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TITLE:

**WHO IS ENTITLED TO A SHIPWRECK LOCATED IN INTERNATIONAL WATERS? A
CONTEST FOR THE SPOILS BETWEEN SALVORS, THE ORIGINAL OWNERS,
LEGITIMATE HEIRS, STATE GOVERNMENTS AND THE HISTORIC PRESERVATIONISTS.**

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DATE: 06 FEBRUARY 2014

University of Cape Town

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A Dissertation submitted to the Faculty of Law
University of Cape Town
Masters in Shipping Law (LLM)

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CHAPTER 1

INTRODUCTION

This dissertation addresses the value of shipwrecks, the reasons why persons have an interest in shipwrecks, the nature of competing claims for the shipwrecks by different persons and how different national laws and international law, treaties and conventions attempts to resolve such competing claims and the difficulties arising therefrom and possible solutions to eliminate such difficulties.

The ocean covers 71 per cent of the Earth's surface and contains 97 per cent of the planet's water, yet more than 95 per cent of the underwater world remains unexplored.¹ These waters have separated but also connected civilizations over thousands of years and have been the carrier of many human adventures.² As civilizations grew more advanced humans began to explore the vast oceans. In 1488 Portuguese explorer Bartolomeu Dias rounded the Cape of Good Hope at the southern tip of Africa, establishing the possibility of a sea route to the Far East.³ In 1492, Columbus's voyage to the New World is regarded as the moment of birth for westward exploration.⁴ Bristol merchants first probed the Atlantic in 1480 in search of an island they called Brasile and they continued to send two or three ships west every year.⁵ During such expeditions, over centuries, with population explosions, and the use of the sea for the transportation of both goods and people, not to mention wars and sea battles, ships have sunk all around the world. The United Nations estimates that there are over 3 million shipwrecks on the sea floor.⁶

With the technological advances every year researchers and salvors have been more able to investigate deeper into the unknown ocean floor resulting in shipwrecks being discovered more frequently. Moreover, the creation of treasure-hunting companies such as Odyssey, who define themselves as world leaders in deep-ocean shipwreck exploration,⁷ has also resulted in the increase in discovery of shipwrecks.

When one thinks of a shipwreck lost deep underwater, it is easy to think of it as a total loss, however this is not the case. Depending on environmental conditions, many shipwrecks have been

¹ National Oceanic and Atmospheric Administration, United States Department of Commerce available at <http://www.noaa.gov/ocean.html>, last accessed on 15/01/2014

² <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-underwater-heritage/wrecks/>, last accessed on 15/01/2014

³ Professor Callum Roberts, *The Unnatural History of the Sea* (2009), page 33

⁴ Professor Callum Roberts, *The Unnatural History of the Sea* (2009), page 33

⁵ Professor Callum Roberts, *The Unnatural History of the Sea* (2009), page 33

⁶ United Nations Educational, Scientific and Cultural Organization, The Protection of the Underwater Cultural Heritage, Wrecks available at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/the-underwater-heritage/wrecks/>, last accessed on 15/01/2014

⁷ Odyssey Marine Exploration, Company Overview available at <http://www.shipwreck.net/aboutus.php>, last accessed on 27/01/2014

preserved underwater for thousands of years. Shipwrecks may, therefore, be valuable in various ways.

A shipwreck may be of value commercially. Throughout time ships have been used to transport valuable cargo. For example, the *SS Gairsoppa* that was sunk by a German U-boat in 1941 was carrying a total cargo of silver worth £600 000 at the time; the *SS Montola* which sank as a result of a torpedo from a German submarine was carrying a cargo of silver worth £110 000; and the *Nuestra Senora de las Mercedes* was a Spanish warship that was sunk by a British frigate that was carrying nearly 600,000 gold and silver coins.⁸

A shipwreck may also provide precious historical information. A shipwreck by its very nature is testimony to trade and cultural dialogue between peoples. Moreover, the unique underwater environment created by the pressure and constant water temperature creates a time capsule preserving the wreck which can often provide a snapshot of the life on board at the time of sinking. States, and the communities within them, would consider many shipwrecks and their cargo to be part of their cultural heritage.

Furthermore, many shipwrecks, such as the *SS Gairsoppa* and *SS Montola*, were military vessels and may contain sensitive information or be considered grave sites for the persons that served and died on board.

As a result of a shipwreck possessing such values, when a shipwreck is discovered competing interests arise between various parties that may claim an interest for differing reasons. It has been described as a ‘tug of war for the spoils with the usual contestants being the salvors, the original owners or their successors and national or State governments and their allies, the historic preservationists.’⁹ The recent cases of *The Titanic* and *The Nuestra Senora de las Mercedes* have highlighted the many complex legal issues that arise as a result of these competing interests. These cases have also highlighted the inconsistency, lack of clarity and perhaps inadequacy of the current legislation dealing with the discovery of shipwrecks in international waters. This dissertation seeks to address those issues.

Competing interests usually involve three different scenarios. In the first scenario, a salvor attempts to assert rights over a shipwreck in competition with the original private owners. This generally involves the application of the law of salvage or the law of finds to determine private property rights.

In the second scenario, a salvor attempts to assert ownership rights over a shipwreck in competition with the claims of the original flag-State owners. In this scenario, the salvor will still

⁸ Odyssey Marine Exploration, Shipwrecks available at <http://www.shipwreck.net/shipwrecks.php> last accessed on 15/01/2014

⁹ Elizabeth Varmer, ‘*RMS Titanic: underwater cultural heritage's sacrifice*’, *Journal of Business Law* 271 (2012), page 276

claim ownership, or claim a salvage award, under the law of finds or salvage but such claims may compete with the claims made by the Sovereign State which may rely on sovereign immunity.

In the third scenario, a salvor attempts to assert rights over a shipwreck in competition directly with the flag-State, and the State or people of cultural origin. Recent international developments in this area of law show that when dealing with shipwrecks, its economic value should be superseded by other more important considerations, such as the protection of underwater cultural heritage. International conventions and the growing recognition of the importance of underwater cultural heritage has had the effect of diluting and lessening the importance of legal doctrines such as law of salvage and the law of finds, as well as a flag-State's ability to claim sovereign immunity.

This dissertation outlines the main legal issues relating to each scenario using England, South Africa and the United States of America as examples, because these are States have important interests in shipping and therefore, have more developed laws which apply to the resolution of claims over shipwrecks. Key cases referred to illustrate the complexities involved and highlight areas of common ground and differences in the way that the courts of those States have dealt with parties' rights to shipwrecks. The law and cases show that there are important differences in the manner that rights are recognised depending on location of the wrecks and the jurisdiction which determines the rights over the wreck. This serves to emphasise the need for a more comprehensive and clearer set of rules that takes into account the interests of all competing parties and of uniform application throughout the world. This can be achieved through an international convention or in the alternative, by contractual arrangements between salvors, owners, flag-States and other interested parties.

CHAPTER 2
COURT JURISDICTION ON WRECKS

2(i) –Jurisdiction over shipwrecks located in international waters

The first issue that a finder of a wreck, or salvor, will face when attempting to assert rights over a shipwreck will be the issue of jurisdiction. The concept of jurisdiction has been described as 'the power of a court to hear and decide an issue between parties and to give effect to its judgement.'¹⁰ The issue of jurisdiction is more complicated if the shipwreck is located in international waters as the wreck will not by reason of its situ, be subject to any one State's jurisdiction. A classical view on the doctrine of the freedom of the high seas was given in 1817 by an English Admiralty Judge who declared that 'in places where no local authority exists, where the subjects of all States meet upon a footing of entire equality and independence, no one State, or any of its subjects, has a right to assume or exercise authority over the subjects of another. No nation can exercise a right of visitation and search upon the common and unappropriated parts of the sea save only on the belligerent claim.'¹¹

International law now determines the jurisdiction, and thus control, that a State can exercise over property found in international bodies of water. The sources of such admiralty jurisdiction can be found in statutes, Conventions, rules of court and judicial doctrines.¹² Conventions in particular play a major role in the expansion or restriction of admiralty jurisdiction of States. Moreover, the ratification of international conventions means that the internal municipal laws of different countries now show greater similarity to one another.

The principal international convention governing jurisdiction of the sea is the United Nations Convention on the Laws of the Sea 1982 (UNCLOS). UNCLOS, as well as seeking to clarify the definition, nature and extent of international jurisdiction in the territorial sea (defined below) and contiguous zones, has created new maritime zones such as the continental shelf, the exclusive economic zone and archipelagic waters. This dissertation will mainly be looking at shipwrecks that are found in the high seas (defined below); however, cases involving shipwrecks within territorial waters, and other maritime zones, where jurisdiction is not contested, will also be discussed, to illustrate the courts approach to the determination of rights in a shipwreck. Water within 12 nautical miles of a State's shorelines is considered within the territory of that State and the sovereignty of each coastal State over its territorial sea 'is exercised subject to UCNLOS and to

¹⁰ Gys Hofmeyr, *Admiralty Jurisdiction: Law and Practice in South Africa* 2 Ed (2009), page 20

¹¹ *The Louis* 2 Dodson's Reports (1817) 219, 243-244, per Sir William Scott, later Lord Stowell

¹² Aleka Mandaraka-Sheppard, *Modern Maritime Law and Risk Management*, 2 Ed (2009), CH 1, page 8

other rules of international law'.¹³ Beyond the internal waters of a State, the territorial sea and the EEZ is an area of water termed the 'high seas' that no State has control over.¹⁴ By customary international law the freedom of navigation on the high seas is absolute, subject to exceptions.¹⁵ Article 89 UNCLOS provides that 'no State may validly purport to subject any part of the high seas to its sovereignty'. It is beyond the scope of this dissertation to discuss the powers that States possess over each maritime zone; however it is important to appreciate that a salvor must be able to bring the claim relating to the shipwreck within a State's jurisdiction to be able to assert rights over it.

Admiralty Jurisdiction is achieved in various ways in different jurisdictions. In England, for example, the present statute dealing with jurisdiction is the Supreme Court Act 1981 (SCA) and the rules of court for admiralty procedures in Part 61 of the Civil Procedure Rules 1998 (CPR), as amended, and new Practice Directions. In South Africa the Admiralty Jurisdiction of the High Court is governed by the Admiralty Jurisdiction Regulation Act 105 of 1983 (AJRA). In the US Article III, Section 2 of the United States Constitution grants original jurisdiction to US federal courts over admiralty and maritime matters.

These jurisdictions are unique due to the existence of actions *in rem* which can be described as actions in regard to rights over property within a State's territory. As mentioned above, States only have *in rem* jurisdiction over the property situated within their territory, thus *in rem* actions can only affect property within jurisdiction of the court. This necessarily complicates the resolution of claims in respect of shipwrecks that are located in international waters and not within any particular State's jurisdiction.

While ships located in the high seas are not within any one State's jurisdiction, there are legal mechanisms for courts to obtain jurisdiction to adjudicate claims relating to them. One of such mechanisms that have been developed is called 'constructive *in rem* jurisdiction'.

This problem can be overcome by physically removing and taking part of the property (i.e. the shipwreck) to the court giving the court constructive possession. Constructive possession does not actually require the court to be in physical possession of all the property. It is based on a legal fiction that 'the *res* is not divided and that therefore possession of some of it is constructively possession of all'.¹⁶ It is important to note that although the court becomes in constructive possession of the property, the action that is under a constructive *in rem* jurisdiction is not exclusive

¹³ Article 2(3) United Nations Convention on the Laws of the Sea

¹⁴ Article 3 Part II 'Territorial Sea and Contiguous Zone'; Article 86 Part VII 'High Seas' United Nations Convention on the Laws of the Sea

¹⁵ I.A. Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels' International and Comparative Law Quarterly (1986), page 9

¹⁶ *RMS Titanic Inc v Haver* 171 F. 3d 943 (1999) (4th Circuit) USA, at 952 - 953

jurisdiction as any other State would have the same power to issue the same order.¹⁷ The court would therefore be able to issue declarations and orders in relation to the property but final enforcement would be ineffective until the whole or part of the *res* is brought before the court.

This mechanism has been used in two recent important cases involving shipwrecks located in international waters, namely the *Titanic*¹⁸ and the *Nuestra Senora de las Mercedes*¹⁹. I will deal with each one in turn.

2(ii) – The Titanic

The *Titanic* was a British owned steamer that sank in international waters of the Atlantic Ocean. She was left to rest for 73 years before being discovered by a joint American and French expedition in 1985 and is now known to be located in international waters around 400 miles off the coast of Canada, around 12 500 feet deep.

In this case no court could be said to have jurisdiction over the shipwreck because it is not within any State's territory. Thus, for the court to be able to exercise jurisdiction over the *Titanic* they had to find constructive possession. In 1993, RMST, the then salvors, asked the Eastern District of Virginia to exercise *in rem* jurisdiction over the *Titanic*. RMST brought a wine decanter along with other objects from the shipwreck within the territory of Virginia to assist the court in obtaining jurisdiction. The court decided that 'when property is outside of the State a court's ability to adjudicate right as to them is limited, but not meaningless. The court can adjudicate the claim, ensure enforcement within its State and hope that it will be enforced elsewhere.'²⁰

Accordingly, the Fourth Circuit found that it had constructive *in rem* jurisdiction over the wreck when any portion of the *Titanic* was within its jurisdiction and the salvor was able to continue with its salvaging operations. The expression of hope by the Court in this case as to the orders being enforced elsewhere, however, emphasises the limits of the jurisdiction exercised and risks over its recognition outside that jurisdiction.

2(iii) – The Nuestra Senora de las Mercedes

In May 2007, Odyssey Marine Exploration Inc. (Odyssey), a leading enterprise in the field of deep ocean explorations,²¹ announced the discovery of a shipwreck of a Spanish frigate, the *Nuestra Senora de las Mercedes*, which sunk in 1804 by the British fleet some 100 miles west of the Straits

¹⁷ *RMS Titanic Inc v Haver* 171 F. 3d 943 (1999) (4th Circuit) USA, 969

¹⁸ *RMS Titanic Inc v Haver* 171 F. 3d 943 (1999) (4th Circuit) USA

¹⁹ *Odyssey Marine Exploration inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP

²⁰ *RMS Titanic Inc v Haver* 171 F. 3d 943 (1999) (4th Circuit) USA, 969

²¹ Odyssey Marine Exploration, About Us available at <http://www.shipwreck.net/aboutus.php>, last accessed on 06/02/2014

of Gibraltar.²² Again, similarly to the case of the *Titanic*, Odyssey brought some salvaged items from the frigate to the United States and filed an admiralty arrest action by symbolically depositing a small bronze block with the District Court. Following the commencement of the action by Odyssey, the States of Spain and Peru along with various descendants of people who had died aboard the ship also filed claims in the case. The court found that the salvaged items had been taken from a sovereign Spanish ship and was entitled to sovereign immunity and thus could not be arrested. Although the court eventually refused jurisdiction on the grounds of sovereign immunity it is nevertheless important to note that the lower courts had exercised jurisdiction over the shipwreck prior to the argument of sovereign immunity being raised. The significance of the case was that, as in the case of the *Titanic*, the courts were able to have constructive *in rem* jurisdiction over the wreck that was located in international waters, at least for the purposes of deciding whether or not and the extent to which it was able to exercise jurisdiction over the shipwreck.

