

DISSERTATION

COASTAL STATE CONTROL OVER HISTORIC WRECKS SITUATED ON THE  
CONTINENTAL SHELF AS DEFINED IN ARTICLE 76 OF THE LAW OF THE  
SEA CONVENTION 1982

In partial fulfilment of the requirements for the degree of  
Master of Laws

by

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## SUMMARY

In this minor dissertation the coastal states rights, jurisdiction and control in respect of wrecks, specifically historic wrecks, situated on the continental shelf are examined in relation to the current state of the law applicable to this area, both customary and conventional. Discussion and argument are developed under the following headings.

### THE TWILIGHT ZONE

This part constitutes the introduction to the subject matter and includes a brief description of the evolution of International Customary Law relating to the continental shelf which resulted in the 1982 Law of the Sea Convention definition which specified rights to natural resources.

### BOUNDARIES OF THE CONTINENTAL SHELF

Area is clarified and distances of outer limit from baseline (200 nautical miles extending to a possible 350 nautical miles under certain circumstances) is discussed.

Necessity for coastal state to inform the Commission on the limits of the Continental Shelf of the limits of its continental shelf beyond 200 nautical miles is noted.

Article 303(2) relating to the contiguous zone and historical objects is referred to and the effects of its provisions on the area under examination is discussed. The starting point of the area is 24 nautical miles from the baseline as explained.

Mention is also made of the overlapping of the exclusive economic zone with the sea bed and subsoil of the continental shelf and attention is drawn to the provisions of art 59 relating to the settlement of disputes over non attributed rights in the exclusive economic zone.

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## HISTORIC WRECKS

The concept of historic wrecks and the desirability of the protection of historical artefacts from such wrecks is considered.

It is noted that today more deep water wrecks are being worked on due to the development of modern technology.

'Old' and 'New' historic wrecks are discussed and the historic wreck legislation of various states considered.

Australia's extension of its jurisdiction to wrecks on its continental shelf and the preservation of modern artefacts of interest are mentioned.

## OWNERSHIP OF WRECKS

This portion is discussed under the headings National Wrecks and Foreign Wrecks. *Res nullius* wrecks, though mentioned, are examined more closely later.

The jurisdiction of states over their own wrecks is considered as well as the loss jurisdiction by the Flag state in certain circumstances.

Under the heading, Foreign Owned Wrecks, ownership by the original owner and ownership by a subsequent owner following abandonment (though *Res nullius* are more fully treated later) are discussed.

Both the *lex rei sitae* and the concept of the personal law of an owner are referred to.

The importance of the protection of owners rights is underlined.

The possible control of foreign owned wrecks by a coastal state when they are situated on its continental shelf is discussed with reference to certain provisions contained in articles other than art 77 in Part VI of LOSC.

The articles are examined briefly in numerical order after which those provisions which might affect wrecks and the coastal states rights in relation to them are discussed. The Intervention Convention is referred to.

Article 77 provisions are examined in conjunction with art 5(1) and 5(8) of CSC in an attempt to clarify the conventional law which now obtains in relation to the coastal states rights on the continental shelf.

(iii)

The meaning of the word research contained in the provisions of art 5(8) of CSC is discussed in connection with the finding and removing of antiquities from the continental shelf

Observations are then made regarding owned wrecks on the continental shelf, foreign and national wrecks, and this is followed up by a brief summing up of the coastal states rights in regard to these

#### RES NULLIUS WRECKS

The question of the acquisition of ownership by occupation is discussed. South African law relating to the retention of the ownership of an occupied object which is temporarily out of the physical control of the new owner is considered with reference to relevant case law.

A break in the link between an abandoned wreck and the state of its previous owner is noted as a necessary condition for loss of ownership.

The *locus standi* of a foreign state and the jurisdiction of the coastal state in cases of abandonment are referred to.

#### WRECKS IN THE EXCLUSIVE ECONOMIC ZONE

The provision of art 59 are again touched on in connection with activities in respect of wrecks, this seen as a non-regulated use of the exclusive economic zone.

The resolution of disputes on the basis of equity is referred to as well as the interests to be considered.

#### OWNERSHIP OF ARTEFACTS ON A WRECK SITE

Ownership of artefacts is discussed first under the sub heading Continental Shelf, and subsequently in conjunction with the provisions of art 59 under the sub heading Exclusive Economic Zone.

Attention is drawn to the similarity between the position of wrecks and of artefacts on the continental shelf whilst noting that the consequences of rules relating to ownership of artefacts may be more complicated in cases of multiple claims.

The uncontrolled exploitation of wrecks and possible loss of valuable artefacts due to multiple claim activity is referred to.

(iv)

Artefacts from wrecks are then discussed under the same headings as were wrecks above.

The 'linking' principle is discussed in relation to owned artefacts and categories of owners are reviewed.

Foreign and nationally owned artefacts are considered and the position regarding possible heirs or assignees in cases of long ignored goods is discussed.

The probability of the problem diminishing with the increasing age of the wreck is mentioned as is the possibility of state rather than private ownership in these cases.

The dangers of applying the rule relating to the occupation of a *res nullius* in the case of ancient artefacts and the mention of a Greek proposal to the Council of Europe in this regard concludes this sub section.

As regards the exclusive economic zone the possible application of art 59 in cases regarding foreign owned artefacts in this zone is discussed.

Finally the position of nationally owned and *res nullius* artefacts is touched upon.

#### SUMMARY OF JURISDICTION

The law gleaned from and difficulties encountered in the provisions of both the conventional and customary law discussed above are summarised.

It is concluded that the coastal states control over historic wrecks on the continental shelf is effectively no greater than that of other states by virtue of the mere accident of its proximity to the site of the wreck.

#### THE VULNERABILITY OF THE HISTORIC WRECK

This problem is underlined by referring to the lack of legislative powers enjoyed by any particular state.

The increase of awareness generally of the significance and value of historic wrecks and artefacts is noted.

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### PROTECTING THE HISTORIC WRECK

The extension of coastal state jurisdiction to objects on the continental shelf is discussed.

Australian and United States legislation are mentioned together with Greek suggestions made to UNCLOS III in 1979 regarding the protection of historical objects.

The settlement of disputes between parties with interests in the same wreck is discussed and the possible development of international law through bi-lateral and multi-lateral treaties considered.

Netherlands - Australia Treaty of 1972 concerning VOC ships is referred to.

### SINGLE STATE JURISDICTION OVER HISTORIC WRECKS

Whilst acknowledging the coastal states lack of legislative and enforcement authority over foreign owned wrecks on its continental shelf it is suggested that the advantages of a single state wreck regime are undeniable.

