical (non commercial) expertise – are satisfactorily applicable to sunken warships defined as underwater cultural heritage by the Convention, once the flag State has authorized an activity directed to the wreck.

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<sup>135</sup> The rejection of a British and Russian proposal, endorsed by the United States, trying to substitute "should inform" to "shall consult" and adding a sentence wording that "such State vessels and aircraft shall not be recovered without the collaboration of the flag State, unless the vessel and aircraft have been expressly abandoned in accordance with the laws of that State", can not be either seen as an acceptance of the rule of reversion of title on warships to the coastal State (see the proposal in UNESCO Doc. 31 C/COM.IV/DR.5, of 26 October 2001, reprinted in Camarda & Scovazzi, *supra* note 15, at p. 417). As said by Craig Forrest, "[t]he actual regime for State owned vessels in the Convention reflects the resulting compromise between flag States and coastal States. Rather than focusing on the rights of the flag State, it was agreed that a balance would be drawn between the right of the flag State and the Coastal State". Forrest, *supra* note 1, at pp. 528–29.

<sup>136</sup> "While the exclusive jurisdiction of the coastal State is recognised – says Craig Forrest –, this Article must be read with the general principles. As such it does not purport to alter the flag State's existing rights in international law. Given that these rights are uncertain, this Article would not necessarily resolve any issues regarding abandonment and sovereign immunity". Forrest, *supra* note 1, at p. 529.

<sup>137</sup> Furthermore, coastal State should have the right to oppose any action in its waters but, under UNESCO Convention, should also have the duty to adopt the minimal measures to protect the wreck and not to impede without reason the legitimate protecting measures decided by the flag State. This would go against the general principle of the Convention, i.e. the duty to preserve the underwater cultural heritage as prescribed in its Art. 2(1) and, for those States not parties to the Convention, in Art. 303(1) of the UNCLOS.

a) *Preservation*

The duty to protect and preserve underwater cultural heritage is an obligation of behaviour endorsed both by UNCLOS and the UNESCO Convention. As article 2(4) of the latter provides for:

"States Parties shall, individually or jointly as appropriate, take all appropriate measures in conformity with this Convention and with international law that are necessary to protect underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities."

The innovation contained in the UNESCO Convention is that preservation shall be made "for the benefit of humanity" (Article 2(3)). This is a new feature with a twofold implication: on the one hand it connects with the general idea on the common heritage of mankind concept,<sup>138</sup> related to outer space, the moon and celestial bodies, the International Seabed Area, or the general environment;<sup>139</sup> on the other hand, as was said by Guido Carducci, "this reference anticipates also the fact that the Convention does not address issues of exclusive rights as ownerships of [underwater cultural heritage]. It does address on the contrary, as its main object, issues of rights, exclusive or not exclusive, to regulate and authorize activities directed to [this heritage]."<sup>140</sup>

At the least, what is intended by the Convention is to engage the interests of *human kind* in the protection of the underwater cultural heritage. Each State Party, as stated

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<sup>138</sup> On the concept of common heritage of mankind, see the classical Course at The Hague Academy of Alexandre Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *R des C* (1982 II), p. 99 *et seq.*

<sup>139</sup> Problems with this concept are mainly related not to the ownership of these spaces but to their uses. The sea-bed Area regime in UNCLOS is a paramount example: once it declared the Area as "common heritage of mankind" (Art. 136) and established a cooperative management system of its resources in Part XI, UNCLOS did not entry into force until a new agreement was reached which deeply changed that management system (Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea, 28 July 1994, text in GA Res. 48/263, of 28 July 1994, reprinted in *International Legal Materials*, 33 (1994), p. 1309).