²² *Odyssey Marine Exploration inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP

CHAPTER 3

PRIVATE PROPERTY RIGHTS (LAW OF SALVAGE v LAW OF FINDS)

Once jurisdiction has been established in a particular court, it is likely that legal rights will be contested between various parties claiming an interest in the shipwreck. The salvors must expect to compete in a 'tug of war for the spoils; [with] the usual contestants [being] (1) the salvors; (2) the original owners or their successors; and (3) national or State governments and their allies, the historic preservationists.'²³ There are numerous views on the appropriate rule to apply to shipwrecks. Once such view explained that there were three main options:

'(1) the salvage rule that the salvor does not create any ownership rights in the property saved: (2) the finders principle, informally expressed as 'finders keepers, losers weepers,' at least in the case of abandoned property; or (3) the international law principle that property of historical and archaeological importance should be preserved for the benefit of mankind as a whole.'²⁴

The following chapter will discuss and outline the law of salvage and the law of finds, their application to shipwrecks and whether they are an adequate regime to apply. Because of the fact specific nature of shipwrecks it is important to look at how the law of salvage and finds have been applied in different jurisdictions in relation to different fact patterns. Consequently, this chapter will look at both regimes and their application to shipwrecks in the predominant maritime jurisdictions with particular focus on the United States of America, England and Wales and South Africa.

3(i) - SALVAGE

Salvage has been defined as 'any act or activity undertaken to assist a vessel or any other property in danger in navigable waters, or in any other waters whatsoever.'²⁵ If a claimant is successful in claiming salvage they will be rewarded for their efforts. The first part of this chapter will first look at the origins of salvage law followed by the application of the law of salvage in the jurisdictions of England, South Africa and the US.

3(i)(a) - Origins of salvage law

Our present-day admiralty law originate from maritime practices from nearly five thousand years

²³ Thomas Schoenbaum, *'Admiralty and Maritime Law'* (2011), Chapter 16-7

²⁴ Thomas Schoenbaum, *'Admiralty and Maritime Law'* (2011), Chapter 16-7

²⁵ Article 1(a) International Convention on Salvage 1989

ago in the Mediterranean Sea.²⁶ The first recorded system of marine law was created and promulgated by the Rhodians around year 300 BC.²⁷ From this Rhodian maritime code emerged the beginnings of the law of salvage where a salvor was awarded a portion of the goods he saved based on the danger involved in the rescue.²⁸

The Romans subsequently modified Rhodian law by providing a right of compensation from the owner of the salvaged property rather than a portion of the cargo saved. This Roman rule of salvage was further developed and elaborated upon by the Laws of Oleron in the twelfth century AD, the precursor to English maritime law.²⁹

The principles of salvage were continually refined and developed by judges of the Admiralty Court in England. But it was not until 1910 that these principles were unified by the first salvage Convention to apply internationally.³⁰

The salvors right to an award arises from the fact that salvage is a mixed question of a private right and public policy. The purpose of salvage is not only to compensate the salvor for the benefit he has conferred to the salvaged property, it is also provides an incentive to seafarers to take risks for the purpose of assisting others in danger.³¹

The question that must be asked is whether the law of salvage is applicable to shipwrecks resulting in a salvor being entitled to a salvage award for the salvage operation. This question has been answered differently in different jurisdictions.

3(i)(b) – Law of Salvage in England and Wales

Salvage law in the England and Wales³² is based on the 1989 Salvage Convention (the Convention) which came into force internationally in 1996 and was enacted into English law by Schedule 11 to the MSA 1995.³³

Article 1(a) defines that, for the purpose of the Convention, a salvage operation 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.³⁴ Article 2 of the Convention provides that the Convention shall apply

²⁶ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994)

²⁷ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 32

²⁸ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 32

²⁹ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 32

³⁰ Aleka Mandaraka-Sheppard, 'Modern Maritime Law and Risk Management', 2 Ed (2009), CH 13, page 634

³¹ Aleka Mandaraka-Sheppard, 'Modern Maritime Law and Risk Management', 2 Ed (2009), CH 13, page 634

³² It is beyond the scope of this dissertation to discuss all the elements of salvage in full detail; however, relevant elements of salvage in relation to shipwrecks will be discussed.

³³ Schedule 11 Merchant Shipping Act 1995 (United Kingdom)

³⁴ The UK has made a reservation, pursuant to Article 30 of the Convention, under Paragraph 2(1) Part II of Schedule 11

whenever judicial or arbitral proceedings relating to matters dealt with in this Convention are brought in a State party. Article 6(1) provides that the Convention shall apply to any salvage operations save to the extent that a contract otherwise provides expressly, or by implication.

There is an exception with regard to salvage operations controlled by public authorities. Article 5 provides that this Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities. Additionally, subject to Article 5, Article 4 provides that the Convention shall not apply to warships or other non-commercial State-owned vessels, unless a State party decides to apply the Convention to warships.

The question is whether the law of salvage in England and Wales can be applied to the salvage of a shipwreck. For the law of salvage to apply to shipwrecks, all the elements of salvage must be satisfied, namely: (i) there should be a recognised subject matter; (ii) the object of salvage should be in danger at sea; (iii) the salvors must be volunteers; and (iv) there must be success by either preserving or contributing to preserving the property in danger.³⁵ The main issues that have arisen in relation to the application of the law of salvage to shipwreck are; (1) whether a shipwreck is a recognised subject of salvage; and (2) whether a shipwreck can satisfy the requirement that it be in danger. Each will be dealt with in turn.

3(i)(b)(1) - Recognised subject of salvage in England & Wales

The first problem that arises when attempting to apply the law of salvage to a shipwreck is determining whether a shipwreck falls within the definition of property that is recognised subject of salvage. Maritime law has traditionally recognised that property such as ship or craft, cargo on board, freight payable pursuant to the contract of carriage, and bunkers carried on board the ship be property that is capable of being subject to salvage.³⁶ The concept of property has been expanded by the Convention, for example, the Convention also recognises saving life as an independent subject of salvage, regardless of whether or not the life salvors saved the property in danger.³⁷ The Convention also recognises as subject of salvage the protection of the marine environment.

To determine whether a 'shipwreck' is capable of being a 'ship' for the purposes of the law of salvage, the concept of a 'ship' must first be defined. Section 313(1) of the MSA 1995 defines 'ship' as including every description of vessel used in navigation. A vessel used in navigation is confined to a vessel which is used to make ordered progression over the water from one place to

to the MSA 1995 that Salvage does not apply to inland waters.

³⁵ It is beyond the scope of this dissertation to discuss all elements of salvage law. For a more detailed study on the law of salvage in England see Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, 2 Ed (2009) Chapter 13

³⁶ Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, 2 Ed (2009), CH 13, page 643

³⁷ Aleka Mandaraka-Sheppard, *'Modern Maritime Law and Risk Management'*, 2 Ed (2009), CH 13, page 643

another, although it is not a necessary requirement that it should be used in transporting persons or property by water to an intended destination.³⁸ Crafts that are used for having fun without the object of going anywhere, such as jet skis, are not 'used in navigation' and are, accordingly, excluded from the definition of 'ship or vessel'.³⁹ Article 1(a) of the Convention defines 'salvage operations' as including services rendered to vessels, or to any other property in danger. Article 1(b) defines a vessel as meaning 'any ship or craft, or any structure capable of navigation'.

Having defined the concept of a 'ship' the question of whether a sunken ship, or shipwreck, falls within the definition of a 'ship' or 'property capable of being the subject of salvage' can now be dealt with. Section 255(1) MSA 1995 defines a wreck as including 'jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.' Although a wreck still may be considered a ship, it will no longer be capable of navigation meaning that it cannot fall within the definition in Article 1(b) of the Convention. Perhaps if the court were to take into account its original use of being used in navigation prior to becoming a wreck, a shipwreck could be considered a ship 'capable of navigation'; however there is no precedent where the courts have done so.

If a wreck is found not to be a ship for the purposes of Article 1(b), it has been submitted that a wreck will fall within the definition of 'property' in Article 1(c) as 'not permanently and intentionally attached to the shoreline', and thus will be capable of being subject of salvage.⁴⁰

Moreover, a wreck which contains treasures may be a subject of salvage, provided there is no reservation made by contracting States as to archaeological finds, as is allowed by Article 30(1)(d) of the Convention.

It is therefore unclear whether the English courts would find that a shipwreck is capable of being property subject to salvage. This emphasises the need for universal clarification on whether shipwrecks are to be considered property subject to salvage.

3(i)(b)(2) - The Danger Element in England & Wales

The second difficulty with applying salvage law to shipwrecks is the requirement that the object of salvage must be in peril or danger at sea. The general principle of salvage is that there must be some real danger, which is likely to expose the property to destruction or damage.⁴¹ An apprehension of danger is sufficient, but it must not be a fanciful danger. Dr. Lushington has been of the opinion that

³⁸ *R v Goodwin* [2006] 1 Lloyd's Rep 432

³⁹ *R v Goodwin* [2006] 1 Lloyd's Rep 432; Aleka Mandaraka-Sheppard, 'Modern Maritime Law and Risk Management', 2 Ed (2009), CH 13, page 644

⁴⁰ Aleka Mandaraka-Sheppard, 'Modern Maritime Law and Risk Management', 2 Ed (2009), CH 13, page 645

⁴¹ Aleka Mandaraka-Sheppard, 'Modern Maritime Law and Risk Management', 2 Ed (2009), CH 13, page 647

'it is sufficient if there is a state of difficulty, and reasonable apprehension [of danger].'⁴² In the case of *The Charlotte* Dr. Lushington again stated that 'it is not necessary... that the distress should be actual or immediate, or that the danger should be imminent and absolute, it will be sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered.'⁴³

There are different views with regards to whether a shipwreck is still in peril as the ship has already sunk and the salvor is not preventing it from doing so. Some claim that the wreck and its contents are still in peril from the sea and could become lost or damaged while others claim the peril has passed.⁴⁴

'The concept of marine peril is stretched to its limit in the treasure salvage cases, where an ancient wreck has lain undisturbed on or in submerged lands for hundreds of years or more. Even here, some courts considering the issue hold that a marine peril exists because the vessel is still in peril of being lost though the action of the elements.'⁴⁵

The courts in England and Wales have taken the view that a shipwreck is no longer in peril and thus do not apply the law of salvage to shipwrecks.⁴⁶ As a result, a salvage award would not seem like an option for treasure hunting ventures in the jurisdiction of England.

3(i)(c) – Law of Salvage in South Africa

We will now consider the position of shipwrecks in relation to the law of salvage in South Africa. The South African coastline is a long and dangerous coastline where many ships have unsuccessfully attempted to circumnavigate Africa in their quest for the riches of the East.⁴⁷ The Cape of Good Hope and Cape Agulhas have been notorious among mariners around the world where harsh weather has caused many spectacular feats of salvage.⁴⁸

Present South African salvage law is seen as being a balance between traditional salvage law inherited from England, and the broadly accepted principles of the International Convention on Salvage 1989⁴⁹ (the Salvage Convention). The law of salvage in South Africa is enshrined in the Wreck & Salvage Act.⁵⁰ Given the fact that South African Salvage law is also based on the Salvage Convention, the question of whether salvage law can be applied to shipwrecks will also depend on

⁴² *The Phantom* [1866] LR 1 A&E 58, p 60, per Dr Lushington.

⁴³ *The Charlotte* (1848) 3 W Rob 68, p 71.

⁴⁴ Elizabeth Varner, '*RMS Titanic: underwater cultural heritage's sacrifice*', Journal of Business Law 271 (2012), page 11

⁴⁵ Thomas Schoenbaum, '*Admiralty and Maritime Law*' (2011), 16-7

⁴⁶ *Pierce v Bemis* [1986] 2 WLR 501, [1986] 1 Lloyd's Rep 132

⁴⁷ John Hare, '*Shipping Law & Admiralty Jurisdiction in South Africa*', 2 Ed (2009), page 396

⁴⁸ John Hare, '*Shipping Law & Admiralty Jurisdiction in South Africa*', 2 Ed (2009), page 396

⁴⁹ The International Convention on Salvage 1989 (IMO)

⁵⁰ Wreck and Salvage Act 94 of 1996 (South Africa)

two important questions; firstly, whether a shipwreck is considered as maritime property capable of being salvaged; and secondly, whether a shipwreck can be considered to be in danger.

3(i)(c)(1) – Recognised subject of salvage in South Africa

Traditionally, prior to the Salvage Convention, maritime property for the purposes of salvage included a ‘ship (if used as a ship, her cargo, flotsam, lagan and jetsam, the wreck of each), and freight.’⁵¹ Traditionally it would seem clear that a shipwreck would be considered maritime property that is capable of being salvaged. Article 1 of the Salvage Convention has expanded the traditional definition of maritime property considerably providing that a ‘salvage operation means any act or activity undertaken to assist a vessel or any other property in navigable waters or in any other waters whatsoever.’ Property is then defined as meaning ‘any property not permanently and intentionally attached to the shoreline and includes freight at risk.’ It therefore seems clearer in South Africa that a shipwreck be considered property that is recognised subject of salvage.

3(i)(c)(2) – The Danger Element in South Africa

Under South African law, without an element of danger, there can be no salvage service. The question is also whether a shipwreck can be considered to be in ‘danger’ or ‘peril’ to satisfy the requirements of salvage.

The traditional definition of danger is based on English law pursuant to section 6 of the Admiralty Jurisdiction Regulation Act 1983 (AJRA), namely that the danger must have been real⁵² and sensible. For example, in *The Marie Jose*⁵³ a vessel was considered to be in danger where it was in imminent danger of running aground and was provided with an anchor by a salvor. I have already set out Dr. Lushington’s analysis of ‘danger’ in ‘II.I.B.2 – The Danger Element in the England and Wales’ above, which is applicable in South Africa.

The prerequisite of the salvaged property being in danger is now governed by Article 1 of the Salvage Convention; however, in the absence of any definition of ‘danger’, the courts will still look at the common law for guidance. The definition of ‘danger’ should therefore be unaltered by the Salvage Convention.⁵⁴

The debate as to whether a shipwreck is considered to be in danger for the purposes of salvage also exists in South Africa and the result is that case law seems to suggest that salvage law is not applied to shipwrecks.

⁵¹ *The Gasfloat Whitton No 2* [1895] P 308; *R v Two Casks of Tallow* (1837) 3 Hag Adm 294; *Five Steel Barges* (1890) 15 PD 142; *A Raft of Timber* (1844) 2 W. Rob 251

⁵² *The Blairhoyle: Randall v Gray* (1895) 12 SC 387; *The Papanui: Table Bay Harbour Board v New Zealand Steamship Co* (1901) 18 SC 34

⁵³ *The Marie Jose: Mossel Bay Boating Co v Brink* (1901) 18 SC 271

⁵⁴ John Hare, ‘*Shipping Law & Admiralty Jurisdiction in South Africa*’, 2 Ed (2009), page 416.

3(i)(c)(3) – Application of salvage law to shipwrecks in South Africa

Presuming a shipwreck is considered to be ‘maritime property’ and a shipwreck is considered to be in ‘danger’, and all the other elements of salvage are satisfied, a salvor of a shipwreck in South Africa should be awarded with a salvage award for his efforts. As we will see below, South African courts have been reluctant to apply the law of salvage to shipwrecks.

In *Mills v Reck*⁵⁵ although the courts dealt with the issue of ownership in saying that ‘neither the original salvor nor the intervening person has a right of ownership, but where there is competition between the original salvor and an intervening person for possession, the original salvor has a preferent right’, the possibility of applying for a salvage award was not expressly excluded. The fact that the applicant was ‘a professional diver and in possession of a licence to salvage, to search and take possession of derelict ships or parts thereof’ would suggest that the idea of salvage of a wreck would in fact be possible.⁵⁶ Moreover in the case of *Salvage Association of London v S.A. Salvage Syndicate, Ltd*⁵⁷ where the court found that insurers had not abandoned their rights of ownership of the wreck, the court did not exclude the possibility of a salvage award and in fact suggested that ‘it may be possible that some arrangement might be made whereby the respondents should continue the operations on the basis of a percentage of the treasure recovered.’⁵⁸

To date, however, there is no case law in South Africa in which the court has awarded a salvor with a salvage award for the salvage of a shipwreck.