### WHICH STATE ?

Options appear to be restricted to the coastal state. These are discussed under the two relevant sub headings.

#### Coastal State

Possible resistance by other states to coastal state jurisdiction and land grabbing accusations are discussed.

It is suggested that the High Seas freedoms and traditional rights of other states will not be unduly diminished by coastal state jurisdiction over wrecks on the continental shelf. Only an area of sea bed is affected and the operations of a salvage ship on the surface should not inconvenience other sea users.

The delimitation of a wreck site is considered.

Proximity as a persuasive factor in a coastal states claim to jurisdiction over continental shelf wrecks is considered.

Arguments in favour of extending coastal states rights of exploitation of natural resources to wrecks are advanced.

Disadvantages are also pointed out. Not all coastal states enjoy the same standards of technology or facilities for

surveying, recovering and preserving historic wrecks and artefacts

It is also suggested that many coastal states might not be interested in the history of wrecks on their continental shelves and would not relate to it in any way. This could well be the attitude of a newly independent state which might perceive the historic wrecks significance as being related to the wreck state only if that wreck state was once the colonizing power.

That this is not always the case, however, is born out by Kenya's declaration of monument status for the San Antonis wreck - discussed.

It is suggested that coastal states which are able and willing to undertake reclamation work in respect of historic wrecks be permitted to exercise the necessary legislative and enforcement powers to achieve this.

Difficulties over the expropriation of wrecks and the payment of compensation are discussed.

Nationally owned and res nullius wrecks are mentioned.

Possible evolution of international customary law following large scale claims of jurisdiction over continental shelf wrecks by coastal states is discussed. Suggested that though this might be viewed as 'creeping jurisdiction', the alternative might be uncontrolled exploitation and damage to valuable historical artefacts.

#### Wreck State Jurisdiction

The jurisdiction of the wreck state and its total control over a wreck is discussed.

It is suggested that the absence of wreck state activity at the wreck site might diminish the credibility of the states claims to jurisdiction over such wreck.

It is suggested that the resolution of conflicting claim disputes should be by agreement between the wreck state and the costal state.

#### CONCLUSIONS

Finally, it is suggested that coastal state control of wrecks on the continental shelf would generally speaking be

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the best practical solution to the problems arising out of the present situation. This would be dependent on the substantial absence of protests from states following increased coastal state claims to jurisdiction leading to the evolution of international customary law.

A system of time criterion tempered by flexibility is advocated for use in declaring a wreck historic.

It is suggested that, should other states prevent the evolution of international customary law and the consequent recognition of coastal state jurisdiction over wrecks on the continental shelf, treaty law might help though it is suggested this might be slower to take effect and be more piecemeal.

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LIST OF ABBREVIATIONS

- Akehurst - Akehurst M A Modern Introduction to International Law 5th ed 1985
- Caflisch - Caflisch L 'Submarine Antiquities and the International Law of the Sea' 1982 13 NYIL
- Churchill & Lowe - Churchill RR & Lowe AV The Law of the Sea 2ed (1988)
- CSC Convention on the Continental Shelf 1958
- Du Plessis & Kok - Du Plessis JR & Kok L An Elementary Introduction to the Study of South African Law 2nd ed 1989
- EEZ Exclusive Economic Zone
- Forsyth - Forsyth CF Private International Law 2nd ed 1990
- ILC International Law Commission
- LOSC Law of the Sea Convention 1982
- NYIL Netherlands Year Book of International Law
- Simpson - Simpson C Lusitania 1972
- TSC Convention on the Territorial Seas and Contiguous Zone 1958
- UK United Kingdom
- UN United Nations
- US United States
- Van Meurs - Van Meurs LH Legal Aspects of Marine Archaeological Research Special Publication Number 1 [1985], Institute of Marine Law, University of Cape Town.
- VOC Vereenigde Geoctroyeerde Oost Indische Compagnie.

COASTAL STATE CONTROL OVER HISTORIC WRECK SITUATED ON THE  
CONTINENTAL SHELF AS DEFINED IN ARTICLE 76 LOSC

CHAPTER I

INTRODUCTION

1.1 A twilight zone in the context of wrecks

The definition of the continental shelf in art 76 LOSC 1982 includes the same sea bed area delimited as continental shelf under the provisions of CSC<sup>1</sup> with the addition of new provisions which permit the extension of the outer limits of the shelf to a maximum distance of 350 nautical miles from the baseline under certain circumstances.

The idea that a coastal state should be permitted to exercise certain clearly defined rights over the sea bed and subsoil forming the natural prolongation of its land territory to the outer edge of the continental margin became generally accepted during the 1950's and is regarded today as correctly reflecting international customary law.<sup>2</sup> The position today therefore is that an area known as the continental shelf forms an indisputable adjunct to a coastal state's land territory over which that state may exercise certain sovereign rights for clearly defined purposes which will be considered below.

The more detailed provisions relating to the definition of this area in LOSC simply help to clarify the precise extent of the zone at any point and will hopefully help to resolve any disputes, should they occur.

The acceptance of the idea of a continental shelf embodied in the provisions of art 1 of CSC, the statement by the International Court of Justice in the North Sea Continental Shelf cases in 1969 that the definition set out in that article represented customary law<sup>3</sup> and its later refinement in LOSC art 76, is a good example of the evolution of customary law as a result of an increasing number of states making similar claims to a specific right. In 1945 the US claimed jurisdiction and control over the continental shelf contiguous to its coasts in respect of natural resources.<sup>4</sup> By the time of the CSC some twenty states had made similar claims.<sup>5</sup>

The concepts of a continental shelf and of the coastal state having sovereign rights to explore it and exploit its

- 
- 1 Article 2.
  - 2 Churchill & Lowe 111.
  - 3 Churchill & Lowe 113.
  - 4 Akehurst 278.
  - 5 Churchill & Lowe 111.

natural resources have always been linked<sup>6</sup>, the rights of the coastal state being reflected in the provisions of art 77 LOSC. These rights however relate only to 'mineral and other non-living resources of the sea-bed and sub-soil and certain living organisms belonging to sedentary species'.<sup>7</sup> No mention is made of rights over anything else.

Thus the continental shelf can be seen as a grey area in international law, lying between the generally unregulated High Seas<sup>8</sup> and the considerable number of coastal state rights relating to the territorial sea and contiguous zone as well as the provisions governing the coastal states activities in the EEZ and its duties therein. It is therefore the extent of the coastal states control over historic wrecks in this 'twilight zone' that will be discussed below. The possibility of future developments in the law relating to this control will also be considered.

## 1.2 Boundaries of the continental shelf

Article 76(1) LOSC defines the continental shelf.