<sup>140</sup> Carducci, *supra* note 15, at p. 153. For this author, another participant in the drafting of the Convention, "[t]he silence of the Convention on ownership reflects also two implicit assumptions. Firstly, from an historic standpoint, the variety of origins of cargo and vessels makes [underwater cultural heritage] often linked, especially if under water since earlier times, to various cultures and States. This original variety of links may be even more complex nowadays: cultures evolve in their geographic reach as well as, to a lesser extent, the territories of a given State at that time may nowadays be under the sovereignty of different States. Secondly, from a technical and legal standpoint, the issue of ownership of [underwater cultural heritage] is too complex and time-consuming for a negotiation already difficult enough. This vacuum remains nevertheless a gap of the Convention and the latter assumes ownership to be ruled by the applicable (domestic) private rules – as already did UNCLOS – and to provide title to the owner until abandonment." (*ibid.*, footnotes omitted)

in Article 29, “shall take all practicable measures to raise public awareness regarding the value and significance of underwater cultural heritage and the importance of protecting it under this Convention.” Additionally, “[r]esponsible non-intrusive access to observe or document *in situ* underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management” [Article 2(10)].<sup>141</sup> As has been explained in the preceding pages the sovereign immunity of the States over their sunken warships as *public* property remains, and as a consequence they *belong* to their populations. Therefore, as far as possible, the public must be engaged in their preservation through a panoply of different measures: information,<sup>142</sup> cooperation, access (preferably *in situ*), education, etc.

#### b) Cooperation

As stated in Article 3(1) of UNCLOS, “States have the duty to protect objects of an archaeological and historical nature found at sea and *shall cooperate* for this purpose” (emphasis added). This principle is expressly included in Article 2(2) of the UNESCO Convention with the following wording: “States Parties shall cooperate in the protection of underwater cultural heritage.” Moreover, drafters of this Convention emphasized that cooperation, not only among States but including a broad number of actors, such as international organizations, scientific institutions, professional organizations, archaeologists, divers, other interested parties and the public at large, as “essential for the protection of underwater cultural heritage” (Preamble).<sup>143</sup>

Cooperation is also a necessary tool in order to: (a) assist other Parties in the protection and management of underwater cultural heritage;<sup>144</sup> (b) to carry on the dif-

<sup>141</sup> See also Rule 35.

<sup>142</sup> Information provided under the Convention is to be given the appropriate protection against disclosure to those who could use it to loot or damage sites. As stated in Art. 19(3) of the Convention, “[i]nformation shared between States Parties, or between UNESCO and States Parties, regarding the discovery or location of underwater cultural heritage shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.” See also Rule 36(a). This is particularly appropriate with respect to sunken warships which, regardless of their time under the sea, may be dangerous places because of unexploded weapons or other hazardous related artefacts.

<sup>143</sup> In its Order of 3 December 2001 relating to *The Mox Plant Case*, the International Tribunal for the Law of the Sea (ITLOS) – although referring to pollution of the marine environment – recalled the duty to cooperate as “a fundamental principle [. . .] under the United Nations Convention on the Law of the Sea and general international law [. . .]” *The MOX Plant Case (Ireland v. United Kingdom), Provisional Measures*, Case No. 10, para. 82, available at <[http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html)>.

<sup>144</sup> Including, where practicable, “collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage”, and sharing “information with other States Parties concerning underwater cultural heritage, including discovery of heritage, location of heritage, heritage excavated or recovered contrary to this Convention or

ferent consultations prescribed in the Convention with State Parties which have declared an interest on how best to protect the underwater cultural heritage;<sup>145</sup> (c) to encourage States Parties to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage;<sup>146</sup> (d) to ensure enforcement of sanctions for violations of measures a State Party had taken to implement the Convention;<sup>147</sup> and (e) to the provision of "training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to underwater cultural heritage."<sup>148</sup>

The proviso included in Article 7(3) of the Convention is particularly relevant for sunken warships: "Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to *cooperating* on the best methods of protecting State vessels and aircraft, should inform the flag State Party to this Convention and, if applicable, other

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*cont.*

otherwise in violation of international law, pertinent scientific methodology and technology, and legal developments relating to such heritage" (Art. 19(1) and (2)).

Rule 8 of the annexed Rules to the Convention further states that "[i]nternational cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals." Hence, as stated in rules 9 and 10(h), the different projects designed for any activity "shall be submitted to the competent authorities for authorization and appropriate peer review" and "shall include a conservation programme for artefacts and the site in *close cooperation* with the competent authorities" (emphasis added).