3(i)(d) – Law of Salvage in the United States of America

The position in the US is clearer without the difficulties that arise in England and South Africa. The court will apply the law of salvage in the US if; (1) the property is in marine peril of being lost; (2) a person has rendered assistance voluntarily not out of a duty; and (3) the person's assistance is successful in whole or in part or contributes to the success of saving the property.⁵⁹ If the salvor can satisfy these elements of salvage he will be entitled to exclusive salvage rights which will mature into a salvage award when he recovers the property.

The elements of salvage in the US are also based on those of the International Convention on Salvage 1989 and are premised upon the notion that the shipwreck has an owner and the owner ought to reward the salvor for rescuing the vessel from peril. Similarly to salvage law in other jurisdictions, the issue of the existence of ‘marine peril’ with regard to a shipwreck has arisen in

⁵⁵ *Mills v Reck and Others* 1988 (3) SA 92 (C)

⁵⁶ As will be seen below, however, the court dealt with this case pursuant to their civil jurisdiction rather than their admiralty jurisdiction which would have required the application of English law.

⁵⁷ *Salvage Association of London v S.A. Salvage Syndicate, Ltd* (1906) 23 SC 169

⁵⁸ *Salvage Association of London v S.A. Salvage Syndicate, Ltd* (1906) 23 SC 169, at 173

⁵⁹ Daniel P. Larsen, ‘Ownership of Historic Shipwreck in US Law’, *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 36

litigation when the law of salvage is applied to shipwrecks.

Historically, the definition of a marine peril in the US has involved sinking ships in rough seas, vessels ablaze by an accidental fire, a vessel running aground, engine failure, or similar catastrophes.⁶⁰ A shipwreck lying on the bottom of the ocean for hundreds of years, slowly being covered by sand and sediment does not seem to fall within the definition of marine peril. However, courts in the United States have successfully extended the definition of marine peril to be able to include shipwrecks.

The court in *Treasure Salvors I* introduced the new concept of marine peril with respect to shipwrecks:

‘Marine peril includes more than the threat of a storm, fire or piracy to a vessel in navigation... Even after discovery of the shipwrecks location it is still in peril of being lost through the actions of the elements.’⁶¹

Applying this definition to shipwrecks, US courts have been able to find a sufficient marine peril upon which to be able to apply the law of salvage.

3(i)(d)(1) - Cases applying salvage law to shipwreck

The law of the United States traditionally follows the concept that 'admiralty has historically disfavoured the law of finds, preferring instead the distinct policies of the law of salvage'.⁶²

In *Zych v Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB "Lady Elgin"*⁶³, the *Lady Elgin* sank in Lake Michigan in September 1860 after a collision with the *Augusta*. The Aetna Insurance Co. paid the claims on the *Lady Elgin* and became subrogated owners of the vessel. In 1989, 129 years later, the ship was located by salvor Harry Zych who filed an action seeking title to the vessel. Zych alleged that abandonment had occurred because of the lapse of 129 years and the owner's failure to make any efforts during this period to recover the vessel. The subrogated owners defended on the basis that the failure to make recovery efforts was due to the lack of technology available to locate the wreck until Zych was able to locate it in 1989 through the use of new technology. The federal court agreed with the subrogated owners that they were not required to engage in salvage efforts to avoid abandoning its interest when those efforts would have had minimal chances for success. The court therefore applied salvage law to the claim awarding a salvage award to Zych.

The US courts preference in applying the law of salvage was again shown in the case of *The*

⁶⁰ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 48

⁶¹ *Treasure Salvors, Inc v The Unidentified Wrecked and Abandoned Sailing Vessel* 569 F. 2d 330, 337 Fifth Circuit 1978

⁶² *Herner v United States* 525 F Supp 350 (1982) AMC 847

⁶³ *Zych v Unidentified, Wrecked and Abandoned Vessel, Believed to be the SB* 755 F. Supp 213 (N.D. Ill. 1990)

*Central America*⁶⁴. The *Central America* was a wooden-hulled, side-wheel ship built to carry passengers down the east coast of the United States to Panama. At the time of its sinking, the *Central America* was transporting more than 600 passengers, many of whom were carrying substantial sums of gold as well as a cargo of commercial gold worth in excess of US\$ 1 250 000 (1857 value).⁶⁵ The wreck of the *Central America* could not be found for over a hundred years until 1988 when it was discovered by the Columbus-America Discovery Group ('CADG'). CADG commenced proceedings *in rem* against the wreck alleging that, under the law of finds, it was the finder of the wreck and entitled to have itself declared the owner of the treasure; or, in the alternative, that under the law of salvage, it was salvor of the wreck and entitled to a salvage award.

The US District Court for the Eastern District of Virginia initially awarded CADG the entirety of the treasure. The crucial issue for the court was whether salvage law or the law of finds should apply. The insurance companies contended the law of salvage was applicable, while CADG argued for the application of the law of finds. The court held that the law of finds was applicable and CADG was the 'finder' and, therefore, sole owner of the *Central America* and its gold.

On appeal, the Fourth Circuit reversed the decision, concluding that salvage law should be applied, that the *Central America* had not been abandoned, and that CADG was entitled only to a salvage award. On remand, the district court held that CADG was entitled to a 90 per cent salvage award for the recovery of the gold. However, this was a Pyrrhic victory for CADG as the projected costs of the award were \$30 million and the amount of gold recovered was only \$21 million, resulting in a final salvage award of around \$19 million. This was far from the \$1 billion of gold cargo thought to have existed at the beginning of the case.

The decision in the *Central America* accords with the clear policy statements of the US courts in favouring treating those in possession of wrecks as salvors in possession rather than finders seeking ownership.

This view was also taken in the case of *R.M.S. Titanic, Incorporated v The Wrecked and Abandoned Vessel*⁶⁶ where the court stated that:

'one who would come upon a lost ship on the high seas would be encouraged to refrain from attempting to save it and to entertain the idea of taking valuable cargo for himself as finder. Indeed, a free finders-keepers policy is but a short step from active piracy and pillaging.'⁶⁷

Salvage on the *Titanic* began in 1987 by Titanic Ventures and IFREMER who recovered 1 800 objects in 1987.⁶⁸ In 1993, the Office of Maritime Affairs of the Ministry of Equipment,

⁶⁴ *The Central America: Columbus-America Discovery Group v Atlantic Mutual Insurance Co* (1992) AMC 2705

⁶⁵ *The Central America: Columbus-America Discovery Group v Atlantic Mutual Insurance Co* (1992) AMC 2705

⁶⁶ *R.M.S. Titanic v The Wrecked and Abandoned Vessel* 435 F.3d 521 (4th Circuit 2006)

⁶⁷ *R.M.S. Titanic v The Wrecked and Abandoned Vessel* 435 F.3d 521 (4th Circuit 2006)

⁶⁸ Elizabeth Varner, 'RMS Titanic: Underwater Cultural Heritage's Sacrifice', *Journal of Business Law* 271 (2012), page

Transportation and Tourism awarded title of the 1 800 objects salvaged from the *Titanic* in the 1987 expedition to Titanic Ventures. Titanic Ventures later sold its interest in the salvage operation and recovered objects to RMST, which recovered 800 artefacts from the *Titanic* in 1993.⁶⁹

RMST recovered further artefacts from expeditions carried out in 1994 and 1996. Based on these artefacts, the Eastern District of Virginia awarded exclusive salvage rights to RMST in 1994 and the Fourth Court affirmed that RMST was the first party to successfully salvage the *Titanic*. Although the Fourth Circuit remanded the case for determination of the salvage award in 2006, RMST failed to submit requests for a salvage award for two years, and continued to assert that it had received ownership rights to the *Titanic*.⁷⁰

In response to these assertions of ownership, in October 2007, the District Court of the Eastern District of Virginia rejected RMST's public claim and reprimanded RMST, stating that 'the court will no longer tolerate these manoeuvres by RMST to circumvent the court's final ruling that RMST is the salvor, and not the owner of the artefacts'.⁷¹ RMST were given 60 days to submit an application for a salvage award. This strongly supports the courts willingness to apply the law of salvage to shipwrecks.

RMST were eventually granted 100 per cent of the fair market value of the artefacts and reserved the right to decide how that award would be paid. However, a year later, the district court Eastern District of Virginia awarded title (subject to the conditions and covenants) of the artefacts to RMST as no appropriate buyer had offered to purchase the *Titanic* for the fair market price within a year.⁷²

The cases of the *Titanic* and *The Central America* support the view that US courts are willing to apply the law of salvage to cases involving the discovery of shipwrecks by salvors.

In contrast to England and South Africa, a salvage award is a likely possibility for a salvor in the US courts. This may explain why many salvors of shipwreck have in the past decided to seize the jurisdiction of the US courts.

3(i)(e) - Is salvage law adequate?

Whether a court will apply the law of salvage to a shipwreck is therefore unclear. Moreover, it is questionable whether the application of salvage law to shipwrecks is appropriate as it arguably does

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⁶⁹ Elizabeth Varner, 'RMS Titanic: Underwater Cultural Heritage's Sacrifice', Journal of Business Law 271 (2012), page 275

⁷⁰ Elizabeth Varner, 'RMS Titanic: Underwater Cultural Heritage's Sacrifice', Journal of Business Law 271 (2012), page 276

⁷¹ Elizabeth Varner, 'RMS Titanic: Underwater Cultural Heritage's Sacrifice', Journal of Business Law 271 (2012), page 276

⁷² Elizabeth Varner, 'RMS Titanic: Underwater Cultural Heritage's Sacrifice', Journal of Business Law 271 (2012), page 276

not take into account important considerations of all interested parties. As discussed above, many States do not apply the law of salvage to shipwrecks as they believe that such legislation cannot be extended and applied to ships that have already sunken to the bottom of the ocean, one of the reasons being that a shipwreck cannot be said to be in 'peril' for the purposes of the definition of salvage.

As discussed above, the application of salvage law by the US courts in the cases of *The Central America* and *The Titanic* has produced obscure and perhaps inadequate or inappropriate results. In the case of *The Central America* the court's decision to apply the law of salvage was a Pyrrhic victory for both parties. Although the underwriters were held to remain the owners of the discovered treasure, they were only awarded 10 per cent of the value of the treasure recovered and lost possession of the treasure to the salvor for marketing purposes. The salvors, on the other hand, were awarded a salvage award of 90 per cent of the value of the treasure which resulted in inadequate compensation for all the costs involved in attaining the salvage order.

In the *Titanic*, although the courts applied the law of salvage to the wreck and artefacts, the decision to apply salvage law or the law of finds ultimately did not matter. The end result of applying both legal regimes was the same. Under the law of salvage, if no one claims title to the shipwreck or artefacts, the court can award title to the property under the law of finds to pay the award. As there is no owner of the *Titanic* to provide the salvage award, the court ordered the sale of the collection in a judicial sale to generate revenue for the salvage award. Accordingly, the court awarded title of the artefacts to RMST. The issue of there being no owner to pay the salvage award is a highly likely scenario with a shipwreck, particularly historical ones. When ships sink, insurers are likely to have paid the shipowners and thus becoming the subrogated owners and then this raises the issue of whether there has been abandonment of the vessel.

Moreover, the law of salvage fails to take into account of certain considerations and may promote careless and hasty salvage efforts by salvors. Craig Forrest expressed his concerns with applying salvage law on shipwrecks as including 'the splitting up of collections and the hasty excavation techniques required minimizing commercial costs and maximising the salvage award'.⁷³

Conversely, however, applying salvage law to a shipwreck provides the court with more control over the salvage operation. As courts are becoming more protective of the historic and archaeological value of shipwrecks, applying salvage to the wrecks allows the court to deny the right of salvage by persons who do not employ sophisticated preservation techniques. Moreover, the court may base the salvage award upon the salvor's good faith and his success in restoring the property from its imperilled position, which would include maintaining the wreck's archaeological

⁷³ Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' 34 J. Mar. L. & Com. 309 (2003), 321

value when removing it from peril.⁷⁴ In the case of *Klein*⁷⁵, for example, the court denied the plaintiff a salvage award for recovering articles from a historic wreck within Biscayne National Park.⁷⁶ The District Court, the Court of Appeals stated that, ‘the plaintiff’s unauthorised disturbance of one of the oldest shipwrecks in the Park and his unscientific removal of the artefacts did more to create a marine peril than to prevent one’. Similarly, in the case of *MDM Salvage v Unidentified, Wrecked and Abandoned Sailing Vessel*, the district court in Florida denied a group of salvors exclusive salvage rights to salvage a wreck partly because ‘they have not sought to preserve the archaeological integrity of the area’.⁷⁷

3(i)(f) - Concluding remarks on salvage

The law of salvage is therefore not applied to shipwrecks under English and South African law due to the fact that a shipwreck is not considered to be in ‘marine peril’. Under US law, however, the position is different where the courts have extended the definition of a ‘marine peril’ to encompass the perils associated with a shipwreck. The law of salvage is therefore applied to shipwrecks under US law. The different approach by courts in different jurisdictions illustrates the significance of the country the claim is brought under. Moreover, even if the law of salvage is applied, it is argued that this doctrine does not take into account the considerations of all parties who may have a claim against the shipwreck. The law of salvage’s lack of clarity, lack of international uniformity and failure to take into account important considerations illustrates the importance of developing an international convention to better deal with the discovery of shipwrecks in the high seas.

3(ii) - LAW OF FINDS

The law of finds, or ‘finders-keepers’ principle, is an alternative set of rules to deal with rights to a shipwreck. Applying the law of finds, the finder becomes the owner of the property immediately after the finder has actual or constructive possession. This section will deal with the origins and application of the law of finds in various jurisdictions, the issue of abandonment and whether applying the law of finds to shipwrecks is appropriate.

⁷⁴ Daniel P. Larsen, ‘Ownership of Historic Shipwreck in US Law’ *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 48

⁷⁵ *Joan M. Klein v The Unidentified Wrecked and Abandoned Sailing Vessel* 758 F. 2d USA Court of Appeals (11th Circuit 1985)

⁷⁶ *Joan M. Klein v The Unidentified Wrecked and Abandoned Sailing Vessel* 758 F. 2d USA Court of Appeals (11th Circuit 1985) at 1515.

⁷⁷ *MDM Salvage v Unidentified, Wrecked and Abandoned Sailing Vessel* 631 F. Supp. 308, 312 (S.D. Fla. 1986)

3(ii)(a) - Origins of the law of finds

The Laws of Oleron were introduced to England by King Richard I towards the end of the twelfth century.⁷⁸ The Laws of Oleron were the first to apply the law of finds in the marine context, providing that ‘if a man happens to find anything in the sea... if it be precious stones, fishes or treasure of the sea, which never belonged to any man.... it belongs to the first finder.’

In England, statute modified the law of finds to provide that rather than the first finder gaining title, the Crown assumed title to all shipwrecks that were not claimed by the owner within one year and one day from the date of the find. Both the law of finds and the law of salvage have passed to the United States and South Africa along with the English common law.

Generally when a claim is made under the law of finds, the court will award title to the shipwreck if; (1) the property is abandoned, and; (2) the claimed has reduced the property to his possession. Claimants generally commence proceedings to gain exclusive possession of the wreck before they recover the entire wreck. Exclusive possession thus allows the claimant to obtain an injunction prohibiting other salvors from carrying out salvage operations on the wreck. Moreover, under the law of finds, exclusive possession gives title of the wreck to the finder who becomes the owner. The finder or owner will not lose title unless he abandons the wreck.