In essence it comprises the sea bed and subsoil of the submarine extension of a coastal states land area extending from the seaward limit of its territorial sea to the outer edge of the continental margin or to a distance of 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.

It will be seen therefore that the continental shelf will extend for a distance of at least 200 nautical miles from the coast and may, under certain circumstances extend even further.

Article 76(3) requires the coastal state to establish the outer edge of the continental margin wherever it extends beyond 200 nautical miles from the baseline. The continental margin includes the sea bed and subsoil of the shelf, the slope and the rise of the submerged prolongation of the land mass of the coastal state but does not include the deep ocean floor.

Paragraphs 4 to 6 of art 76 detail certain provisions relating to the establishing of the outer edge of a continental margin which extends beyond 200 nautical miles from the baseline.

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6 Ibid.

7 LOSC art 77(4).

8 Aside from contentious provisions in LOSC Part XI relating to the exploitation of the international sea bed area.

Article 76(8) requires the coastal state to inform the Commission on the Limits of the Continental Shelf (set up under Annexure 11) should the limits of its continental shelf exceed 200 nautical miles.<sup>7</sup> The Commission will then make whatever recommendations it considers fit to the coastal state relating to the outer limits, which limits will be final and binding.

Article 76(9) requires the coastal state to deposit with the Secretary General of the United Nations charts and relevant information including geodetic data permanently describing the outer limits of its continental shelf. This will be publicised by the Secretary General. The extent and exact delimitation of continental shelf areas adjacent to states party to LOSC should therefore be easily ascertainable.<sup>10</sup> Should a historic wreck be lying on the continental shelf in an area subject to a dispute regarding delimitation between opposite or adjacent states, the dispute would have to be resolved before it could be clearly established on whose portion of the continental shelf the wreck was situated.

A further point to note is the provisions in art 303(1) LOSC which read 'states have a duty to protect objects of an archaeological and historic nature found at sea and shall co-operate for this purpose'<sup>11</sup> (discussed below). Paragraph 2 then refers to the application of art 33 which relates to the contiguous zone and permits a coastal state to exercise control over the traffic in objects of an archaeological or historical nature removed without its permission from the contiguous zone. This is done by the exercise of a legal fiction whereby the coastal state may presume that their removal from the sea bed in the contiguous zone without its

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9 It would seem that, at least at this stage of the development of the law relating to the continental shelf, the requirement for coastal states to work through the Commission on the Limits of the Continental Shelf does not form part of international customary law. Churchill & Lowe 115. Churchill & Lowe at 113 note that in the North Sea Continental Shelf cases the International Court said that the definition of the continental shelf contained in art 1 of CSC represented customary law. It is suggested that due to the ongoing evolution of the law, in particular the provisions of art 7(6) LOSC, this may no longer be the case.

10 Again the procedure is probably not international customary law, see n4.

11 This duty is put in general terms and it is submitted that the vagueness of its wording relating to its area of application (unlike para 2) indicates nothing more than an acknowledgement of the existence of historical objects at sea and enjoins states not to harm them. The specific coastal states rights set out in paragraph 2 relating to the contiguous zone are quite clear.

approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.<sup>12</sup>

Article 33 permits the establishment of a zone which may extend no further seaward than 24 nautical miles from the baseline from which the breadth of the territorial sea is measured and which will be contiguous to such territorial sea. The purpose of the creation of this zone is to provide a 'buffer strip' adjoining the coastal states territorial sea in which the state may exercise the control 'necessary to prevent infringement of its customs, fiscal immigration or sanitary laws and regulations within its territory or territorial sea',<sup>13</sup> and to punish infringement of the above laws and regulations committed within its territory or territorial sea.<sup>14</sup>

It will be seen, therefore, that the coastal state, by virtue of the provisions of art 303(2) enjoys a measure of control over objects of a historical nature (which must surely include historical wrecks) in area covering the first 12 nautical miles of its continental shelf, which does not extend to the remaining portion of the shelf.

In the unlikely but conceivable event of an historic wreck site lying athwart the seaward limit of a coastal states contiguous zone a condition would arise in which the site would be divided into two portions, the artefacts from the wreck in the one portion being subject to a different system of control regarding their removal to those in the other portion even though both would be intrinsically linked and would both lie together on the same states continental shelf.

The anomaly of this, admittedly unlikely situation would be avoided by the existence of a generally accepted regime of jurisdiction and control over historic wrecks and artefacts on the whole of the continental shelf. At this stage it is proposed therefore only to consider the protection and control of historic wrecks on the continental shelf beyond the 24 nautical mile zone.

A point which will be discussed more fully when coastal state rights on the continental shelf are examined is the confusion which might arise as a result of the provisions in LOSC relating to coastal states rights in the EEZ, whose sea bed and subsoil also forms the continental shelf up to the 200 nautical mile limit. Conflicts arising out of disputes concerning rights and jurisdiction in the EEZ are dealt with by art 59 of the Convention.

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12 LOSC art 33.

13 See *ibid* paragraph 1(a).

14 See *ibid* paragraph 1(b).

This article states that in cases where the convention does not attribute rights or jurisdiction to the coastal state or to other states within the EEZ, and a conflict arises between the interests of the coastal states and any other state or states, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

No such provision exists in LOSC with regard to the continental shelf and the provisions of art. 59 will in any event not apply to any portion of the continental shelf extending beyond 200 nautical miles from the baseline.<sup>15</sup>

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15 Article 59 being confined to the area of the EEZ.

## CHAPTER II

### HISTORIC WRECKS

#### 2.1 History and concept

Having clarified the area under discussion and noted its situation in relation to the other maritime zones we shall now consider historic wrecks and their status in relation to the coastal state before addressing the question of state control over them. The position of artefacts from these wrecks will also be examined.

Wrecks of an earlier era to that of the researcher present him with a capsule of real history which even the written records found in old documents cannot provide. In many cases, though not in all, the wrecks will be linked historically to the coastal state on whose shelf they are found. Preservation of what can be preserved, recovered, studied and possibly exhibited will therefore add to mankind's knowledge of history generally and will possibly be of particular interest to a specific state or group of people.

It is submitted that this approach is to be preferred to that of the simple exploiter of a wreck who may damage matter of historical value whilst attempting to secure something for personal gain or from which to make a profit.<sup>16</sup>

Every shipwreck has a value as a 'closed find'. Each sunken vessel represents a single day in history when the ship foundered. Therefore everything found in the wreck must date from before the date of that wreck. Many objects can then be identified and dated in this context.

With the development of technology deeper water wrecks are becoming increasingly accessible and wreck sites previously of little interest because of their depth are now becoming attractive to both professional and amateur salvors. Good examples of historic wrecks which have links both with the coastal state and are of general interest are those of the Dutch East India Company (Vereenigde Geoctroyeerde Oost-Indische Compagnie or VDC) in South African waters.