<sup>145</sup> Arts. 10(3)(a) and 12(2) Consultations are another typical tool of the Convention among the States that, under Art. 9(5) or 11(4), had declared an interest based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned. The Convention also suggests [Art. 6(2)] that these interested States be invited to join the agreements that other States Parties might adopt for the particular protection of underwater cultural heritage (see *infra* note 146).

<sup>146</sup> Art. 6(1). These agreements "shall be in full conformity with the provisions of this Convention and shall not dilute its universal character" and, in such agreements, States can "adopt rules and regulations which would ensure better protection of underwater cultural heritage than those adopted in this Convention." The UNESCO Convention offers, thus, a *minimum standard* of protection that can be improved.

<sup>147</sup> Art. 17(3). These sanctions "shall be adequate in severity to be effective in securing compliance with this Convention and to discourage violations wherever they occur and shall deprive offenders of the benefit deriving from their illegal activities" [Art. 17(2)]. States shall also "take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and/or recovered, where recovery was contrary to this Convention" (Art. 14). See Art. 18 for questions of seizure and disposition of underwater cultural heritage. On this particular question it must be kept in mind the limits imposed by general international law as codified in article 18 and 19 of the of the 1991 ILC Draft Articles on Jurisdictional Immunities of States and Their Property (see *supra* note 32).

<sup>148</sup> Art. 21.

States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.”<sup>149</sup>

As we have seen, practice has shown how States have cooperated in the protection of their sunken warships, generally speaking either through the creation of bilateral committees (as in the *Old Dutch Shipwrecks* case or the *CSS Alabama* case) or direct consultations (like in the *HMS Birkenhead*, *HMS Erebus* and *HMS Terror* cases or the *Juno* and *La Galga* case). Spain, as perhaps the most interested State in the subject, has already finished (or it is concluding) several cooperative agreements with some Latin-American and Caribbean States (such as Dominican Republic, Uruguay, Costa Rica or Nicaragua) with the aim of preserving old galleons of the *Carrera de Indias* and their artefacts embedded in the territorial waters of those countries.

*c) Technical (non commercial) Expertise*

One of the main ideas surrounding the protection of the underwater cultural heritage is to avoid the commercial exploitation of the objects. As is plainly stated in Article 2(7) of the UNESCO Convention, “[u]nderwater cultural heritage shall not be commercially exploited”. This general principle presented from the beginning of the Convention does not preclude, as we have seen, the “[r]esponsible non-intrusive access to observe or document *in situ* underwater cultural heritage which shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management” (Article 2(10)). Rule 2 of the Rules annexed to the Convention also stated that:

“The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”<sup>150</sup>

In another interesting published article prior to the adoption of the UNESCO Convention, David J. Bederman sadly lamented that the positions of many archaeologists,<sup>151</sup>

<sup>149</sup> For the rest of maritime zones, as clarified above, the UNESCO Convention requires the *agreement* of the flag State [Art. 10(7) for objects located in the EEZ or continental shelf] or the *consent* of the flag State (Art. 12(7) for the sea bed Area).

<sup>150</sup> However, Rule 2 further clarifies that it “cannot be interpreted as preventing: (a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities; (b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.”

<sup>151</sup> Hence, one of the main critiques to the Agreement of 27 September 2002 between the British government and *Odyssey Marine Exploration* concerning the shipwreck of the HMS

jurists<sup>152</sup> and international governmental<sup>153</sup> and non-governmental organisations<sup>154</sup> are "[. . .] simply and categorically, anti-commerce and inalterably opposed to the role of free-enterprise in the recovery of property at sea."<sup>155</sup> Although it may be true to some extent that "as applied in admiralty courts in the United States, historic preservation values have been merged with 'traditional' salvage law",<sup>156</sup> this is not, alas, the normal behaviour of salvors.<sup>157</sup> The results are well known. As early as 1974, studies showed that all known wrecks off the Turkish coast had already been pilfered; treasure hunters regularly recruit local fishermen in the Philippines to comb the ocean floor for traces of wrecked Spanish galleons; and a 1986 *Christie's* auction of salvaged porcelain and gold from a 1752 Dutch shipwreck in the South China Sea broke up the collection and brought in \$16 million. All these activities were carried out without any historical conservation compromise or following any archaeological protocol. It is therefore not surprising that, more than ten years ago, it had already been said that:

"very few North American archaeologists are willing to work in the employ of treasures salvors. Experience to date has demonstrated that such relationships have not met the expectations of either party, and that the professional reputations of

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*cont.*

*Sussex* (see *supra* note 103), came from the Council for British Archaeology which denounced, among other reasons, the non compliance by the British Government of Article 3 of the revised European Convention on the Protection of the Archaeological Heritage, in force for the United Kingdom since 23 January 2001 (see its Press Release of Oct. 8, 2002, "Council for British Archaeology Slams Government Treasure Hunt", at <<http://www.britarch.ac.uk/conservesussex.html>>, visited on 13 November 2002). In the Explanatory Report made by the Council of Europe it is said that "[e]xcavations made solely for the purpose of finding precious metals or objects with a market value should never be allowed". Council of Europe Doc. MPC (91) 8, available at <<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>>. See also the position against the Agreement of the British branch of ICOMOS in its Press Release of 5 November 2002, available at <[http://www.icomos.org/uk/news/hms\\_sussex\\_press.doc](http://www.icomos.org/uk/news/hms_sussex_press.doc)>.

The Group of Experts which helped the drafting of the UNESCO Convention also plainly concluded that "the recovery of archaeological material should not be governed by its commercial value." See *supra* n. 61, at p. 11 § 45.

<sup>152</sup> The ILA 1994 Draft and its commentary being a good example (see *supra* n. 1).

<sup>153</sup> See the *Law of the Sea Report of the Secretary general*, UN Doc. A/51/645 (Nov. 1, 1996). Following the Secretary General opinion before the adoption of the UNESCO Convention, "there was general agreement that the incentives regarding commercial value, contained in some national salvage law, should not be included in the future instrument . . ." (*ibid.*, at p. 40 § 143).

<sup>154</sup> The ICOMOS 1996 Charter is self-explaining on this point.

<sup>155</sup> Bederman, *supra* n. 36, at p. 124.

<sup>156</sup> *Ibid.*, at p. 105 and see the precedents cited herein.

<sup>157</sup> The recent salvage activities around the wreck of the HMS *Sussex* in Spanish waters are a crystal example of this. It must be also kept on record the different 'technical appropriateness' and 'cultural sensibilities' of domestic legislations and government's attitudes and capabilities relating to the protection of their underwater cultural heritage.

those few archaeologists who do work for salvors for any length of time have suffered. Gradually, an unspoken attitude has come to prevail that scientific archaeology and treasure salvage are simply incompatible, with totally different methods and objectives".<sup>158</sup>

Here we find again the problem with the *dangerous liaisons* between the protection of underwater cultural heritage and the law of salvage. As is well known, one of the principles presiding over this branch of admiralty law is the *no cure no pay* principle.<sup>159</sup> It has been already said that "[t]he major problem is that salvage is motivated by economic considerations; the salvor is often seeking items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value."<sup>160</sup> Salvors, generally speaking, differ from archaeologists in their excavation methodology, including the selection of excavations, dispersal of the recovered pieces, the disrespectful treatment of human remains, etc., and generally adopting "cost-effective" (and not protective *in situ*) recovery methods that are time consuming. To sum up, and using Craig Forrest's words:

"[a]s such, salvage law does not promote a uniform system of law applicable to [underwater cultural heritage] and is therefore inappropriate as the bases for an international agreement. The creation of an international legal regime that will be applicable to the recovery of [underwater cultural heritage], based on its historical importance, rather than the existence of marine peril, will replace the necessity of having to determine whether salvage law is applicable. The extent to which the [underwater cultural heritage] is in 'marine peril' in the sense that it is in danger of physical destruction or damage, however, will continue to be an important element of this regime as it will be a determining factor as to whether the [underwater cultural heritage] should be recovered or preserved *in situ*".<sup>161</sup>

There are also some precedents "which interestingly suggest that there comes a time when salvage law must give way to archaeological law."<sup>162</sup> Article 4 of the UNESCO Underwater Convention seems to go along this path since it permits the application of the law of salvage and law of find under *three cumulative conditions*:

<sup>158</sup> P.F. Johnston, "Treasure Salvage, archaeological ethics and maritime museums", 22 *The International Journal of Nautical Archaeology* (1993), p. 53 *et seq.*, at pp. 58–9.