3(ii)(b) - Law of Finds in England and Wales

The application of law to shipwrecks in England and Wales is largely governed by statute, namely the Merchant Shipping Act 1995 (MSA 1995). Sections 231 – 235 deal with vessels in distress. Sections 236 – 240 deal with wreck. Section 236(1) provides that if any person finds or takes possession of any wreck in United Kingdom waters or finds or takes possession of any wreck outside United Kingdom waters and brings it within those waters he shall give notice to the receiver of wrecks stating that he has found or taken possession of it and describing the marks by which it may be recognised.

Section 239(1) provides that the owner of any wreck in possession of the receiver who establishes his claim to the wreck to the satisfaction of the receiver within one year from the time when the wreck came into the receiver's possession shall, on paying the fees and expenses due, be entitled to have the wreck delivered or the proceeds of sale paid to him.

Sections 241 – 244 deal with unclaimed wreck. Section 241 provides that Her Majesty and Her Royal successors are entitled to all unclaimed wreck found in the United Kingdom or in United Kingdom waters except in places where Her Majesty or any of Her Royal predecessors has granted the right to any other person.

⁷⁸ S. Friedell, *‘Benedict on Admiralty’* (7 ed. 1993), page 1

The question is how the English courts will deal with the situation where a salvor discovers and salvages a shipwreck in the high seas and seeks to exercise ownership over that wreck in England.

The relatively recent case of *Pierce v Bemis (The Lusitania)*⁷⁹ established the principle that unclaimed wreck found outside UK territorial waters belongs to the finder and not to the Crown. The case involved a passenger liner called *The Lusitania* which was sailing from the United Kingdom to New York. In 1915 she was torpedoed by a German Submarine and proceeded to sink. She subsequently was abandoned and sank outside the United Kingdom territorial waters. Insurers compensated the owners for her loss and the ship and the contents belonging to the owners became the property of the insurers. In 1982, the *Lusitania* was located on the sea bed and the claimants salvaged a number of chattels and brought those items into the United Kingdom and in respect of which no title had been proved. These items were brought ashore in Britain and were seized by the local receiver of wreck. The claimants sought a declaration from the court that, in the absence of the true owners, they had good title to the items that had been either part of the passengers' personal property or part of the cargo.

The case depended on the interpretation of the Merchant Shipping Act 1894 (MSA 1894), which contained a comprehensive code for the treatment of wreck, very similar to that contained in the MSA 1995. One of the issues for the court was whether the *Lusitania* fell within the definition of 'wreck', which was defined as including 'derelict found in or on the shores of the sea or any tidal water'.⁸⁰ The court held that a ship is derelict in the legal sense of the term if the master and crew have abandoned her at sea without any intention of returning to her and without hope on their part of recovering her.

The court looked at two cases to determine the definition of abandonment of a wreck. In *The Aquila*⁸¹ Sir William Scott said that 'it is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery, I say, without hope of recovery, because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment.'

The defendants, the Department of Transport, however argued that the *Lusitania* was not 'derelict' for the purposes of the MSA 1894 and attempted to rely on the case of *Bradley v H. Newsom, Sons and Co.*⁸² The case involved a vessel called *The Jupiter* which was on a voyage from Archangel to Hull and was attacked by an enemy submarine similarly to the *Lusitania*. The master and crew were compelled to leave the ship. However, the ship did not sink and was eventually found by a British patrol boat and taken into a British port. The House of Lords held that the *Jupiter*

⁷⁹ *Pierce v Bemis* [1986] 2 WLR 501, [1986] 1 Lloyd's Rep 132

⁸⁰ Merchant Shipping Act 1894, s 510(1) (United Kingdom)

⁸¹ *The Aquila* (1978) 1 Ch. Rob. 37, at 40

⁸² *Bradley v H. Newsom, Sons and Co* [1919] A.C. 16 (United Kingdom)

was not derelict when the master and crew were ordered to leave by the enemy submarine because their departure was involuntary.

In the judgement of *The Lusitania* the judges set out the opinion of Viscount Haldane setting out his view on abandonment.

‘The master and crew really left the steamer not of their own volition but under duress, being forced to do so... The act of having been forced away from her is one thing. An intention to leave her derelict is quite a different thing. They did not leave the vessel. It was really taken from them. I think there is confusion in the judgment of the courts below between a being parted from the vessel by force of arms and a quitting of it as an act of free will. No doubt if they had quitted it because they desired to make sure of saving themselves from being drowned if she went down, that would have been an act to the performance of which they would have been moved by a motive, none the less that it was one of the most potent. It would have been an act of volition, just as on the other hand it is plainly an act of volition when men elect to perish with a war vessel instead of being taken prisoners and saved.’⁸³

The House of Lords applied this reasoning to the facts of *The Lusitania* and held that there could be no doubt that when the master and crew and passengers abandoned the vessel, they did so in order to save their own lives and without any hope or intention of returning to her. The House of Lords went on to say that if there had been any doubt as to the state of mind of those who abandoned the vessel, the matter would be put beyond doubt by the fact that the Cunard Steamship Co (the shipowners) claimed and were paid by the underwriters on the basis of an actual total loss of the ship. Moreover, an inference was drawn from the agreed facts and from the lapse of 67 years before any attempt was made to salvage the contents.⁸⁴

The second obstacle that the finders of *The Lusitania* had to overcome to attain title was whether the Crown had better title as a result of the provisions in MSA 1894. Section 518 of the MSA 1894 required that only wreck found inside the limits of the UK territorial waters should be delivered to the receiver of wrecks. However, the Merchant Shipping Act 1906 (MSA 1906) enlarged the application of that section to include wreck found outside UK territorial waters and brought within the UK.⁸⁵ It was clear that there was indeed an initial obligation by the finders of *The Lusitania* to deposit all salvaged items from any location with the receiver of wreck. The dispute concerned whether the MSA 1906 had extended the application of section 523 of the MSA 1894 so that the Crown would have title to any unclaimed wreck outside UK territorial waters that

⁸³ *Bradley v H. Newsom, Sons and Co* [1919] A.C. 16, at 32

⁸⁴ *Bradley v H. Newsom, Sons and Co* [1919] A.C. 16

⁸⁵ J.C. Woodliffe, ‘*Current Legal Developments*’, *International Journal of Estuarine and Coastal Law* Vol 1, 323 (1986) United Kingdom, page 324

were brought within the UK. Section 523 of the MSA 1894 declared the right of the Crown to all wreck found in the UK and unclaimed within a year, except where the Crown has granted the franchise to a subject. The House of Lords eventually held that the Crown's right to claim a droit of Admiralty was limited to an unclaimed wreck found inside UK territorial waters, and although section 518 had been extended by section 72 of the MSA 1906 so that, where a wreck lying outside territorial waters was found and brought within the UK, the finder had the duty to deliver the wreck to the receiver of wrecks, the Act of 1906 did not alter or extend the Crown's right over wrecks; and that, therefore, there was no droit of Admiralty over the wreck and in the absence of the true owners, the claimants had good title.⁸⁶

The decision in *The Lusitania* is significant for several reasons. It removes an impediment to the commercial viability of prospective salvage operations on other wrecks such as the *Titanic*.⁸⁷ The case clarifies the position in England on the abandonment of a wreck requiring that the master and crew must abandon without any intention of returning to the ship whether she is afloat or sank. Secondly, the case clarifies the scope of the Crown's entitlement to unclaimed wreck by limiting it to unclaimed wreck inside the territorial waters of England.

The position of a salvor seeking to assert rights in a shipwreck in England is therefore relatively clear requiring proof of abandonment on the part of the original owner.

3(ii)(c) - Law of Finds in South Africa

The issue of abandonment is also the principle issue in South Africa. Whether the party recovering the wreck is entitled to ownership of the property or a salvage reward will depend on whether the shipwreck is still owned by its original owner, or the original owner's subrogated insurer, or whether the shipwreck has been abandoned by the owner and is unowned property. It is important to note that applicable law to such maritime claims is governed by the Admiralty Jurisdiction Regulation Act 1983 (AJRA). Despite the argument that English law be applicable to the issue of abandonment of shipwreck⁸⁸, the South African courts have generally dealt with the issue applying Roman Dutch law in the exercise of their municipal jurisdiction.⁸⁹

In South Africa, the right of a shipowner to abandon its rights of ownership to a ship which has been wrecked is clear.⁹⁰ For example, in the case of *The Paris Maru*⁹¹ the Supreme Court of

⁸⁶ [1986] 2 WLR 501, [1986] 1 Lloyd's Rep 132

⁸⁷ J.C. Woodliffe, 'Current Legal Developments', International Journal of Estuarine and Coastal Law Vol 1, 323 (1986) United Kingdom, page 324

⁸⁸ John Hare 'Shipping Law & Admiralty Jurisdiction in South Africa', 2 Ed (2009), 4-1.2, page 256

⁸⁹ *Mills v Reck* (3) SA 92 (C); For a full study on applicable law in South Africa please refer to Gys Hofmeyr, 'Admiralty Jurisdiction: Law and Practice in South Africa' 2 Ed (2009)

⁹⁰ John Hare 'Shipping Law & Admiralty Jurisdiction in South Africa', 2 Ed (2009), 4-3.1, page 264

⁹¹ *The Paris Maru: Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 168

Appeal recognised the right of the owner to abandon its property, and ruled that 'liability for wreck removal costs in terms of the then harbour regulations only attaches to him who is the owner at the time the Administration elects to exercise the power conferred on it.'⁹²

The abandonment of property rights is known in Roman Dutch law as *derelictio*, and once property has been abandoned it becomes a *res nullius*. In the case of *The Antipolis*⁹³ Joubert JA stated that 'according to our common law, a right of ownership is lost through *derelictio* when an owner waives or abandons his case with the intention of not longer being owner.'

If the property is *res nullius* then the party recovering or raising the wreck may acquire ownership by way of *occupatio* which involves taking possession of the property with an intention to acquire ownership.

In South Africa therefore, the essential question of fact remains the same as that in the England, namely; has the original owner of the property abandoned it and where the wreck was abandoned to the underwriters in return for indemnification, so that the insurers are subrogated owners, have the underwriters abandoned the vessel?

Similarly to the case in England, the question of abandonment is a question of fact. Whether there has been abandonment of the property will depend on the circumstances of each case. The court will look at various factors to draw an inference as to the owner's intention. One of the main factors that the court will consider will be the time that has passed from the time of the wreck without any action being taken to salvage it. The longer the period of time, the more likely it would be that the owner has abandoned the ship. The inference that the owner has abandoned the ship, however, has not been lightly drawn and the courts have grappled with determining factual abandonment of wreck.

In the case of *Salvage Association of London v SA Salvage Syndicate*⁹⁴ (*The Thermoplae*) was wrecked in Table Bay in 1899. She was abandoned by her owners to their underwriters and began to break up on the sea bed causing the cargo to be dispersed. The underwriters, now subrogated owners, took no steps to recover any of the property for seven years. The defendant syndicate, who had a salvage licence to seek treasure, recovered ingots of tin and copper from the wreck site, but the salvage operation was interrupted by the Salvage Association who was representing the underwriters. The Salvage Association obtained an interdict from the court preventing the salvors from working the wreck and disposing of any property they had already recovered.

The defendant salvage syndicate were of the view that the wreck had been abandoned and

⁹² *The Paris Maru: Osaka Mercantile Steamship Co Ltd v South African Railways and Harbours* 1938 AD 168, at 177

⁹³ *The Antipolis* 1990 (1) SA 751 (SCA)

⁹⁴ *Salvage Association of London v SA Salvage Syndicate* (1906) 23 SC 169 at 171

that by taking possession of the abandoned property they had acquired ownership of it. The court held, however, that, 'a person whose property has gone down in a shipwreck cannot be presumed to have abandoned it because for some years he has taken no steps to raise it. He may hope that in the meanwhile some appliances may be discovered by which the recovery of his property might be discovered by which the recovery of his property might be facilitated'. The judge went on to say that 'clear proof of abandonment must be given, and in the present case there is not... such clear proof of abandonment.'

The judge did hold, however, that the salvors as the party 'in possession' were entitled to protection against all but the true owner, and in this case the underwriters who had succeeded the owner's rights. The interdict was granted subject to the filing of proof within 2 months that the applicant party represented the owners/underwriters.

The lapse of seven years in this case was not a long enough time period for the court to be able to infer that the owners had abandoned ownership of *The Thermoplae*. There seems to be nothing inconsistent with the decision by the English courts in *The Lusitania* where the court held that 'it is a necessary inference from the agreed facts and from the lapse of 67 years before any attempt was made to salvage the contents that the owners of the contents had abandoned their property.'⁹⁵

3(ii)(c)(1) - Assertion of ownership: possession?

Once it is established that property has been abandoned, the party recovering the property must take possession or control the property to be able to acquire ownership. The South African cases dealing with this point have involved shipwrecks within South African territorial waters rather than the high seas but nonetheless illustrate the courts approach to possession.

The case of *Underwater Construction & Salvage Co (Pty) Ltd v Bell*⁹⁶ involved a vessel called *The Hypatia* which was a wreck off Robben Island. In 1967, a salvor called Harry Fuchs loosened and separated four blades from the wrecks propeller by blasting them off the propeller with the intention of becoming the owner. Two of the blades were taken ashore while he marked the others with a buoy which was attached to the shaft where the blades lay. A second salvor disconnected the buoy and took the remaining two blades ashore and alleged that he had acquired possession and ownership. The court held that the wreck was *res nullius* so the question remained whether either salvor could acquire ownership by *occupatio*.

The court held that 'ownership is acquired as soon as there is a seizure with the intention of becoming owner. Ownership once acquired cannot be lost by a mere failure to remain in physical

⁹⁵ [1986] 1 Lloyd's Rep 132, at 135

⁹⁶ *Underwater Construction & Salvage Co (Pty) Ltd v Bell* (1968) (4) SA 190 (C)

possession. The fact that the two propeller blades were not hoisted onto the ship did not mean that they had not been seized.' The court went on to say that the act of forcing the blades apart from the wreck with the intention of acquiring ownership was sufficient to give him title. The blasting of the blades off the propeller was legal seizure sufficient to found *occupatio*.

3(ii)(d) - Law of Finds in the United States of America

In the United States, under the law of finds, one of the fundamental issues that the courts must determine is whether the shipwreck in question has been abandoned. As we have discussed above, courts are generally unwilling to find that shipwrecks have been abandoned by their owners even after the passing of a significant period of time. Moreover, when looking at the law of salvage we saw that the US courts are reluctant to find abandonment and would rather apply the law of salvage to shipwreck.

In the case of *Central America* the court stated that the law of finds may be applied in only two types of cases; firstly, in those cases where the owners have expressly and publicly abandoned their interest and, secondly, in those cases involving ancient shipwrecks where no owner appears to claim items recovered from the vessel. The court also held that evidence of abandonment must be shown by clear and convincing evidence, such as an express declaration of abandonment.⁹⁷ Abandonment must be proven by clear and convincing evidence.⁹⁸ It was held that the mere passage of time does not conclusively establish abandonment; however a significant passage of time does raise the inference of abandonment.⁹⁹ The judge expressed his dislike of finding abandonment of a shipwreck where someone has been involuntarily removed of their property at sea and that the owner retains title forever if he has parted with his property involuntarily.