Though historians often consider the 15th century as the start of the 'modern' history period it is unlikely that any preserved wrecks will date from that time, though very much older artefacts have of course been discovered, notably in the Mediterranean Sea. There is however no obvious 'cut off' point or date after which wrecks cease to be historic, though a number of states introduce a time criterion into

their legislation relating to historic wrecks. Though the qualifications for a wreck to be classified as historic varies in the legislation of the states mentioned below and though the legislation generally applies only to wrecks in their territorial waters, a general impression does emerge that age is the most usual criterion.<sup>17</sup>

#### Netherlands

The Monument Act of 1961 declared any object made by man to be a monument if it is more than 50 years old and important for its beauty, value to science or its folklore. Provisions are made for its recovery and preservation.<sup>18</sup>

#### Denmark

The Law concerning the Protection of Historic Wreckage dated 31 May 1963 claims state ownership of objects including derelict vessels found in Denmark on the bottom of the sea if they were lost more than 150 years before, unless someone else can prove ownership.<sup>19</sup>

#### Finland

The law protects shipwrecks found in the sea or other body of water if their probable age is 100 years or more. Furthermore, objects found on a wreck or seemingly originating therefrom are held to belong to the state without compensation.<sup>20</sup>

#### France

The French state claims ownership of wrecks of historic, archaeological or artistic interest. No age limit is specified.<sup>21</sup>

#### Norway

Claims ownership of old ships and objects belonging to them if they are more than one hundred years old and if no owner can be found.<sup>22</sup>

#### Sweden

Classifies shipwrecks as 'ancient monuments' if they are at least 100 years old.<sup>23</sup>

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- 17 Van Meurs 1.  
 18 See *ibid* 43.  
 19 Van Meurs 44.  
 20 See *ibid*.  
 21 See *ibid*.  
 22 See *ibid*.  
 23 See *ibid*.

### United Kingdom

The Protection of Wrecks Act (ch 33) was passed in 1973.<sup>24</sup> It applies to historic wrecks on the sea bed within British territorial waters, provided that they are of 'historic, archaeological or artistic importance'. No age qualification is mentioned.<sup>25</sup>

### Greece

The state, in terms of the Law Concerning Antiquities No 535 of 1932 claims ownership of all antiquities on the sea bed of the territorial waters of Greece if;

(a) they date from a period before 1453 (without any exception)

(b) they date from 1453 to 1830 (on advice from the Archaeological Council).<sup>26</sup>

### Australia

The Historic Shipwrecks Act No 190 of 1976<sup>27</sup> enables 'The Minister' to declare any wreck to be a historic wreck and the wreck site to be a 'protected zone' if the wreck appears to be of historic significance.

This provision applies to the continental shelf as well. Australia's continental shelf however is that defined in the CSC and thus not as extensive as that of art 76 LOSC.<sup>28</sup>

As noted, most of the above states apply a time criterion to determine the historical value of a wreck and, with the passage of time, an increasing number of wrecks will fall into this category. The question however, is whether such an arbitrary time limit will not act as a built in hindrance to prevent the state from proclaiming a newer wreck to be historic, if that should be desirable, and thus be unable to afford it the protection that it might urgently require.

The point here is that though a wreck might be the product of a time not far removed from the present and possibly possess little 'old' historical significance, the circumstances of its loss might be significant or remarkable enough to make it, or any artefacts from it worth preserving.

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24 Van Meurs 45.

25 See *ibid.*

26 See *ibid* 46.

27 See *ibid* 52.

28 Van Meurs 52. This refers to the Commonwealth of Australia's Historic Shipwrecks Act 190 of 1976 which does not specify an age qualification for 'historic' wrecks.

It is suggested, for example, that both the *Titanic* and the *Lusitania* were at the time of their sinking two such cases. The precise position of the *Titanic* has of course only recently been discovered on Canada's outer continental shelf by the use of equipment not available until the present day, but it is submitted that this type of disaster, even if only by virtue of its magnitude, should be considered an historic wreck from the time it occurs, and any artefacts recovered from it should be preserved for future generations.

The astonishing development of modern technology makes it impossible to say that any wreck will be inaccessible in the future.

As a great many wrecks have occurred on the continental shelf in the past and may well do so in the future it is surely time that an internationally recognised regime of control and jurisdiction over historic wrecks in this 'twilight zone' should be evolved to protect valuable historical objects from uncontrolled exploitation.

It is of interest to note that the United States passed the RMS *Titanic* Maritime Memorial Act in 1986 which was designed to encourage international efforts to protect the ship as a memorial. The Act authorises the Secretary of State to enter into negotiations with Canada, France and the United Kingdom as the most interested countries, with a view to reaching an agreement on the protection of the wreck from uncontrolled exploitation.

The case of the *Lusitania* is an example of how circumstances surrounding the loss of a ship can justify the wreck being classified 'historic' regardless of the fact that it may be of very recent origin and one worth considering briefly even though the sinking occurred inshore of the part of the continental shelf being discussed.

The torpedoing of the liner by a German submarine on the 7th May 1915 off the coast of what is now the Republic of Ireland with great loss of life is traditionally one of the main reasons for the entry of the United States into the First World War on the Allied side. A large number of American nationals were lost, including Alfred Vanderbilt, and the attack was used to great effect by the pro-ally political lobby in the United States Congress as an argument for an outright declaration of war on Germany, despite German claims that the *Lusitania* had been armed with naval guns and was carrying arms, ammunition and explosives, thereby changing her character from that of an unarmed

merchant vessel to one of a ship-of-war belonging to an enemy state, and thus a legitimate target.<sup>29</sup>

The controversy has never been completely resolved and some mystery still surrounds the events leading up to the sinking, as well as the nature of certain information given by the Admiralty to Lord Mersey, the Wreck Commissioner who conducted the subsequent inquiry prior to the hearing.

A clue might lie in a letter sent after the inquiry by Lord Mersey, to the Prime Minister, Herbert Asquith, in which he wrote 'I must request that henceforth I be excused from administering His Majesty's justice'.<sup>30</sup>

This brief discussion of what might be termed modern historic wrecks illustrates the difficulty in applying a fixed time criterion as the factor determining the declaration of a wreck as historic. Ancient wrecks will be of general international historical significance as a tangible record of man's past endeavours, regardless of where such a wreck is found, whilst a modern wreck might be of historical significance to very few states, possibly only to one, though in this case the significance may be very great.