<sup>159</sup> Significantly, major efforts of salvors are focused on wrecks allegedly containing precious metals or other kind of economic valuable objects, untargeting their sonar from wrecks just containing spices, charts, human beings, etc., *i.e.* non economically valuable objects.

<sup>160</sup> O'Keefe & Nafziger, *supra* note 53, at p. 408.

<sup>161</sup> Forrest, *supra* note 1, at p. 535.

<sup>162</sup> Sarah Dromgoole & Nicholas Gaskell, "Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1988", 14 *The International Journal of Marine and Coastal Law* (1999), p. 171 *et seq.*, at p. 188 n. 57. The case, known as the *Streedagh Armada* case, was disputed before the Irish courts: *Re La Lavia, Juliana and Santa Maria*

"Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it:

- (a) is authorized by the competent authorities, and
- (b) is in full conformity with this Convention, and
- (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection".

Dealing with sunken warships, the law of salvage or law of finds thus might apply only if the salvor's or finder's conduct is expressly authorized by public authorities,<sup>163</sup> and following the objectives and principles of the Convention – including, particularly, the full guidance of the Rules annexed to it<sup>164</sup> – and, in any case, under the "maximum protection" principle. Therefore, even with an express abandonment act of the flag State, for the law of salvage or law of finds to apply to sunken warships as underwater cultural heritage – a still controversial point under the archaeological point of view – new conditions would be imposed by the Convention: authorisation by the competent authorities,<sup>165</sup> plus a strict technical expertise in order to give the activities directed to the wreck the highest level of archaeological protection. Hence, general public protective principles overrule particular commercial interests of private sectors.

One of the standards of archaeological underwater protection relates to *in situ* protection, due both to submarine preservation techniques<sup>166</sup> and to contextual historical analysis. As stated in Article 2(5) of the UNESCO Convention, "[t]he preservation *in situ* of underwater cultural heritage shall be considered as the first option before allowing or engaging in any activities directed at this heritage."<sup>167</sup> It is accepted that

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*del Vison* [1996], 1 ILRM 194. See an interim report of the archaeological works over the remains of *La Lavia*, *La Juliana* and the *Santa María del Visón*, the three Spanish Armada shipwrecks involved in the case, in 28 *The International Journal of Nautical Archaeology* (1999), p. 265 *et seq.*

<sup>163</sup> See *supra* notes 40 *et seq.*

<sup>165</sup> Along with the coastal State, authorisation can be given by the so called "coordinating State", ordinarily the coastal State when the object has been found in its EEZ or continental shelf. When objects are found in the Area beyond the limits of national jurisdiction, or in the EEZ or the continental shelf but the coastal State expressly declares that it does not wish to be the coordinating State, an interested State as described in Arts. 9(5) and 11(4) then assume the coordinating tasks in relation to the underwater cultural heritage as described in Art. 10(5) and Art. 12(4) and (5). The coordinating States shall act on behalf of the States parties to the Convention. See further *infra*.

<sup>166</sup> Long-term preservation techniques are particularly concerned in these cases because objects recovered from the sea need special, prolonged treatments once in contact with the atmosphere. The cases of the *Wasa* in Stockholm or the *Mary Rose* in Portsmouth are well known. As in the case of the *HMS Swift* in Argentina, special museums have been created or adapted to honour these wrecks and the artefacts recovered therein.

<sup>167</sup> See also the Preamble and Rule 1. Art. 2(6) foresees the alternative saying that "[r]ecovered underwater cultural heritage shall be deposited, conserved and managed in a manner

“the techniques employed shall be as non-intrusive as possible” (Rule 16).<sup>168</sup> As is well known, *in situ* protection hardly sympathizes with “recovery techniques” of salvage law.