The amount of time necessary to be able to infer abandonment has not been consistent or clear, however, in two District Court cases in the USA the judges have suggested that 60 years is the minimum time of desertion required for finding that there has been abandonment of a shipwreck.¹⁰⁰

The unwillingness of US courts to find abandonment in shipwrecks stems from the Treasure Salvor cases¹⁰¹ involving the disposition of the *Atocha* and its sister ship the *Santa Margarita*, Spanish Galleons sunk by a hurricane in 1622, nine and a half miles off the shores of the Florida

⁹⁷ Mark A. Wilder, 'Application of Salvage Law and the Law of Finds to Sunken Shipwreck Discoveries', Defence Counsel Journal (2000), page 100 (accessible on <http://www.rms-republic.com/reference/Volume67No1Article6.pdf>, last accessed on 06/02/2014)

⁹⁸ *Columbus America Discovery Group v Atlantic Mutual Insurance Company v The Unidentified Wrecked and Abandoned Sailing Vessel and others II*, 974 F. 2d at 464

⁹⁹ *Columbus America Discovery Group v Atlantic Mutual Insurance Company v The Unidentified Wrecked and Abandoned Sailing Vessel and others II* 974 F. 2d at 462

¹⁰⁰ Daniel P. Larsen, 'Ownership of Historic Shipwreck in US Law', The International Journal of Marine and Coastal Law, Vol 9, No 1 (1994), page 39.

¹⁰¹ 556 F. Supp. 1319 (S.D. Fla. 1983)

Keys. The courts eventually gave title of the wrecks to the salvors of the wrecks, Mel Fisher and his company, Treasure Salvors Inc. Although the court found abandonment, the judges in the case acknowledged at least three situations where an owner may not be fictitious.

First, the court acknowledged the possibility of a claim by the country of origin of the wreck.¹⁰² This suggests that the government of the flag under which the ship sailed may have a claim to these ancient ships as ‘successor-owner’.¹⁰³

Secondly, the court acknowledged that ownership may be vested in an existing person, or heirs of the actual owner. For example, the Court in *The Central America* was surprised that descendants of passengers did not bring claims of ownership in the treasure. This suggests that descendants of owners may have a claim of ownership to the sunken treasure.

Thirdly, the courts acknowledged that an owner may presently exist as ‘successive-owner’ by finding insurance companies as ‘subrogated owners’ after indemnifying the original owners for the loss of the ship. This is important as it may apply to many shipwrecks because some insurance companies have existed for hundreds of years, such as Lloyds of London which was established in 1688.¹⁰⁴

Two cases that we have looked at regarding salvage have expanded the third acknowledgement by the court of insurers being ‘successive-owners’. Firstly, in *Zych v Unidentified, Wrecked and Abandoned Vessel*¹⁰⁵ the court found that the ship was not abandoned because the underwriters had purchased title by paying \$11 993.20 on the policy in 1860, thereby obtaining ownership rights.

The second major case regarding insurers was the case of *The Central America* where the court held that the insurance company destroying insurance documents unintentionally did not evidence intent to abandon. Furthermore, the fact that some of the insurers had engaged in salvage negotiations in the mid 1980s, when it became technologically feasible to salvage the wreck supported the fact that the ship had not been abandoned.

These cases are very important. They make it very difficult for finders of shipwrecks to assert ownership without strong compelling evidence of abandonment. Moreover, they provide a cause of action to anyone who may be a successor-owner to the original owner, whether it is insurance companies, the nation of origin of the vessel, or the descendants of the owners.¹⁰⁶

¹⁰² This issue will be dealt with in chapter III.

¹⁰³ Daniel P. Larsen, ‘Ownership of Historic Shipwreck in US Law’, *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 40

¹⁰⁴ Daniel P. Larsen, ‘Ownership of Historic Shipwreck in US Law’, *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 40

¹⁰⁵ *Zych v Unidentified, Wrecked and Abandoned Vessel* 755 F. Supp. 213 (N.D. III. 1990)

¹⁰⁶ Daniel P. Larsen, ‘Ownership of Historic Shipwreck in US Law’, *The International Journal of Marine and Coastal Law*, Vol 9, No 1 (1994), page 42

3(ii)(e) - Concluding remarks

This chapter has illustrated that a claimant has two alternative claims over a shipwreck. The claimant may attempt to assert property rights over the wreck thus making him the owner or he may claim for a reward for having salvaged the property of the owner under the law of salvage. Furthermore, the case law has shown how the courts have applied these legal doctrines differently in different jurisdictions. One significant difference is that the US courts clearly apply the law of salvage to shipwrecks whereas the English and South African courts do not. In relation to the law of finds a significant factor has been the courts willingness to find that the original owner has abandoned the shipwreck. These differences emphasises the importance of developing international uniform laws to avoid uncertainty.

CHAPTER 4

SOVEREIGN IMMUNITY

The next contestants in the tug of war for the spoils of shipwrecks are national or State governments. Thousands of State-owned vessels lie within, and in waters beyond, the territorial sea and contiguous zone. Many such vessels are now becoming subject to the unauthorised disturbance or recovery by salvors and treasure hunters as a result of the recent advances in science and technology. Growing international concern over such salvage operations has resulted in the recent practice in which States have claimed sovereign rights over shipwrecks (and their cargo) that were discovered and salvaged by treasure-hunting ventures from the seabed.¹⁰⁷ Sovereign immunity can be defined as a legal doctrine that concerns the protection which a State is given from being sued in the courts of other States. A ship, and perhaps a shipwreck, that is owned by a State may, therefore, be protected by sovereign immunity, and thus be immune from the arrest and jurisdiction of other State courts.

The reasons States claim sovereign rights over such shipwrecks vary. Many of the shipwrecks are considered to be objects of an historical nature, and which, with the passing of time, have acquired scientific and cultural value to the flag-State. In addition, such State shipwrecks, particularly sunken warships, may contain objects of sensitive national security. They often also contain unexploded ordnance that could pose a danger to human health and the marine environment if disturbed.¹⁰⁸ The claims by States of their sovereign rights are therefore closely related to the idea of underwater cultural heritage.

The claims concerning sunken vessels have mainly been brought by flag-States on the basis of their sovereign rights over such vessels. However, when discussing the law applicable to State vessels, it is important to appreciate the difference between issues relating to the jurisdiction of the flag-State and the issue of ownership.¹⁰⁹ This chapter will begin by making the distinction between these two issues and setting out how the principle of sovereign immunity has been applied to state vessels under customary international law and whether this immunity continues to exist once a state vessel has sunk and converted into a shipwreck. This will involve looking at how the courts have dealt with the issue of sovereign immunity. This chapter will then seek to address the issue of ownership of state vessels, looking particularly at the issue of abandonment.

The claims by flag-States on the basis of their sovereign rights are often challenged by

¹⁰⁷Patrizia Vigni, *'Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights'* Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 279

¹⁰⁸ Jason R. Harris, *'The Protection of Sunken Warships as Gravesites at Sea'*, Ocean and Coastal Law Journal, Vol 7:1, page 77

¹⁰⁹ Craig Forrest, *'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage'*, Ocean Development and International Law, vol. 34, issue 1, 41-57 (2003), page 41

interests by other interested parties, such as, for example, the universal interest in protecting the cultural heritage of the shipwreck and cargo. Moreover, although States may have sovereignty over a shipwreck, this does not exclude private ownership of the ship itself and its cargo.¹¹⁰ Although some shipwrecks may be very ancient, it is still very possible to identify the legitimate owners, or their heirs of some objects belonging to the cargo of a ship through historic information. Furthermore, States other than the flag-State may have claims for property or sovereignty over the cargo of the shipwreck, such as, for example, the State of origin of the cargo or the State of nationality of the proprietors of the cargo. These other States may argue that some of the cargo is part of their cultural heritage and should be subject to their sovereign rights.¹¹¹

4(i) - Ownership and Sovereign Immunity

The distinction between jurisdiction and ownership of shipwrecks was clearly set out by *Craig Forrest* where he states that jurisdiction relates to the ability of a state to control activities in its territory or over its nationals.¹¹² States will have jurisdiction over vessels that fly the flag of their State, notwithstanding the ownership of that vessel. A flag-State therefore has jurisdiction over its own State vessels as well as private merchant vessels that sail under its flag. Article 92 of the United Nations Law of the Sea Convention (UNCLOS) provides that ‘ships shall sail under the flag of one State only and shall be subject to its exclusive jurisdiction on the high seas.’ A coastal state, on the other hand, has jurisdiction to control activities within its territorial waters, which also include activities of a vessel sailing under a foreign flag.¹¹³ However, customary international law has always recognised that government ships operated for non-commercial purposes, including warships, are immune from coastal State enforcement. Having established that Flag-States have jurisdiction over their nationals (i.e. State owned vessels) and that international law recognises the sovereign immunity of State-owned vessels it follows that determining ownership is vital for the purposes of sovereign immunity.

4(ii) - Sovereign Immunity of Warships and State Vessels

Many State vessels, or indeed many shipwrecks, have been warships. Due to the sensitivity regarding warships and State owned ships, many maritime and former colonial powers want to

¹¹⁰ Craig Forrest, ‘*An International Perspective on Sunken State Vessels as Underwater Cultural Heritage*’, *Ocean Development and International Law*, vol. 34, issue 1, 41-57 (2003), page 45

¹¹¹ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ *Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law* (2012), CH 13, page 283

¹¹² Craig Forrest, ‘*An International Perspective on Sunken State Vessels as Underwater Cultural Heritage*’, *Ocean Development and International Law*, vol. 34, issue 1, 41-57 (2003), page 45

¹¹³ Subject to the doctrine of innocent passage. See I.A. Shearer, ‘*Problems of Jurisdiction and Law Enforcement against Delinquent Vessels*’ *International and Comparative Law Quarterly* (1986), B. Innocent Passage, page 3

retain exclusive jurisdiction over and ownership of these vessels.¹¹⁴ One of the main policy considerations supporting the application of the principle of sovereign immunity to State vessels has been based on mutual respect for each sovereign State's armed forces and governmental activities and more generally equality of states.¹¹⁵

Being able to define whether a vessel is a warship is important as it will provide the ship with sovereign immunity. The definition is set out in Article 29 UNCLOS providing:

‘For the purposes of this convention, “warships” 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 the regular armed forces discipline.’

Once it is established that a ship is a ‘warship’, Article 95 UNCLOS provides that ‘warships on the high seas have complete immunity from the jurisdiction of any State other than the flag-State.’ Furthermore, State owned or State operated vessels are also protected by Article 96 UNCLOS which provides that ‘ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag-State.’ Moreover, the immunity for warships and other non-commercial vessels owned or operated by a State is extended further into the salvage of such vessels.¹¹⁶

UNCLOS and the 1989 Salvage Convention therefore provide States with the power to claim sovereign immunity over the warships and State vessels. This is significant because it follows that salvors cannot claim ownership or a salvage reward over warships or State owned vessels in the courts of other jurisdictions as they are protected by sovereign immunity.

Three important questions must be answered before it can be determined whether a shipwreck is subject to sovereign immunity. Firstly, the question of whether a shipwreck can fall within the definition ‘ship’ for the purposes of immunity under UNCLOS and international customary law. Secondly, the identity and nationality of the shipwrecks and their cargo must be determined to create the necessary link between the ship and its flag-State as the primary legal basis for justifying a claim by such State over such wreck both under international and domestic law. Thirdly, if the shipwreck is found to be State-owned, the question of whether it has been abandoned must be determined.

¹¹⁴ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 283

¹¹⁵ Craig Forrest, ‘*An International Perspective on Sunken State Vessels as Underwater Cultural Heritage*’, Ocean Development and International Law, vol. 34, issue 1, 41-57 (2003), page 42

¹¹⁶ International Convention on Salvage 1989, Article 5

4(iii) - Is a shipwreck a 'ship' for the purposes of sovereign immunity?

The first question that must be answered is whether a shipwreck is capable of being a 'ship' for the purposes of sovereign immunity. Craig Forrest notes various commentators who have the view that sunken vessels cease to be ships and are, therefore, no longer entitled to immunity.¹¹⁷ Calfish is of the opinion that a wreck may no longer qualify as a vessel subject to the exclusive authority of its flag-State.¹¹⁸ Riphagen stated that in the case of sunken ships 'it is understandable that such "objects" cannot simply retain indefinitely the status under international law of a ship.'¹¹⁹ Migliorini stated that a shipwreck has lost the characteristics of a warship and should simply be subject to the same rules as any other historical shipwreck.¹²⁰ If it were accepted that shipwrecks are not ships, they cannot be subject to the protection of sovereign immunity and can be subject to a claim of salvage, or ownership, as if they were a privately owned vessel.

Notwithstanding the semantics of the definition of a ship and whether a shipwreck falls within that definition, the wrecks are still property of the State and could continue to be subject to the general principles of State immunity for State property used for non-commercial purposes. In some cases, for example recently sunken warships, the shipwrecks would still contain State intelligence, information and secrets, meaning that the shipwreck is still fulfilling an important State non-commercial function. This argument, however, loses strength when one considers the condition of a shipwreck that is decades old as it would be unlikely that any useful important intelligence, information or secrets would be found or still intact.

It is therefore not possible to conclude whether a sunken State vessel, particularly one of historical nature, which no longer fulfils a government non-commercial function, can be said to be subject to sovereign immunity as there appears to be no conventional or customary international law on the issue. Moreover, the historical maritime powers such as Spain, Portugal, the Netherlands, and the United Kingdom have failed to adopt any consistent policies.¹²¹

The US courts however seem to recognise the idea of sovereign immunity of warships lying at the bottom of the sea irrespective of how long they have laid there. In the case of *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels*,¹²² the Fourth Circuit Federal Court of Appeal held that

¹¹⁷ Craig Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage', *Ocean Development and International Law*, vol. 34, issue 1, 41-57 (2003), page 46

¹¹⁸ Lucius Calfish, 'Submarine Antiquities and the International Law of the Sea' 13 *Neth. Y.B. International Law* 3 (1982), page 32

¹¹⁹ W. Riphagen, 'Some reflections on "functional sovereignty"' *Neth Y.B. International L* 128 (1975), page 128

¹²⁰ Luigi, Migliorino, 'The Recovery of Sunken Warships in International Waters' in B. Vukas (ed.), *Essays on the New Law of the Sea* 251 (1985)

¹²¹ Craig Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage', *Ocean Development and International Law*, vol. 34, issue 1, 41-57 (2003), page 45.

¹²² *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels* 221 F. 3d 363 (2000)

a State could refuse salvage services, and where they were undertaken against the wishes of the State, no salvage award would be forthcoming. The case involved claims to two Spanish warships. *La Galga*, a 50-gun frigate was en route from Havana to Spain, carrying Spanish soldiers and some English military prisoners. It encountered a hurricane near Bermuda and eventually sank near the Virginia coast. *Juno* was lost in 1802 when the 34-gun frigate was sailing from Veracruz to Spain, carrying Spanish soldiers, their families, and some civilian officials. During a severe storm it sprang leaks and eventually sank with the loss of at least 415 lives. Sea Hunt, Inc found them and issued permits for their salvage. As mentioned above, the US Court of Appeals held that because the ships had not been abandoned by Spain, they were not subject to salvage. Both Spain and the United States gave emphasis to the fact that the Spanish vessels, like many sunken vessels of the United States military, serve as sacred military gravesites.¹²³ The circuit court gave close attention to the concerns of Spain and the United States that such sunken vessels serve as the graves of sailors and soldiers, as well as civilians. The court quoted part of the amicus curiae brief of the United States:

‘The United States “is the owner of military vessels, thousands of which have been lost at sea, along with their crews. In supporting Spain, the United States seeks to insure that its sunken vessels and lost crews are treated as sovereign ships and honoured graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea.”¹²⁴

On the other hand, the decision is consistent with traditional salvage law that allows an owner to refuse salvage services in circumstances where a reasonable shipowner would do so. In the case of historic shipwrecks which have been lying on the sea bed for many years and are not considered to be in immediate marine peril, it would seem reasonable for the shipowner, i.e. the State, to refuse salvage. This express and reasonable prohibition of salvage services by an owner is provided for in Article 19 of the 1989 Salvage Convention. States, however, are entitled to make a reservation not applying the provisions of the convention ‘when the property involved is maritime cultural property of pre-historical, archaeological or historic interest.’¹²⁵ Therefore, for States that have elected to have such a reservation, it is the principle of sovereign immunity that must be relied on to maintain exclusive jurisdiction over such State vessels.