It is accepted that old wrecks have an intrinsic historic value because of their age which is not enjoyed by modern wrecks which might, however, possess historic significance for other reasons, the question arises; at what point does a 'modern' non-historic wreck become an 'old' one and acquire historic status for reasons of age alone?

As has already been seen, this is generally decided by coastal states in respect of wrecks in their territorial waters though Australia has legislated extra-territorially to include wrecks on its continental shelf. Generally, whether the classification of wrecks is made by reference to a time scale or other criteria (and there is no reason why a combination of both methods should not be used) the principle of recognition and protection of ownership rights and other rights in the wrecks, should they exist, is upheld

29 Simpson C 193. In a diplomatic note to the American Government dated 28 May 1915, Count Bernstorff, the German Ambassador to the US, cited the alleged mounting of naval guns and the carrying of munitions (among other factors) as proof of the transformation of the *Lusitania* from a peaceful merchant vessel into a ship of war. Subsequently, however, Germany accepted full legal liability in a note to the US government in 1916. Schwarzenberger G International Law vol II 1969 424.

30 Simpson 232.

in the states legislation relating to wrecks mentioned above.<sup>31</sup>

This in turn leads to the question of the extension of the coastal states rights of jurisdiction or control over historic wrecks on the continental shelf.

Before this can be discussed, however, the general provisions relating to the ownership of wrecks and artefacts on the continental shelf will have to be examined. Here it will be necessary to consider the situation in regard to unowned or abandoned wrecks, wrecks owned both nationally and by foreign states or persons and owned and unowned artefacts relating to these wrecks.

In addition, art 77 LOSC will be discussed and the conventions' provisions relating to the rights of the coastal state over the continental shelf will be examined, as will various other provisions of the convention which detail particulars of exclusive coastal state rights and activities on the continental shelf in an attempt to relate such provisions to possible coastal state jurisdiction over historic wrecks in this area.

## 2.1 Ownership

### 2.1.1 National wrecks

The question which arises here is what jurisdiction a state possesses over its own wrecks.<sup>32</sup> The difficulty is the change in nature of the vessel from its character of ship to that of wreck which, on sinking, ceases to fly the flag of its flag state or state of registry and which is no longer under the physical control of the crew employed by its owners. It is submitted that this loss of physical control, however, will not necessarily mean that the flag state loses jurisdiction over the wreck, provided that the existing connection or link between the flag state and the wreck continues to exist. It is submitted that if this remains, the flag states jurisdiction remains unimpaired.

Ownership could be the link and this might take the form of ownership by a national of the flag state or even by an owner who is not a national of the flag state, but whose ownership is governed by the laws of the flag state.

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31 See also art 303(3) LOSC.

32 The owner of such a wreck may be the flag state itself, a national of that state a company registered in that state or an individual domiciled in that state.

A good example of this second type of flag state wreck link is that which existed when the *Titanic* sank. The ship was actually owned by JP Morgan's International Mercantile Marine, an American corporation which had in 1902 bought the entire capital stock of the White Star Line, the British shipping company under whose house flag the *Titanic* sailed on her first and last voyage in 1912.

The British law was that, in order to maintain jurisdiction over vessels flying its flag, it was necessary for them to be owned by British nationals and indeed no share in them could be owned by aliens. No master or officer of a British ship could be an alien.

JP Morgan, an American financier was aware, however, that as long as the White Star Line remained nominally British with its headquarters in the UK there was nothing to prevent its shares being bought by an American holding company, the IMM. In theory, therefore, the White Star ships were British registered and were in fact officered by British officers and flew the Red Ensign.<sup>33</sup>

This was the position then in April 1912 when the *Titanic* struck an iceberg off the Grand Banks of Newfoundland and sank. The link between the flag state, the UK and the ship at the time of sinking was one of ownership governed by the laws of the flag state, even though the controlling finance behind the shipping company was American. Jurisdiction over the wreck at the time of the disaster therefore remained British, though it is arguable that this is no longer the case. The UK may have lost jurisdiction over the wreck by having done nothing about it and by not seeking to exercise authority over it from 1912 to the present day.

It may be argued that until recently it was not possible even to ascertain the wrecks exact position, let alone recover any part of it or any artefact from it. By the same token, however, it can also be argued that the flag state has for this very reason accepted that the wreck and its artefacts were irretrievably lost, has abandoned them and has consequently lost jurisdiction over them.

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33 Coleman T The Liners 1976 48.

Most legal systems have rules relating to the loss of ownership of abandoned property<sup>34</sup> and, in the case of a wreck, the system of law which determines this loss will be the law of the flag.<sup>35</sup>

If a wreck is abandoned by its owner for whatever reason it becomes a *res nullius* and the pre existing link between the flag state's legal system and the wreck will no longer exist. Should this occur there will no longer be any flag state jurisdiction to legislate for or to enforce legislation over such wreck. The flag state would then be in the same position as regards the *res nullius* wreck as any other state.

A case in point on loss of ownership due to inaction by the owners over a long period is Pierce vs Bemis.<sup>36</sup> The court held ownership to be lost in the contents of the wreck of a ship (the *Lusitania*) where the owners had done nothing about the property for some 67 years. By analogy this judgement should apply to the wreck itself.

### 2.2.2 Foreign wrecks

The question here is to what extent a coastal state can exercise power over a foreign owned wreck on its continental shelf.

Under the previous heading 'National wrecks' the link between a flag state and the wreck of a vessel which was owned by someone operating under its laws and over which the flag state exercised jurisdiction was discussed. The resultant loss of ownership and jurisdiction over the wreck when the link was broken due to abandonment of the wreck and the consequent change in its status from owned wreck to *res nullius* was noted.

34 Du Plessis JR & Kok L 111. See also Wille G Principles of South African Law 7th ed 1977 74 'An abandoned thing is something which its owner has thrown away or discarded with the intention of relinquishing his ownership; it consequently becomes a *res nullius*.'

35 The law of the flag state would be the law under which the owner operated and thus his decision to relinquish ownership would be governed by this law in view of the 'link' between the state and ship, see Von Glahn G Law Among Nations 3rd ed 1976 347, for discussion of 'genuine link'.

36 1986 1 AER 1011 QBD.

In the case of a foreign wreck (which is someone else's national wreck viewed from a different perspective) the same question relating to ownership arises. It is necessary to establish whether or not the wreck is owned, and if so, by whom.

First the owner at the time of the sinking must be ascertained. Thereafter it must be established whether that owner still in fact owns the wreck or whether it has been abandoned. It will be necessary to determine the law of the flag state on the matter of loss of ownership by abandonment before this can be decided.

If it is found that the original ownership of the wreck has been lost, it then becomes necessary to find out if anyone else has occupied the wreck subsequently and thereby acquired ownership of it, if this is possible.