#### 4. A Special Regime for Ancient Sunken Warships?

A *leitmotiv* of this paper has been the important role given to the flag State over its sunken warships. Having retained its immunity, by principle, the flag State continues to hold exclusive title over its shipwrecks anywhere. But it can be rather problematic to identify the *flag State* of ancient shipwrecks, many of which may be considered sunken warships.<sup>169</sup> What is the modern day flag State of Etruscan vessels? Greek, Italian? What of the Khmer wrecks embedded in the Mekong Delta? Must be they considered Vietnamese, Laotian, Cambodian or Thai? Or what about the Phoenician fleet? Must it be considered Lebanese, Syrian, Tunisian or, even, Spanish?

These cases, in the present author’s view, must be governed by the general cooperation principle that gives priority to the protection of the underwater cultural heritage (and endorsed in Article 6 of the UNESCO Convention).<sup>170</sup> This is also the position of the Council of Europe’s Parliamentary Assembly which recently recommended the Council of Ministers to:

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that ensures its long-term preservation.” Articles 4 and 5 of the 1992 European Convention of the Protection of the Archaeological Heritage (Revised) (*supra* n. 22) also state as preferable the *in situ* protection and management of cultural heritage.

<sup>168</sup> Keeping in mind too the principle settled in Art. 2(9) regarding human remains and explicated in Rule 5: “Activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.”

<sup>169</sup> I will not address in this paper the particular case of wrecks involved in a succession of States’ process (secession, independence, disintegration, unification, etc.). These could be the cases, for example, of the Catherine the Great warship *Yewstafy*, sunk in 1770 in current Turkish waters; or the case of the cruise *St. Stephano*, an Austro-Hungarian imperial warship discovered in July 2002 in Croatian waters by a team of the Italian and Croatian navies. In both cases, none of the probable successor States have submitted any claim before Turkey or Croatia.

Unsuccessfully codified by the ILC in the Vienna Convention on Succession of States in respect of State Property, Archives and Debts, of 7 April 1983 (UN Doc. A/CONF.117/14, reprinted in *International Legal Materials*, 22 (1983), p. 306), general international law governs these cases referring them to the particular agreement between predecessors and successors States which generally overrides all other principles and rules of international law. See *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, *I.C.J. Reports 1994*, p. 6, at p. 23.

<sup>170</sup> Hence, for example, the management of the underwater Etruscan (or Phoenician or Latin) heritage in the Mediterranean basin, could be governed by a regional agreement since that heritage is perfectly considered a common heritage shared by all the coastal States of the *Mare Nostrum*, which might properly grant themselves title as “interested States” in the sense given by the UNESCO Convention. Some efforts have been already made to deal

"encourage regional co-operation on the underwater cultural heritage between countries (whether member states of the Council of Europe or not), bordering on the same sea or part sea, by sharing information or by concluding bilateral or multi-lateral agreements which may be more stringent than global agreements."<sup>171</sup>

In order to give room to States with historic evidence of a relationship with a wrecked warship without an identifiable flag, Articles 7(3), 9(5) and 11(4) of the Convention establish the concept of the "interested State" which, generally speaking, should be a State with a verifiable link, especially a cultural, historical or archaeological link, with respect to the wreck(s).<sup>172</sup> Rights of the interested State (when not the coastal State) may differ depending on where the wreck is embedded:

"(1) Within the archipelagic waters and territorial sea,<sup>173</sup> the "interested State" should be informed with respect to the discovery of the vessel (Article 7(3));

(2) In the exclusive economic zone or on the continental shelf, the "interested State" shall be consulted on how to ensure the effective protection of that underwater cultural heritage [Article 9(5)]. "Interested State" could be also appointed as "coordinating State" [Article 10(3)(b)];<sup>174</sup> and

(3) When the objects are found in the International Seabed Area, the "interested State" shall be consulted on how to ensure the effective protection of that underwater cultural heritage, "particular regard being paid to the preferential rights of States of cultural, historical or archaeological origin" [Article 11(4)].<sup>175</sup> Furthermore, as stated in paragraph 3 of Article 12, all States Parties – including, of