The statement made by the court that Spain did not abandon (either expressly or by implication) title to the two warships, seeks to protect State vessels, thereby inherently making a

¹²³ Michael White, *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels*, 221 F. 3d 534, *The American Journal of International Law*, Vol. 95, No. 3 (Jul. 2001), page 679

¹²⁴ Tullio Scovazzi, *The Protection of the Underwater Cultural Heritage Before and After the 2001 UNESCO Convention* Publications on Ocean Development (2003)

¹²⁵ Article 30(1)(d) International Convention of Salvage 1989

distinction between State vessels and non-State vessels.¹²⁶ The identity of the shipwreck and cargo is therefore important as the finding that a shipwreck is State owned would make it subject to sovereign immunity.

4(iv) - Identity and Nationality of shipwreck and their cargo

In determining whether a shipwreck is subject to sovereign immunity, its' nationality and identity must be determined to create the link between the ship and the flag-State to form the primary legal basis for justifying a claim by the State over such a ship both under international and domestic law. The longer the period of time passed, the more difficult it becomes to determine the nationality of the shipwreck. One becomes reliant on historical data and thorough research activity to identify the ship and their demise.

The recent case of *Nuestra Senora de las Mercedes*¹²⁷ (the *Mercedes*) has provided an example of the uncertainty in identifying shipwrecks. The *Mercedes* was sailing from Peru to Cadiz in 1804 when it was destroyed and sank by a British ship. Although Odyssey set out to find the *Mercedes* and found it, they argued that the Court should still entertain doubt because 'at the current level of site reconnaissance and study, there is no definitive archaeological evidence and all evidence pointing toward that theory [that the shipwreck is the *Mercedes*] remains circumstantial.'¹²⁸ The court took into account various factors in determining the identity of the shipwreck.

Based on the records of the *Mercedes's* sister frigates, Spain plotted the likeliest area of her demise and the *res* lies within this zone. No other naval vessel matching her type, according to Spain, sank within this zone during this period. One of Odyssey's own experts actually admitted that the 'extant documents place the *Mercedes* in the area' of the site.¹²⁹ Odyssey relied on what were considered weak arguments by stating that 'at least one individual reported land to be visible when the *Mercedes* went down, and none can be seen according to Odyssey from the site even with the aid of binoculars.'¹³⁰

Secondly, the *Mercedes* was loaded with approximately 900 000 coins, most of which were

¹²⁶ Jason R. Harris, 'The Protection of Sunken Warships as Gravesites at Sea', *Ocean and Coastal Law Journal*, Vol 7:1,75, page 78

¹²⁷ *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009

¹²⁸ *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP, page 8

¹²⁹ *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP, page 9

¹³⁰ *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP page 10

silver. Coincidentally, Odyssey recovered approximately 594 000 coins with an overwhelming disparity of silver to gold dating from the latter half of the 18th century to no later than 1804, all of Spanish nationality and minted almost exclusively in the ‘South American Spanish Crown Colonies’ and the mint in Lima in particular.¹³¹ Odyssey argued that the coins could have come from another vessel because Spanish coins were acceptable currency throughout the commercial world. Again, the court did not find this argument persuasive.

Thirdly, the cannons found at the site match the type the *Mercedes* would have carried. Although Odyssey attempted to argue that cannons are very weak indicia of a ship's nationality and date because they were extensively traded and distributed commodities, the Court did not find this persuasive.¹³²

Based on the historical information concerning the location, nature, and cargo of the ship, the court declared that the ship was indeed the *Mercedes* and declared Spain as the legitimate flag-State. The significance of this finding was that it enabled Spain to rely on the protection of sovereign immunity.

Even if the identity and nationality of a shipwreck is certain, the nationality of the cargo may also be questioned. Commercial vessels used to carry both national and foreign goods.¹³³ In such cases, situations may arise where the flag-State and the State of origin of the cargo do not correspond, or some difficulties may arise when determining the nationality of the cargo of a shipwreck that had been moving from territory of a colony towards its mainland. This problem is made greater by the fact that over the centuries colonies have now achieved independence and borders have changed making the State of origin of the cargo difficult to determine.

Recent cases show that the courts are not acknowledging the argument that shipwrecks and their cargo may have different nationalities. In the cases of *La Galga* and *Juno*¹³⁴ the US courts stated that sunken vessels and their cargo must be presumed to belong to the flag-State unless the State clearly renounced its rights in the past. Moreover, in the above mentioned case of *Nuestra Senora de las Mercedes* the court stated that the separation of the ship and its cargo is not admissible since ships and their cargoes are ‘inextricably intertwined’.¹³⁵ In the US the Foreign Sovereign Immunities Act 1976 (FSIA) provides the exclusive means to bring a foreign sovereign

¹³¹ *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division 2009; Case no. 8:07-CV-614-SDM-MAP page 10

¹³² *Odyssey Marine Exploration Inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division, 3 June 2009; Case no. 8:07-CV-614-SDM-MAP, page 11

¹³³ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 282

¹³⁴ *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels*, 221 F. 3d 634 Fourth Circuit (2000)

¹³⁵ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 282

under the jurisdiction of the US courts. The general rule is sovereign immunity; however there are a number of exceptions to the rule. Arguments were made that because the cargo was not owned by Spain, and was simply private cargo on-board the *Mercedes*, the FSIA did not apply. In the alternative, it was argued that the exception contained in s 1605(b) applied which allows the court to resolve a maritime lien over a vessel or cargo of a foreign state ‘if that lien is based upon a commercial activity of the foreign state.’

Additional arguments were made by Peru, who joined the claim against *Odyssey*, asserting its sovereign rights as the State of the origin of the cargo of the *Mercedes*. Firstly, Peru raised the argument that State practice should be consistent with the general principle of international law that condemns colonialism, particularly when it involves the pillage of the resources of the occupied territory.¹³⁶ During Spain's occupation, the Indian population allegedly declined by nearly 80 per cent due to overwork, malnutrition, and the introduction of diseases and it took over 300 years to replace that loss in population.¹³⁷ Secondly, Peru claimed that the cargo of the *Mercedes* was part of its cultural and historic heritage and that the coins constitute a natural resource from Peru that is protected under international law.¹³⁸ Despite the arguments made by Peru the US court dismissed Peru's claim denying its jurisdiction because the dispute between Peru and Spain was an inter-State dispute that should be settled by international means.¹³⁹

In addition to claims made by Peru, twenty-five descendants of private persons who owned cargo that was on-board the ship filed claims of ownership of the cargo. Spain even admitted to the fact that there was private cargo on-board the *Mercedes*.¹⁴⁰ It was therefore argued that although the *Mercedes* may convey sovereignty under the FSIA, the coins as private property do not.

Despite these arguments, the District Court explained in their order granting Spain's motion to dismiss that the ship and the cargo are indistinguishable for the purposes of the FSIA.

However, the recognition of the sovereign rights of a State over a ship and its cargo does not exclude the fact that private property rights may exist. In the case of the *Titanic*, the US court affirmed that private property which had been recovered in a shipwreck could not be considered as abandoned unless no one had claimed it after its discovery. In this case, private persons were able to claim their property rights over some objects before the courts of the State that was recognised to have jurisdiction over the objects themselves. In the case of the *Mercedes* however, the court rejected the claims of some private persons who argued that they were the direct descendants of the

¹³⁶ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 282

¹³⁷ Kim Alderman, ‘*High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case*’

¹³⁸ Kim Alderman, ‘*High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case*’

¹³⁹ Kim Alderman, ‘*High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case*’

¹⁴⁰ *Odyssey Marine Exploration inc. v The Unidentified Shipwreck Vessel and the Kingdom of Spain, the Republic of Peru*, US District Court, Middle District of Florida, Tampa Division (2009)

owners of some of the cargo on the basis that the ship and its cargo are ‘inextricably linked.’

4(v) – Abandonment and consequences of abandonment in relation to sovereign immunity

Once it is established that the ship and the cargo are of a certain nationality and thus subject to sovereign immunity, the recognition of such immunity is dependent upon the continued ownership of the vessel by the flag-State.¹⁴¹ As we have seen in relation to privately owned shipwrecks in the previous chapter, ownership is extinguished primarily through abandonment of the owner, in the case of State owned vessels by the flag-State. Determining when and if a State has abandoned a warship or a state owned vessel is more problematic, however, as there appears to be no conventional or customary international law governing the question, and State practice has so far been inconsistent.¹⁴² There are two possible theories regarding the abandonment by flag-States of their vessels. The first theory requires the flag-State to expressly abandon title, while the second provides that abandonment may be implied by the facts, for example the passage of time.¹⁴³

The theory that flag-States must expressly abandon title was advocated as the international practice by the United States, providing in a 1996 statement of US policy that:

‘title to such vessels [warships or other state vessels] is lost only by capture or surrender during battle, by international agreement, or 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 the abandonment of governmental property... Title to such vessels and aircraft is not lost by mere passage of time.’¹⁴⁴

However case law seems to be inconsistent in the application of both theories. The US Abandoned Shipwreck Act 1987 provides that although an intention of the flag-State to abandon is required for US vessels, it is not required for foreign vessels. This has been reflected in the US courts where State Vessels of Spain and the United Kingdom found in US waters were found to have been impliedly abandoned.¹⁴⁵ Inconsistency has also been seen by US courts in relation to US state vessels where implied abandonment was found in the cases of the *USS Texas* and the *USS Massachusetts*¹⁴⁶ while the courts applied the express abandonment theory in the case of the *CSS*

¹⁴¹ ‘An International Perspective on Sunken State Vessels as Underwater Cultural Heritage’, Ocean Development and International Law, vol. 34 (2003), page 46

¹⁴² An ‘An International Perspective on Sunken State Vessels as Underwater Cultural Heritage’, Ocean Development and International Law, vol. 34 (2003), page 46

¹⁴³ ‘An International Perspective on Sunken State Vessels as Underwater Cultural Heritage’, Ocean Development and International Law, vol. 34 (2003), page 46

¹⁴⁴ David Bederman, ‘Rethinking the Legal Status of Sunken Warships’, Ocean Development and International Law L. 97 (2000), page 31

¹⁴⁵ David Bederman, ‘Rethinking the Legal Status of Sunken Warships’, Ocean Development and International Law L. 97 (2000), page 31

¹⁴⁶ *Baltimore, Crisfield & Onancock, Inc. v United States* 140 F. 2d 230 Fourth Circuit (1944)

Alabama.¹⁴⁷

More recently in the cases of *La Galga*¹⁴⁸ and *Juno*¹⁴⁹ the salvors, Sea Hunt Inc had sought a declaratory judgement that the vessels had been abandoned by Spain and therefore not subject to sovereign immunity but instead to the law of finds and salvage. Both Sea Hunt and Virginia both argued that implied abandonment was enough to satisfy the requirements of abandonment, the circuit court, like the district court, held that since Spain had ‘asserted an ownership claim to the shipwrecks, express abandonment is the governing standard.’¹⁵⁰ The Court had relied on a variety of cases such as *California v Deep Sea Research, Inc*¹⁵¹ where the circuit court noted that the ‘meaning of “abandoned” under the Abandonment of Shipwreck Act conforms with the meaning under admiralty law,’ which requires express abandonment whenever a previous owner comes forward to assert a claim. The Fourth Circuit in *La Galga* and *Juno* also referred to the decision in *the Central America*.¹⁵² where the court had held that although abandonment could be inferred in the case of a shipwreck; such an inference would not be sustained where a previous owner comes forward and asserts a propitiatory interest. Although the case concerned a privately owned shipwreck the court relied on this decision to assert that the appearance of Spain in claiming ownership required the application of the express abandonment theory.¹⁵³

The express abandonment theory has been further strengthened, however, by its application in the more recent case of the *Mercedes*. In response to the claims that the ship was not subject to sovereign immunity the court applied the principle that ‘a sovereign vessel that appears to have been abandoned remains the property of the nation to which it belonged at the time of sinking unless that nation has taken formal action to abandon it or to transfer title to another party.’¹⁵⁴ This decision confirmed the international law that sunken warships may be abandoned only by an ‘express act of abandonment’.

4(vi) – The justification and significance of US case law

The case law that we have discussed above regarding sovereign immunity has all been US case law. This is justified by the fact that cases of such nature involving the identification of allegedly State owned shipwrecks and sovereign immunity has not arisen in other jurisdictions. Moreover, an additional justification for using US cases, such as the *Nuestra Senora de las Mercedes*, is that as a

¹⁴⁷ *United States v Steinmetz* 973 F. 2d 212 Third Circuit (1992)

¹⁴⁸ *La Galga: Virginia v Spain* 00-629; *Sea Hunt Inc. v Spain* 00-652

¹⁴⁹ *Juno: Virginia v Spain* 00-629; *Sea Hunt Inc. v Spain* 00-652

¹⁵⁰ *Sea Hunt, Inc v Unidentified Shipwrecked Vessel or Vessels*, 221 F. 3d 634 Fourth Circuit (2000), 640.

¹⁵¹ 102 F.3d 379; 523 U.S. 491, 501 (1998)

¹⁵² *Columbus-America Discovery Group Inc v Unidentified, Wrecked and Abandoned Sailing Vessel* 1992 AMC 2705

¹⁵³ ‘An International Perspective on Sunken State Vessels as Underwater Cultural Heritage’, Ocean Development and International Law, vol. 34 (2003), page 46

¹⁵⁴ Kim Alderman, ‘High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case’

result of their high profile and importance they have had a significant effect on maritime law in other jurisdictions.

Spain, for example, has often been the flag-State claiming sovereign immunity in the US. As a result of these cases, and in anticipation of future such cases, Spain has initiated the '*Proyecto de Ley de Navegacion Maritima*' ('Bill of Shipping') which will drastically reform Spanish maritime law which is still based on the '*Libro III del Codigo de Comercio de 1885*' ('Book III of the Commercial Code of 1885'). Various reforms under the Bill of Shipping arise as a direct and necessary consequence of the recent case against Odyssey in the *Nuestra Senora de las Mercedes*. The reforms have been said to be necessary to avoid the lack of coordination and effectiveness of regional administrations which has facilitated the destructive work to Spanish heritage by treasure hunters around the world and on their own shores.¹⁵⁵ Moreover, the reforms would provide Spain with a means to protect their State vessels beyond their territorial waters by providing them with sovereign immunity. The reforms also provide other States with the exclusive jurisdiction and sovereign immunity over their vessels.¹⁵⁶ A '*buque*' ("ship") for the purposes of sovereign immunity under the Bill of Shipping is defined as '*todo vehiculo con estructura y capacidad para navegar por el mar y para transportar personas o cosas, que cuente con cubierta corrida y de eslora igual o superior a 24 metros.*'¹⁵⁷

Although England has been a historical maritime power the courts have not been faced with a complex case involving the sovereign immunity of a shipwreck. In most cases the United Kingdom has entered into contractual arrangements with salvors which have avoided the difficulties that arise in litigation. If such a case were however to arise in the courts of England and Wales the likelihood is that the outcome would be similar to that of the United States. In the United Kingdom sovereign immunity is governed by the State Immunity Act 1978 (the SIA). Section 10 of the SIA provides that a ship or cargo belonging to a State is not immune as respects an action *in rem* or an action *in personam* for enforcing a claim in connection with such a ship or cargo if at the time when the cause of action arose, the ship or cargo was in use or intended for use for commercial purposes.¹⁵⁸

¹⁵⁵ José María Lancho, '*Una Ley para salvar los buques de Estado históricos*' available at <http://abcblogs.abc.es/espejo-de-navegantes/2013/12/16/una-ley-para-salvar-los-buques-de-estado/>, last accessed 23/01/2014

¹⁵⁶ Article 50 *Proyecto de Ley de Navegacion Maritima*

¹⁵⁷ *Proyecto de Ley de Navegacion Maritima* Serie A, Num. 73-1 (29 de Noviembre de 2013), Titulo II, Capitulo I, Articulo 56; in English, 'all vehicles with the structure and ability to navigate on the sea and transport persons or things that has a length equal to, or superior to, 24 metres'

¹⁵⁸ Section 10(2), 10(4) State Immunity Act 1978

4(vii) – Concluding remarks on Sovereign Immunity

In conclusion, there has been an element of inconsistency and lack of international case law in providing shipwrecks with sovereign immunity. Customary and international law provides flag-States with exclusive jurisdiction and ownership over their vessels, however this principle is by no means clear. Questions still arise as to whether a 'wreck' is a 'ship' for the purposes of sovereign immunity; whether the identity and nationality of both shipwreck and its cargo makes it a State-owned vessel; and, if it was a State-owned vessel, whether the shipwreck has been abandoned by the flag-State. In some situations the issues have been resolved through bilateral agreements between flag-States;¹⁵⁹ however, in the majority of cases there is no consistency in the application of sovereign immunity. Determining ownership of a shipwreck is therefore of paramount importance to salvors seeking to assert ownership rights, or claim a salvage award, as the finding that the owner is a flag-State could result in the claim failing on the basis of sovereign immunity. What we can conclude with an element of confidence is that there is a clear distinction drawn between a State-owned vessel (whether it be a warship or a ship carrying out non-commercial activities) and non-State-owned vessels (i.e. privately owned vessels or government vessels carrying out commercial activities). It follows, therefore, that if the shipwreck is found to be a State vessel, it may be subject to sovereign immunity.