The question here is one of a choice of law. To determine whether or not a new occupier can acquire ownership of the wreck by occupation it will be necessary to decide which law will apply. Either (a) the law of the place where the object is (the *lex rei sitae*) or (b) the personal law of the occupier could apply.

The law of the place where the thing is found (a) is usually confined to immovables.<sup>37</sup> A wreck is not an immovable no matter how difficult it may be in practice to move it either wholly or in part from the sea bed.<sup>38</sup>

Secondly, the continental shelf is not a part of the coastal state and thus, as conventional and customary law stands at present, the *lex rei sitae* not be applicable here simply because there is no *lex rei sitae*.

As we have seen, Australian law purports to extend to wrecks on its continental shelf but probably this simply means that Australia has applied its law extra-territorially. In any event, Australia's continental shelf is based on the CSC and not on art 76 of LOSC.

It is submitted that the personal law of the occupier (b) is more likely to apply. This could either be the law of his nationality or that of his domicile.<sup>39</sup> He

37 Forsyth 298.

38 Wille (n34) 165 'Immovable things are those which cannot be moved from one place to another without injury to themselves'. Also Van Meurs 40.

39 Forsyth at 296 and 299 writes 'in accordance with the fiction *mobilia sequuntur personam* the movables are considered to be where the owner is. Real rights in

need not therefore necessarily be a national of the state whose laws relating to the acquisition of ownership by occupation will apply.

If therefore the occupier's personal law permits the acquisition of ownership by occupation, then the wreck will be owned by him and the coastal state must respect this right of ownership as it would have had to respect the original flag state ownership.

The provisions of art 303(3) of LOSC which relate to archaeological and historical objects found at sea, read 'nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practises with respect to cultural exchanges'.

Diplomatic protection could be afforded the owner by his national state in the event of his rights of ownership being disregarded.<sup>40</sup>

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such *res* are generally governed by the *lex situs* by which a person's movables are considered to be at his place of domicile, thus the *lex domicilii* will apply. Akehurst at 49 however makes the point that the rules of private international law relating to nationality and domicile are not universally the same. The UK for example has consistently adhered to the domicile rule, while on the continent this is not universally applied. One example given is that of Spanish national domiciled in the UK who obtains an English divorce. This would probably be recognised in most English-speaking countries but very likely not in many continental ones.

40 This would follow naturally as a consequence of the owner being either a national of a state which protects his rights as best it may, or a person domiciled in that state, or a company registered in that state or the state itself.

Van Meurs at 42 discusses the case of '*Die Liefde*' a ship which had belonged to the Netherlands and which had been wrecked near the Shetland Islands. In terms of the 1894 Merchant Shipping Act, every find must be reported to the Receiver of Wreck, if found in British waters. The Receiver will decide as to its disposal. The finder of '*Die Liefde*' approached the Netherlands government directly and was granted rights in the wreck. These rights were now underwritten by a foreign government in the same way as if a Netherland's national had claimed them. The government accepted the Netherlands as successor in-title to the VOC and as such to have the capacity to make over or cede these rights. The rights were granted to the founder on condition that the Netherlands received 25% of anything realised by the sale of salvaged goods. It is

We now return to the original question of whether a coastal state can assume control over a foreign owned wreck on its continental shelf. What sort of control could it exercise and what power, if any, might it have to assume ownership of the wreck against payment of compensation to the owner?

Just as art 76 defines the extent of the continental shelf, so a number of other provisions are contained in other articles in part VI of LOSC which detail more precisely the coastal states rights on the continental shelf, and by implication, define their limits.

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submitted that this arrangement could equally well apply to a modern wreck.

### CHAPTER III

#### COASTAL STATE JURISDICTION ON THE CONTINENTAL SHELF

Article 77(1) contains provisions giving the coastal state sovereign rights for the purposes of exploring the continental shelf and exploiting its natural resources. Paragraph 2 states that these rights are exclusive to the coastal state which does not need to exercise them to retain them and provides further that no one else may undertake these activities without the express consent of the coastal state. No occupation by the coastal state is required to retain these rights.<sup>41</sup>

The natural resources mentioned in paragraph 1 are detailed more fully in paragraph 4 and consist of mineral and other non-living resources of the sea bed and subsoil plus sedentary living organisms.

This paragraph, together with paragraph 1 contains the most important provisions in the article and forms the basis of the majority of coastal state rights on the continental shelf.

These rights, as set out in paragraphs 1 and 4, operate in respect of natural resources only. No mention is made of man-made objects. A wreck and its artefacts are not natural but man-made and in any event are not strictly speaking resources (though they may be valuable assets as far as the cultural heritage of the state is concerned).

It is submitted that a coastal state is not accorded any rights to exploit or to exercise control over a wreck by reason of the fact that it is situated on the continental shelf, though it may exploit the natural resources of the same area.

The coastal state therefore has no jurisdiction over a wreck in terms of art 77.

#### Article 80

This simply states that art 60 applies *mutatis mutandis* to artificial islands, installations and structures on the continental shelf.

Article 60 contains the provisions relating to these structures and the coastal states rights to construct and use them (as well as to authorise and regulate the construction of use of them) in the EEZ.

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41 Paragraph 3.

Paragraph 8 makes it clear that these structures do not generate their own territorial seas as they do not possess the status of islands. This is important because it removes any possibility of extending coastal state territorial sea rights to the continental shelf by the expedient of constructing or moving installations in or about this zone at will.

The appearance of art 80 in Part VI of LOSC extends the provisions of art 60 to the continental shelf. This in turn makes it clear that the provisions of art 60 will extend beyond the limits of the EEZ or 200 nautical miles from the baseline, when circumstances permit an extended continental shelf.

These provisions do not help either. A wreck is not an artificial island, installation or structure on the continental shelf put there for the purposes set out in art 60. The wreck has not been placed on the continental shelf intentionally, its positioning being fortuitous.

The coastal state therefore has no jurisdiction over such a wreck in terms of the provisions of art 80.

#### Article 81

This article gives the coastal state the 'exclusive right to authorize and regulate drilling on the continental shelf for all purposes'. No stipulation is made here as to the direction of drilling, i.e. downwards or sideways.

These provisions may possibly be of some slight assistance to a coastal state seeking rights in terms of LOSC to exercise jurisdiction over a wreck on the continental shelf. The coastal state has exclusive rights to authorise and regulate drilling in the area. The meaning of the word 'drilling' is not qualified in art 81 and thus the coastal state could prevent any form of drilling in the vicinity of a wreck should it wish to do so.