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with underwater Mediterranean cultural heritage: the Barcelona Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, of 10 June 1995 (EC *Official Journal L 322*, of 14 December 1999, at p. 3, available through the *Euro-Lex Website* at <[http://europa.eu.int/eur-lex/en/lif/reg/en\\_register\\_151040.html](http://europa.eu.int/eur-lex/en/lif/reg/en_register_151040.html)>) bounds its parties to protect, preserve and manage in a sustainable and environmentally sound way areas of particular natural or cultural value, notably by the establishment of specially protected areas (in force for Italy, Malta, Monaco, Tunisia, Spain and the European Community since 12 December 1999). As a new tentative effort, see the Siracusa Declaration of 10 March 2001, and the commentaries of U. Leanza and J-P. Beurier in Camarda & Scovazzi, *supra* note 15, at p. 448, 253 and 279 respectively, and the proposal of a particular Mediterranean agreement discussed in the Siracusa Colloquium held in 3–5 April 2003 (publication forthcoming).

<sup>171</sup> Recommendation 1486 (2000), of 9 November 2000, § 13 (vii) (*supra* n 31)

<sup>172</sup> Art. 149 of UNCLOS did already refer to "the State of cultural origin, or the State of historical and archaeological origin."

<sup>173</sup> Under the dubious terms of Art. 8, it could be also presumed that this regime should also apply to the contiguous zone.

<sup>174</sup> See *supra* note 165.

<sup>175</sup> This process of consultation and the appointment of the coordinating State are managed by the UNESCO Director-General who shall also invite the International Seabed Authority to participate in such consultations [Art. 12(2)].

course, the “interested States” – “may take all practicable measures in conformity with this Convention, if necessary prior to consultations, to prevent any immediate danger to the underwater cultural heritage, whether arising from human activity or any other cause including looting.” Significantly, in coordinating consultations, taking measures, conducting preliminary research, and/or issuing authorizations relating to objects found in the Area, the Coordinating State – always an “interested State” – “shall act for the benefit of humanity as a whole, on behalf of all States Parties” [Article 12(6)], and, in this respect, again, “[p]articular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.” (*Ibid.*)

#### IV. CONCLUSIONS

David Bederman’s Article warns about the “phenomenon of ‘instant’ custom” which “is certainly problematic in a context of an historical enquiry into the legal status of objects lost at sea for extended periods of time.”<sup>176</sup> But the problem here, from my point of view, is that there does exist, as an ancient principle, the rule of immunity for warships, accompanied by their exclusion from the rules governing salvage of commercial vessels unless the flag State decides otherwise. For the present author *this* is the “hoary principle of maritime law” and not the contrary. Until the advent of modern diving techniques and equipment, wrecks were beyond reach of any but the most crude and destructive devices. It is only now that underwater techniques permit not only the discovery but also the commercial salvage of wrecks, when salvors have begun – with a panoply of talented lawyers – to question the “ancient vintage” of that rule. Questions raised concerning the “express abandonment rule” also reflect an effort to reverse the burden of proof and place it upon the flag State. Fortunately for underwater historical heritage, as we have seen, international practice has not accepted these efforts.

Depending on where the wreck is embedded, rights of the flag State and coastal State are different. Yet, as advanced earlier in this paper, other circumstances may give room to other “building blocks” which complete the legal canvas that regulates the legal status of sunken warships. Among these, particularly when dealing with ancient warships, cooperation is a landmark which must be achieved in order to give underwater cultural heritage – including sunken warships when necessary – the best protection for the benefit of humanity, and not solely for the benefit of treasure hunters and auction houses. Practice among States has shown how they can cooperate in the protection of sunken warships through agreements that, when dealing with ownership, grant title to the flag State in absence of an express abandonment act.

From the legal point of view, the UNESCO Convention may be another useful instrument – once in force and, perhaps, with some improvements – complementing

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<sup>176</sup> Bederman, *supra* note 3, at p. 115.

the general legal regime established by UNCLOS. Another tool may be the "rethinking" and "revisiting" discussion among scholars, practitioners and political authorities on how to draw up the best law to secure the preservation of sunken warships as underwater cultural heritage. In my particular case, David Bederman's leading article gave me the opportunity to have an amicable discussion, across an Ocean paved with historic wrecks, on the current legal status of sunken warships.