¹⁵⁹ For example: Agreement between Government of Great Britain and Northern Ireland and the Government of the Republic of South Africa regarding the Salvage of the *H.M.S Birkenhead*, Pretoria, Sept. 27, 1989, U.K.T.S. No. 3 (1990); Agreement between the Government of the French Republic and the Government of the US of America concerning the wreck of the *CSS Alabama*, Paris, Oct. 3, 1989, T.I.A.S. No. 11687

CHAPTER 5

CULTURAL HERITAGE DEVELOPMENTS

As we have seen, shipwrecks have been prized by salvors and their flag-States for their economic value resulting in disputes involving a myriad of questions including what State has jurisdiction over the shipwreck; whether the law of salvage or the law of finds should be applied; whether the ship is protected by sovereign immunity and indeed the nationality of the shipwreck and its cargo. These disputes, however, do not take into account the importance of the shipwrecks in providing information about human history and cultural heritage. Few states around the world have felt compelled to protect historic shipwrecks and other underwater cultural heritage from vandalism and exploitation.¹⁶⁰ Conventions such as the United Nations Law of the Sea Convention¹⁶¹ (UNCLOS) and the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001¹⁶² (UCH Convention) and its set of annexed rules¹⁶³ have strengthened the view that when dealing with shipwrecks, particularly historical shipwrecks, its economic value should be superseded by other values as underwater cultural heritage. The values that the UCH Convention seeks to protect, for example, are outlined in the preamble which provides for ‘the importance of underwater cultural heritage as an integral part of the cultural heritage of humanity and a particularly important element in the history of peoples, nations, and their relations with each other concerning their common heritage.’¹⁶⁴ This chapter will look at the development of cultural heritage law protecting historical shipwrecks and how that affects the traditional application of salvage law and the law of finds, as well as the role of sovereign immunity.

5(i) - United Nations Law of the Sea Convention (UNCLOS)

The regime under UNCLOS provides for the protection of underwater cultural heritage in two ways in accordance with two main provisions; Articles 149 and 303.

Article 303(1) provides for a general obligation of protection and cooperation which applies to all archaeological and historical objects, wherever they are located at sea providing that ‘States have a duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.’

¹⁶⁰ Sarah Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, International Journal of Cultural Property (2007)

¹⁶¹ United Nations Convention on the Law of the Sea 1982 (Montego Bay, 10 December 1982)

¹⁶² UNESCO Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November, 2001, ILM, vol. 41 (2002))

¹⁶³ The Rules Concerning Activities Directed at Underwater Cultural Heritage, available at <http://www.unesco.org/new/en/culture/themes/underwater-cultural-heritage/unesco-manual-for-activities-directed-at-underwater-cultural-heritage/unesco-manual/rules/>, last accessed 06/02/2014

¹⁶⁴ UNESCO Convention on the Protection of the Underwater Cultural Heritage, Preamble, para. 1.

As a result of this provision, States cannot knowingly destroy or allow the destruction of objects forming part of the underwater cultural heritage. Additionally, States cannot persistently disregard requests by another State to negotiate forms of cooperation aiming at the protection of the underwater cultural heritage.¹⁶⁵

Under Article 303(2), a different regime applies to archaeological and historical objects located within the 24-mile contiguous zone:

‘In order to control traffic in such objects, the coastal State may, in applying article 33 (i.e. the provision concerning the contiguous zone), presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article [i.e. customs, fiscal, immigration or sanitary laws and regulations].’

Although UNCLOS provides for the protection of underwater cultural heritage it has been heavily criticised as being unsatisfactory, insufficient and counterproductive in the protection of cultural heritage. The first criticism of Article 303(2) relates to the fact that the powers coastal States have over the archaeological contiguous zone are irrelevant to the protection of cultural heritage (i.e. powers in relation to customs, fiscal, immigration or sanitary laws and regulations). Secondly, the provision provides the coastal State with the power to prevent and sanction the ‘removal from the sea bed’ of objects of an archaeological and historical nature. If this is interpreted literally it would mean that coastal States have no power against someone who ‘destroys’ the object rather than ‘removing’ it. These issues and complications have been said to arise as a result of UNCLOS wanting to avoid increasing coastal States rights beyond the territorial sea, a concept known as creeping jurisdiction.

Article 303(3) creates a further problem with regards to the protection of cultural heritage. Article 303(3) provides that ‘nothing in this article affects the rights of identifiable owners, the law of salvage and other rules of admiralty, or laws and practices with respect to cultural exchanges.’

This provision means that if there is a conflict between protecting underwater cultural heritage (Article 303(1)) on one side, and the law of salvage and other rules of admiralty, on the other, the latter would prevail (Article 303(3)). This provision, therefore, makes salvage law compatible with the protection of underwater cultural heritage. UNCLOS, however, fails to clarify the meaning of ‘the law of salvage and other rules of admiralty.’ As we have seen in chapter II above, in many countries, such as England and South Africa, salvage law only applies salvage to attempts to save a ship or cargo from imminent marine peril and does not apply salvage of shipwrecks, which are not

¹⁶⁵ Tullio Scovazzi, *The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage* Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 271

considered to be in peril, but instead a total loss. Only a small number of common law jurisdictions, such as the US, have extended the application of the law of salvage to cover shipwrecks. Moreover, also discussed in chapter II, salvage law has been said to be inconsistent with the protection of the cultural heritage of historical shipwrecks. The extent to which UNCLOS affects the application of traditional maritime principles, such as salvage law, to shipwrecks is therefore unclear and requires clarification.

Article 149 UNCLOS deals with the underwater cultural heritage that is found on the seabed and ocean floor beyond the 200-mile limit of national jurisdiction (continental shelf) by providing that:

‘All 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.’

This provision gives preferential rights to the State of cultural origin, the State of historical and archaeological origin and the State or country of origin, whereas there seems to be little or no rights given to private interests. Although Article 149 gives cultural heritage priority over private rights, it is very vague and does not set out clearly the content of such rights nor how the rights should be harmonised with the concept of ‘benefit of mankind as a whole’.¹⁶⁶

5(i)(a) - Nuestra Senora de las Mercedes Case

We have discussed this case various times throughout this dissertation therefore it is unnecessary to recite the facts in great detail. As discussed, Odyssey Marine Exploration Inc. discovered the shipwreck of a Spanish frigate, the *Nuestra Senora de las Mercedes*, which was sunk by a British fleet in 1804 in international waters off the coast of Cadiz, Spain. Odyssey took salvaged items to the US to have the wreck symbolically present so that it could be arrested, and Odyssey subsequently claimed either ownership or a salvage award for its services. The Court of Appeals rules that they did not have jurisdiction over the matter due to Spain's sovereign immunity as the flag-State of the vessel and ordered that Odyssey hand over the approximate 500 000 silver and gold coins to the Spanish government.

As a result of the US courts dismissing the claim due to sovereign immunity, the claims made by Peru as the country of cultural origin were not examined. Peru had requested that the District Court address the competing interests of both countries before deciding on matters of

¹⁶⁶ Tullio Scovazzi, ‘The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 271

sovereign immunity. If the court had done so, the proceedings may have been decided in a different way. The dispute would not have been one between salvors and a sovereign State, but instead it would have been one between two sovereign States asserting preferential rights over recovered underwater cultural heritage.¹⁶⁷ This case seems like exactly the situation that Article 149 UNCLOS envisages, providing that ‘particular regard be 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.’

Looking at the facts, Peru is arguably more entitled from a cultural heritage perspective than Spain. The ship carried gold coins that originated in the present territory of Peru arguably making Peru closer to being the State of origin, the State of cultural origin and the State of historical and archaeological origin, than Spain. Moreover, the cargo never even reached the shores of Spain. One of the issues, however, is that at the time of sinking, Peru was part of the Spanish Empire and was not a sovereign State. This raises the interesting question as to whether Spain should really be able to assert ownership over property that was only Spanish property in the first place through the exercise of colonialism. It may also be argued that the interests of a sovereign State should not outweigh the importance of the protection of underwater cultural heritage.

The application of Article 149 UNCLOS was, however, challenged on two grounds, namely, that, Peru is not a party to UNCLOS, and, secondly, that the salvaged items were found in the EEZ of Portugal (which is not covered by Article 149 UNCLOS). This was despite an affidavit by John Norton Moore,¹⁶⁸ presented on behalf of Peru, explaining why the District Court should apply Article 149 to the case. It was argued that ‘Article 149 has a significance that goes beyond the legal zoning provided by UNCLOS, since it is its only provision specifying the preferential rights of States to underwater cultural heritage.’¹⁶⁹ During the negotiations for UNCLOS, the United States had wanted to include in the General Provisions section the following:

‘... all States have a duty to protect objects of an archaeological and historical nature found in the marine environment. Particular regard shall be given to the State of origin, or the State of cultural origin, or the State of historical and archaeological origin of any objects of an archaeological and historical nature found in the marine environment in the case of sale or any other disposal, resulting in the removal of such objects from a State which has possession of such objects.’¹⁷⁰

Moore recalled this to argue that Article 149 should determine the preferential rights of sovereign

¹⁶⁷ Nicola Ferri, ‘*The Right to Recovered Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 11, page 261

¹⁶⁸ Affidavit of Norton Moore available at <http://www.lawyerbird.com/misc/Odyssey/AffidavitMoore.pdf>, last accessed on 06/02/2014

¹⁶⁹ Nicola Ferri, ‘*The Right to Recovered Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 11, page 261

¹⁷⁰ Nicola Ferri, ‘*The Right to Recovered Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 11, page 261

states to underwater cultural heritage beyond the zoning limitations.

Although it is clear that Peru would have better chances than Spain of being identified as the State of cultural origin, the US court dismissed Peru's claim on the basis that Peru is not a party to UNCLOS. The case was simply decided on the basis of sovereign immunity based on a report and recommendation that explained why the issue of sovereign immunity was relevant in the case.

The fact is that it is clear that the cargo form part of cultural and historical origin of the region of Peru and due to the fact that Peru had not ratified UNCLOS and the fact that the cargo was located within the EEZ of Portugal, Article 149 was not applied.

This case highlights the problems with UNCLOS and its ability to protect underwater cultural heritage, particularly in relation to claims made by flag-States. In addition to the problems addressed it is difficult to say with certainty the extent that UNCLOS affects the balance of power between the different interested parties to a shipwreck. Article 303(4) UNCLOS, however, provides that the provisions are 'without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature', which allows States to pass more detailed conventions on the protection of underwater cultural heritage.

5(ii) - The UCH Convention

The UCH Convention was drafted to 'prevent the destruction of submerged archaeological sites, to regulate cooperation among States... to harmonise international research standards... and the protection of submerged heritage, which includes for instance ancient shipwrecks and sunken ruins, with the protection already accorded to cultural heritage on land.'¹⁷¹ The UCH Convention therefore applies to 'all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years'.¹⁷² The UCH Convention would therefore apply to a shipwreck that has been partially or totally underwater, periodically or continuously, for at least 100 years (hereafter shall be referred to as 'an historic shipwreck').

The UCH Convention has been described as a 'reasonable defence against the results of the contradictory and counterproductive regime of the UNCLOS'.¹⁷³ One of the ways that the UCH Convention has achieved this reputation is by removing the possibility of commercial exploitation of heritage for individual profit and with it the undesirable effects of the law of salvage and finds

¹⁷¹ Accessible on <http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CLT/pdf/UNESCO2001Def.pdf>, last accessed on 10 January 2014

¹⁷² Convention on the Protection of the Underwater Cultural Heritage (Paris, 21 November 2001), ILM, vol. 41

¹⁷³ Tullio Scovazzi, 'The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage' Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 274

for the heritage found on the continental shelf.

5(ii)(a) - Law of Salvage and Law of Finds under UCH Convention

During negotiations most countries agreed that the law of salvage and finds should not apply to underwater cultural heritage. There were, however, a minority of States that were not prepared to accept an absolute abolition of the principles. Article 4 of the UCH Convention therefore provides a compromise:

‘Any activity relating to underwater cultural heritage to which this Convention applies shall not be subject to the law of salvage or law of finds, unless it: (a) is authorised by the competent authorities, and (b) is in full conformity with this Convention, and (c) ensures that any recovery of the underwater cultural heritage achieves its maximum protection.’

In addition to the above, Rule 2 of the Annex to the UCH Convention provides that:

‘... the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.’

The UCH Convention therefore limits the application of the law of salvage and finds, and where it does allow these principles to be applied; it prevents all the undesirable effects of their application by not allowing commercial exploitation. The position of the salvor is therefore greatly weakened.

5(ii)(b) - Jurisdiction under the UCH Convention

The UCH Convention also deals with the issue of jurisdiction. Again, a compromise was made to deal with the concerns of creeping jurisdiction and the balance embodied in the UNCLOS between the rights and obligations of coastal States and other States.¹⁷⁴ The UCH Convention deals with the issue by providing a three-step procedural mechanism involving reporting, consulting and urgent measures.

If the activity or discovery is located in the EEZ or on the continental shelf of another State Party, Article 9(1)(b) provides that the national or the master of the vessel must report such a discovery or activity to them and to all other State Parties.

Article 9(5) deals with consultations and provides that the coastal State is bound to consult all States Parties which have declared their interest in being consulted on how to ensure the effective protection of the underwater cultural heritage in question. It continues to provide that a

¹⁷⁴ Tullio Scovazzi, ‘*The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 274

State Party may make such a declaration of interest ‘based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.’

Article 10(4) deals with urgent measures providing State Parties to take measures in accordance with international law to prevent immediate danger to underwater cultural heritage.

The UCH Convention does not therefore extend State jurisdiction but simply imposes obligations on interested parties, such as coastal States, flag-States and salvors, to report and consult with each other, promoting collaboration. Additionally, State Parties are given the power to take practicable measures to prevent immediate danger to underwater cultural heritage. Involving States in the discovery and coordination of the salvage operations of shipwrecks will perhaps avoid the situation of States being excluded and may promote cases being settled outside of court.