Members of a diving expedition operating at the wreck-site of the *Lusitania* reported seeing damage to the hull of the wreck which suggested that explosives had been used by unknown persons to gain entry to the ship.<sup>42</sup>

It is submitted that if a coastal state has knowledge that similar methods were being used in operations on a wreck on its continental shelf and if the method of placing the explosives necessitated drilling into the sea-bed, such a state could probably rely on the provisions of art 81 to prevent the drilling even though the provisions of this

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42 Simpson 10.

prevent the drilling even though the provisions of this article do not relate directly to wrecks.

#### Article 85

This article relates to tunnelling and reads 'this part does not prejudice the right of the coastal state to exploit the subsoil by means of tunnelling, irrespective of the depth of water above the subsoil'. Again, no restrictions regarding the direction of tunnelling have been included. The use of the words 'to exploit the subsoil' would seem to indicate that the coastal state enjoys sovereign rights for this purpose.

It is submitted that again a similar situation could arise here to that relating to drilling in which tunnelling by an unauthorized person results in interference with a wreck on the coastal state's continental shelf. Here again the coastal state could act to prevent this.

#### Article 208

Appearing in Part XII of LOSC, this article requires the coastal state to 'reduce and control pollution' from its activities relating to installations and to 'take other measures' to prevent, reduce and control pollution.<sup>43</sup>

Though these provisions relate to the coastal state activities connected with installations, artificial islands and structures under its jurisdiction pursuant to arts 60 and 80 and require the coastal state to take anti-pollution measures at these sites, they do not relate to any wreck-site activity. It is therefore submitted that this article will be of no assistance to the coastal state in extending its jurisdiction to a wreck.

#### Article 210

The provisions here require the coastal state to adopt laws to prevent pollution of the marine environment by dumping. Power to withhold permission for a foreign vessel to dump on the continental shelf is contained in paragraph 5.

'Dumping' is described as an intentional act. The sinking of a ship is not (or should not be) intentional. As the purpose of this article is to specify coastal state rights to 'prevent, reduce and control pollution of the marine environment by dumping', an unintentional sinking of a ship would not automatically give the coastal state jurisdiction over a wreck. The deliberate sinking of a ship might possibly be viewed as dumping. This article will not

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43 Paragraph 2.

assist in extending coastal state jurisdiction to a wreck on its continental shelf.

#### Article 211

This permits the coastal state to 'adopt' laws and regulations for the prevention, reduction and control of pollution of the marine environment from vessels. A wreck, however, is not a vessel in the sense that it is still a ship.<sup>44</sup> In any event most historic wrecks, with the possible unlikely exception of a 'modern historic wreck', will not be a source of pollution. This article will therefore not help a coastal state to extend its jurisdiction to a wreck on its continental shelf.

#### Threats to the coastal state

Examination of LOSC articles relating to pollution and coastal state rights and duties in this regard on the continental shelf does not appear to give the state any jurisdiction over wrecks in this area, but the possibility of a threat to the coastal state by pollution from such a wreck must be briefly considered.

In the section on ownership and state jurisdiction, the law relating to wrecks in general was examined. Here the question of historic wrecks is central. and these, as stated, are unlikely to be a source of pollution. If, however, a modern wreck of historical interest threatened to cause damage to the marine environment or the coast, the coastal state could intervene.

This intervention reflects the customary right of a state to protect its territory, in this case its coast. This right recognised in international customary law was confirmed by the Intervention Convention of 1969<sup>45</sup> following the pollution problems caused by the *Torrey Canyon* disaster which occurred some 17 miles off the Cornish coast in 1967. The resultant oil spill prompted the UK to take unilateral action by attacking the wreck with incendiary bombs in an attempt to set fire to the cargo and destroy its oily properties before it reached land. The right was later confirmed by LOSC.<sup>46</sup>

Intervention, however, takes the form of physical rather than legal action and is not the same as jurisdiction. On examination therefore it is found that the coastal state's

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44 Van Meurs 40.

45 The International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969.

46 Article 221.

In the case of a foreign wreck the coastal state's obligation to respect the rights of foreign ownership would apply as would the foreign owners' law (the law of his nationality or his domicile) in the case of private ownership.

#### Comments on Article 77

Before summarizing the coastal state's rights over owned wrecks on the continental shelf and proceeding to discuss unowned wrecks and artefacts on wreck sites, it will be necessary to examine the provisions on the rights of the coastal state on the continental shelf contained in art 77 in rather more detail than has been possible in the brief mention above. This will complete our examination of all the Part VI provisions relating to coastal state rights over the continental shelf which might apply to wrecks.

As has been previously mentioned paragraph 1 permits the coastal state to exercise sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources.

It is submitted that this can be literally interpreted as meaning the coastal state can explore the continental shelf for any purpose.<sup>47</sup>

The wording of paragraph 1 does suggest that the coastal state alone possesses the sovereign right to explore the continental shelf and if this does mean for 'any purpose' as suggested by Caflisch, this would mean that no other state could explore the continental shelf off a coastal state for any purpose without that coastal states' authority, even if the exploration was not connected in any way with the natural resources of the continental shelf.<sup>48</sup>

Searches by foreign states for wreck sites and antiquities (or archaeological sites which was the main theme of Caflisch's article)<sup>49</sup> could therefore be undertaken only

47 Caflisch 13.

48 Churchill & Lowe 256 comment on the intent of art 5(8) of CSC which states 'the consent of the coastal state shall be obtained in respect of any research concerning the continental shelf and undertaken there. Nevertheless, the coastal state shall not normally withhold its consent if the request is submitted by a qualified institution with a view of purely scientific research...'.  
The authors suggest that although this wording may be interpreted in different ways, it is nonetheless clear that research in the superjacent waters which does not concern the continental shelf does not require consent.

49 Caflisch 7.

Searches by foreign states for wreck sites and antiquities (or archaeological sites which was the main theme of Caflisch's article)<sup>49</sup> could therefore be undertaken only with the permission of the coastal state, even though the wreck being sought might belong to the foreign state.

If, however, the coastal states' sovereign rights of exploitation on the continental shelf are confined to its natural resources it seems improbable that the words 'exploring it' were intended to be read out of context with the rest of paragraph 1 and to be understood in an exclusive sense.

Prior to LOSC in 1982, consideration had been given to the meaning of the words 'natural resources; and their implied exclusion of other things. At its eighth session the ILC was quite emphatic on the point that a coastal state's sovereignty was limited to exploiting natural resources only. The Commission specifically mentioned 'wrecked ships and their cargoes', as being excluded from the coastal states rights to resources on the continental shelf.<sup>50</sup>

Article 5(1) of CSC provides that the exploration and exploitation of the continental shelf must not cause unreasonable interference with, among other things, scientific research.