5(ii)(c) - Sovereign Immunity under UCH Convention

The UCH Convention also amends States ability to rely on the international principle of sovereign immunity. State sovereign rights are not safeguarded as fundamental rights under the UCH Convention and are instead only preserved as a means to ensuring effective preservation of the underwater cultural heritage by requiring that State parties comply as far as is reasonable and practicable with the Convention.¹⁷⁵

Therefore, although sovereign immunity still exists for jurisdictional purposes, flag-States are only able to exercise their rights for the purpose of preserving underwater cultural heritage. In practice, however, this may not affect the outcome of cases involving Flag-States claiming sovereign immunity as these claims are usually based on underwater cultural heritage arguments.

5(iii) - The Present Situation

The UCH Convention entered into force in 2009¹⁷⁶ and as of 2011 it had forty-one parties. Although the UCH Convention has made significant changes to the treatment of historical shipwrecks, as a result of its youth we have yet to see any examples of its application. Moreover, there are various examples showing that the Convention has not yet been appreciated by a sufficiently great number of States.¹⁷⁷

For example, in the recent case of *Nuestra Senora de las Mercedes*, little reference to the cultural heritage or any legislation concerning the protection of cultural objects was made, and instead the decision was made to reject jurisdiction based on Spain's right to sovereign immunity.

¹⁷⁵ Article 13 UCH Convention

¹⁷⁶ Article 27 UCH Convention

¹⁷⁷ Tullio Scovazzi, ‘*The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 277

Similarly, in England, the idea of preserving underwater cultural heritage has also not been appreciated as evidenced by an agreement with Odyssey Maritime Exploration in order to rescue the *Sussex* which was an ancient sunken vessel loaded with gold and silver coins located near Gibraltar.¹⁷⁸ England was criticised for entering into such an agreement as it did not take into account existing domestic and international provisions relating to the preservation of the cultural heritage and was largely based on the commercial exploitation of the cargo.¹⁷⁹ In relation to the UCH Convention, it is clear that England did not base the agreement on it at all as it did not appreciate the preference under the for *in situ* preservation; it did not appreciate the fact that commercial exploitation is completely banned by Rule 2 of the Annex to the UCH Convention; and, the agreement did not take into account any interests of private or public persons other than those of England.

In addition to States being suspicious and uncomfortable with the UCH Convention, the United Nations General Assembly until recently has also been reluctant to mention the UCH Convention in its resolutions. Only recently with the Resolution on Oceans and Law of the Sea adopted in 2011 the General Assembly was more open to the application of the UCH Convention. The General Assembly called upon ‘States that have not yet done so to consider becoming parties to that [UCH] Convention’, noting ‘in particular the rules annexed to that Convention, which address the relationship between salvage law and scientific principles of management, conservation and protection of underwater cultural heritage among Parties, their nationals and vessels flying their flag’.¹⁸⁰

5(iv) - Conclusive remarks

UNCLOS and the UCH Convention have therefore increased the importance of considerations of underwater cultural heritage over private and sovereign rights over historical shipwrecks. These Conventions have also created a distinction between a shipwreck under 100 years old and a shipwreck that is over 100 years old, providing only the latter with protection as underwater cultural heritage. These conventions have made progress in creating international uniformity in relation to treatment of shipwrecks; however, such progress cannot be fully appreciated until courts have had the opportunity to apply them.

¹⁷⁸ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 293

¹⁷⁹ Patrizia Vigni, ‘*Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 293

¹⁸⁰ Tullio Scovazzi, ‘*The Merits of the UNESCO Convention on the Protection of the Underwater Cultural Heritage*’ Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 12, page 278

CHAPTER 6

CONCLUSION AND SOLUTION

As this dissertation highlights, the determination of rights to any shipwreck is extremely fact specific. The obstacles that an exploration company, or indeed anyone claiming to have rights, must overcome in order to exercise rights over a shipwreck are by no means easy or indeed clear. In fact, the discrepancies and uncertainties created by the different laws and their application are such, that any company considering a commercial venture to profit or even recover costs from a shipwreck must as part of its business plan to evaluate risk and reward, first carry out a lengthy and complicated legal analysis of the rights that it may acquire, the manner in which it can enforce such rights and also consider possible rights of others which compete with or defeat its own rights. As this dissertation shows, such a legal analysis involves many factors.

An exploration company finding a shipwreck in international waters must first deal with the issue of jurisdiction as international waters are not subject to any one State's jurisdiction and therefore any State control over such wrecks is limited. Generally, by bringing part of the shipwreck within the physical jurisdiction of the court will give the court the constructive possession required to be able to seize jurisdiction on the matter.

Even when jurisdiction is established, the court is then required to determine which law should be applied in relation to rights over the shipwreck. As we have seen there are numerous views on the appropriate rules that should be applied, namely whether the law of salvage and the law of finds should be applied. The key question in relation to these two doctrines of maritime law is whether the original owner is found to have abandoned the shipwreck. This is something which will be very difficult for any exploration company to investigate in order to be able to reach a view and in any event, it is possible that the court entertaining the matter, may well come to a different conclusion either on the facts or in the light of further evidence. Generally, if the shipwreck has been abandoned the law of finds shall be applied resulting in the finder becoming the owner. Whereas if the shipwreck has not been abandoned, the law of salvage may be applied resulting in the salvor being awarded for his efforts.

The question is complicated even further by the involvement of a national or State governments who may claim sovereign rights over shipwrecks and their cargo. Generally, customary and international law recognises that warships and State-owned vessels are entitled to immunity. Whether a shipwreck is subject to sovereign immunity also depends on a variety of factors. There is debate as to whether a 'shipwreck' is a 'ship' for the purposes of sovereign immunity. Secondly, the identity and nationality of the ship and its cargo must be determined to create the link between the ship and the flag-State to form the legal basis for justifying a claim by

the State over such a ship. In addition to both these issues, the question of whether the shipwreck was abandoned must be decided. If abandonment is established the Flag-State it will no longer be protected by sovereign immunity. But generally, courts have been reluctant to find abandonment of warships or State-owned vessels unless there is very clear evidence of express abandonment.

The above principles of law applied to shipwreck do not take into account the importance of its potential underwater cultural heritage. Certain national regimes and international conventions, such as UNCLOS and the UCH Convention have strengthened the principle that when dealing with historical shipwrecks, their economic value should be superseded by other values, such as underwater cultural heritage. Although the UCH Convention recognises the priority of the interest of humankind in preserving underwater cultural heritage as a common good, the law of the sea is still anchored to the traditional sharing of powers and rights between sovereign States and private owners.¹⁸¹

Despite the inconsistency in approaches and lack of appreciation for underwater cultural heritage in relation to historical shipwrecks, it seems clear that generally it is universally agreed that historical shipwrecks form part of the underwater cultural heritage, which cannot be considered as ordinary properties or resources, which must be preserved for the purpose of the preservation of history and traditions of humankind as a whole.¹⁸² If one is to agree that historical shipwrecks are special in nature, then it follows that applying the law of salvage, the law of finds and recognising the absolute rights of flag-States' over sunken vessels through sovereign immunity, is inconsistent with the promotion of underwater cultural heritage on the scales of priority considerations. The law must take into account other States' claims, such as the State of cultural origin, and must also take into account the private claims of legitimate heirs if it is possible to demonstrate a link between private persons and the legitimate owners of the objects found on the historic shipwrecks. Moreover, although these private rights should be protected, the public access to these properties should not be denied as these historical objects are important as part of cultural heritage and the evolution of human kind.¹⁸³

The *status quo* is clearly inadequate for all interested parties providing no clarity, no certainty, no consistency and no international uniformity as to how cases involving shipwrecks will be dealt with. Any solution to clarify the determination of rights to shipwrecks must be a balancing act that take into account the different interests of all the interested parties and provide a clear set of rules which properly and fairly deal with these interests giving due priority to those interests from a

¹⁸¹ Patrizia Vigni, 'Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights' Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 297

¹⁸² Patrizia Vigni, 'Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights' Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 297

¹⁸³ Patrizia Vigni, 'Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights' Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 298

private sentimental, economic, political, cultural and legal perspective. In theory, the solution to the issue is twofold; (1) the agreement of pre-salvage contracts between salvors and interested States; and (2) the ratification of an international convention dealing with private rights, sovereign rights of flag-States and underwater cultural heritage.

The first practical solution to solve the issues relating to rights over shipwrecks and historical shipwrecks would be to encourage salvors to enter into pre-salvage contractual relationships with flag-States. This has already been common practice making the existing law subject to any such contractual arrangement that may be entered into by the parties. This would avoid many of the problems most often encountered. Under this approach the salvors would approach the flag-State and agree a salvage award prior to the commencement of any salvage operations and the incurring of costs. This would provide the salvor with certainty in the form of a legally binding contract enforceable in the courts. Having a pre-salvage contractual relationship with the flag-State would also avoid the issue of jurisdiction as the contract would contain a jurisdiction clause and a submission to the law of a jurisdiction. As matters presently stand, each shipwreck scenario is extremely fact specific and entering into pre-salvage contractual relationships would also enable the parties to tailor the contract to the particular shipwreck balancing risk and reward, providing incentives and achieving the objectives of the parties in an agreed and orderly manner that permits the work to be undertaken in the most efficient manner.

Although, a pre-salvage contractual relationship has obvious advantages as a solution to come of the obstacles, it also has its complications. Approaching a flag-State, or indeed any interested State, regarding a salvage operation of its State owned vessel or a vessel within their territorial waters is likely to be a long drawn out process. For example, when Odyssey entered into an agreement with the United Kingdom to salvage the *Sussex* which involved entering into parts of Spanish territorial waters the amount of correspondence and authorisations required was excessive spanning over years.¹⁸⁴ In addition to the significant passing of time, a treasure hunting company cannot be certain that the State would be willing to contract. For example, Odyssey, in discovering the *Nuestra Senora de las Mercedes* attempted to contract with the Spanish Government. Having approached the Spanish Government regarding the possibility of entering a contractual relationship regarding the salvage of the shipwreck, Spain rejected the proposal stating that Odyssey was not authorised to salvage the Spanish shipwreck, *Nuestra Senora de las Mercedes*.¹⁸⁵ Any process requiring the reaching of an agreement with a Government is likely to take time and much expense, whereas the exigencies of modern business and commercial life, require a simpler and quicker

¹⁸⁴Odyssey Marine Exploration, Odyssey Spain Communications available at <http://www.shipwreck.net/pdf/OdysseySpainCommunications.pdf>, last accessed on 06/02/2014

¹⁸⁵Odyssey Marine Exploration, Odyssey Spain Communications available at <http://www.shipwreck.net/pdf/OdysseySpainCommunications.pdf>, last accessed on 06/02/2014

solution that allows the business to be undertaken.. This is also complicated by the fact that Government change periodically with elections. It is also ad hoc, in the sense that depending on the facts and location of the vessel, a salvor will need to deal with different Governments of different states on each occasion.

Moreover, even when salvors have entered into agreements with flag-States for the salvage of their vessels both parties have been criticised for failing to take account of underwater cultural heritage considerations or respecting the interests of private or public persons. This was the situation in 2002 when the United Kingdom entered into an agreement with Odyssey for the salvage of the *Sussex*.¹⁸⁶

For these reasons, a preferred solution, would be to create an international convention that provides a clear regime that with a balanced approach also takes into account the interests of all interested parties, the salvors on the one part as the company investing the money, undertaking the work and taking the risks and, the flag-States, the States of cultural origin, and the legitimate owners or heirs to the legitimate owners on the other who will also benefit from the salvors efforts. The key to a successful international convention would be to provide a sufficient reasonable incentive for each interested party.

The salvors, such as companies like Odyssey, are realistically the only type of entities with the funds, knowledge, expertise and, most importantly, the technology to be able to salvage shipwrecks in international waters. As we have seen from expeditions such as the *Titanic*, *Nuestra Señora de las Mercedes*, *Juno and La Galga* and the *Lusitania* salvage operations are often very expensive. Salvors will therefore only be willing to carry out such salvage operations if they are guaranteed adequate reward for their efforts. Although it has been argued that the law of salvage has undesirable effects on wrecks, such as promoting careless and hasty salvage efforts by salvors, the reality is that without treasure-hunting ventures the majority of the shipwrecks that have been salvaged would not have been in the first place. Allowing salvage awards for the salvage of shipwrecks would therefore be a very important part of any international convention. It is also likely that in view of the difficulties experienced by salvors which substantially increase their risk and costs, salvors would support an international convention which brings clarity and certainty even if this were at the expense of having to give up part of the larger share of the wreck that sometimes they are presently awarded in cases when they are successful.

It is understandable that the flag-States, conversely, would be unwilling to allow salvors to explore and exploit shipwrecks that may contain valuable cargo or sensitive information to which the flag-State would feel entitled. The difficulties with attracting States to such conventions has

¹⁸⁶ Patrizia Vigni, 'Historic Shipwrecks and the Limits of the Flag-State Exclusive Rights' Cultural Heritage, Cultural Rights, Cultural Diversity New Developments in International Law (2012), CH 13, page 293

been evidenced recently by the UCH Convention where States have been reluctant to give up their sovereign rights over their State-owned vessels and are unwilling to allow for increased jurisdictional control by coastal States over international waters. In reality, in most cases, flag-States do not give salvage high levels or priority and do not have the expertise, knowledge or capital available to carry out salvage operations and are reliant on commercial operations of salvors, such as Odyssey, to carry out the operations on their behalf. Without the salvors efforts, flag-States would not even be in the position to be able to claim sovereign immunity in the first place. The solution also to provide States with an incentive to signing up to an international convention would include certainty, involvement and/or control in the salvage operation, a say in the outcome coupled with a financial incentive. Perhaps this solution could involve the requirement that once the nationality or identity of the shipwreck is determined, the flag-State be given exclusive jurisdiction over the matter, subject to applying the set of rules contained in the international convention. This would provide the flag-State with the control and involvement in the salvage operation of their shipwreck, provide the flag-State with exclusive jurisdiction, allow delicate, secret or sensitive matters to be addressed in an orderly and proper forum and, also ensure that the interests of other parties are taken into account through the mandatory application of the international convention.

The interests of those claiming cultural heritage have involved flag-States, States of cultural origin and heirs to the legitimate owners of shipwrecks and cargoes. As discussed, UNCLOS and the UCH Convention have increased the importance of considerations of underwater cultural heritage over private and sovereign rights over historical shipwrecks. The full effects of the UCH Convention, however, are yet to be seen due to the fact that it only came into force in the year 2009. A good starting point for the proposed convention would be to provide a clear definition of a wreck, clearly distinguishing between a shipwreck and an historical shipwreck by reference to age, so that only historical shipwrecks are accorded with the protection as underwater cultural heritage. Then, similarly to the UCH Convention, provide exceptions allowing salvors to be awarded for their efforts ensuring that underwater cultural heritage is protected. In addition, compromise ensuring the protection of underwater cultural heritage, while providing financial incentives to salvors, would be to impose conditions on salvors to set up exhibitions or museums and enable them to make profit. This would provide the underwater cultural heritage with the protection it requires, allow the public to appreciate such heritage while concurrently providing income for the salvors without any the loss of such heritage to commercial private sales.

An international convention would therefore be a welcome solution providing an element of clarity and fairness to the situation of shipwrecks found in international waters. However, like all international conventions, it is very difficult to satisfy all interested parties needs. The development of such an international treaty would ultimately be subject to the political will of all States involved.

With advances in underwater technology and the ability to venture into deeper and more challenging waters, it can be expected that commercial exploitation of shipwrecks will become much more frequent. Moreover, with a greater sense of public interest and appreciation for the protection of cultural heritage, the legal disputes for rights in shipwreck will also become more frequent. For this reason, it is very important to establish a reasonable and clear set of applicable rules to govern the activity of wider application to bring certainty, clarity and purpose to an important activity in a manner that address and provides for the interest of all parties involved throughout the process.

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