Article 5(8) requires anyone wishing to conduct research relating to the continental shelf to obtain permission from the coastal state. Caflisch, in his article on submarine antiquities suggests that, as the rights of the coastal state relate only to natural resources, the Convention did not intend the coastal state to have jurisdiction over activities concerned with antiquities (which, it is submitted, could include historic wrecks) which cannot be

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49 Caflisch 7.

50 See Van Meurs at 23 in which the author refers to comments by ILC (1956 8th Session) on sovereign rights over the continental shelf which are as follows: 'It is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the sea-bed or covered by the sand, of the subsoil.' Van Meurs, suggests that this comment indicates the Conventions intention to limit coastal state sovereignty over the continental shelf to matters pertaining to natural resources.

termed natural resources.<sup>51</sup> This being the case, the word 'research' cannot include the finding and removal of antiquities (or historic wrecks, parts of historic wrecks or artefacts) from the continental shelf and, accordingly, the coastal state will have no power in terms of art 5(8) to withhold permission for an undertaking of this nature.<sup>52</sup>

Caflisch states that the ICJ was also of the opinion that arts 1 to 3 of the CSC Shelf which provide that the coastal states' rights are sovereign and exclusive only insofar as they relate to the natural resources of the continental shelf had (by 1982) evolved into international customary law.<sup>53</sup>

This fairly lengthy examination of the various provisions relating to the coastal state's rights over the continental shelf contained in LOSC and CSC as well as the inclusion of various opinions as to their meaning and import has been necessary to enable the following observations to be made regarding the coastal state's jurisdiction over the types of owned wrecks discussed thus far. It is submitted that as regards wrecks over which the coastal state has jurisdiction, there is no bar to any owner, whether a company registered in the coastal state, or a person who is a national of or domiciled in the coastal state, from dealing with the wreck in any way.

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51 Caflisch 15, 16. See also Churchill & Lowe at 119 who write 'nevertheless it remains true that non-natural "resources" are not the subject of coastal state rights merely because they are found on the continental shelf, so that, for example, wrecks lying on the shelf are still excluded'.

52 LOSC art 246 is concerned with marine scientific research in the EEZ and the continental shelf. Essentially coastal states have the right to 'regulate, authorize and conduct' marine scientific research in their EEZ's and on their continental shelves. They must give consent to other states before such states can conduct research in these areas but such consent should not be unreasonably withheld in "normal circumstances". Article 246(3). There are a number of foreign state activities however which may result in the coastal state withholding permission for research. These generally relate to activities referred to in this article shall not unjustifiably interfere with activities undertaken by coastal states in the exercise of their sovereign rights and jurisdiction provided for in this Convention.

53 Caflisch 15.

In the case of a foreign owned wreck the wreck might still be owned by its original owner or his legal heirs, successors or assignees, or it may be owned by someone else who has acquired ownership. In either case the law which will apply (flag state law or the personal law of the owner) and the rights of ownership must be respected by the coastal state.

Article 303(3) of LOSC is in point here. This article, previously referred to above, refers to archaeological and historical objects found at sea and reads 'nothing found in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practises with respect to cultural exchanges'. Again, in the case of the private owner, his national state could exercise diplomatic protection.

As regards the rights detailed in the articles contained in Part VI, little can be found which permits the coastal state to exercise control of any form over owned wrecks on its continental shelf with the possible exception of its right to control activities relating to drilling, tunnelling, and in certain circumstances to intervene in cases of pollution.

### 3.2 Res nullius wrecks

Having looked at the question of owned wrecks on the continental shelf, namely those wrecks which are owned by persons or companies subject to coastal state legislation or by the coastal state itself and foreign owned wrecks owned by persons, who, if they are the original owners, will be subject to the flag states law or, if a subsequent owner, will be subject to personal law, which could be either the law of their country of nationality or of their place of domicile. We will now consider the matter of unowned (*res nullius*) wrecks on the continental shelf.

Generally ownership in an unowned (possibly abandoned) thing can be acquired in most legal systems by '*occupatio*' or occupation coupled with an intention to become the owner.<sup>54</sup>

Occupation relates to taking possession of the thing, though in South African law it has been held that an occupier of a formerly unowned object does not lose his rights in that object because the object is temporarily out of his physical possession and control after he has initially taken possession of it.

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54 Wille (n34) 174. Also Van Meurs at 39 quotes from 'Maasdrorp's Institutes of South African Law where he writes 'such things (*res derelictae*) may be acquired by the first person to seize them.'

A case in point occurred in South Africa in Cape waters.<sup>55</sup> The facts were briefly that a salvor wishing to take possession of a propeller attached to an abandoned wreck succeeded in detaching it from the main body of the wreck by the use of explosives. He was unable at the time to remove the propeller from the sea bed and take it ashore due to the lack of lifting equipment and he therefore marked the position of the propeller and left it where it lay, intending to return with the necessary equipment and helpers as soon as he could. A second salvor then took possession of the propeller, claiming ownership in view of the fact that it was not under anyone's control when he moved it. The court held however, that the original salvor had acquired ownership as he had occupied the propeller with the intention of becoming owner, and though forced by circumstances to leave it on the wreck site he had no intention of abandoning ownership.

If therefore a wreck becomes *res nullius* because it has been abandoned (as is possibly the position in the case of the *Titanic*) or perhaps because the original owners cannot be identified, as might occur in the case of a very old wreck, the laws of the flag state which governed the ship at the time of its sinking will no longer apply, the link between this state and the wreck will be broken and no state will have jurisdiction over it.

No foreign state will therefore have *locus standi* here but neither will the *res nullius* status of the wreck enable the coastal state to claim jurisdiction of it either. It is classified as has been mentioned above, as a movable and thus there cannot be any application of the *lex rei sitae* or the law of the place where the object is. Furthermore, whether or not the wreck could be considered a resource of the coastal state, it is not a natural resource.

It would seem therefore that anyone could claim this wreck, although exactly what is meant by 'claim' in this context is, it seems, not certain. Presumably a state, or national of the state claiming ownership will have to exert some form of physical control over the wreck to establish a link between the state in question and the wreck for the purposes of exercising jurisdiction. Other states with no legal link to the wreck will possibly not have any valid jurisdictional claim over it.

The coastal state's claim to jurisdiction over a wreck will therefore have to be founded on the establishment of a link such as its ownership or that of one of its nationals etc. It is submitted that the claim of the first 'linked' state will prevail.

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55 Underwater Construction and Salvage Co (Pty) Ltd v Bell  
1968(4) SA 190(C).

This last supposition is really one of conjecture as there would seem to be no commonly accepted practise in international customary law relating to such claims.

The possible development of this area of law will be discussed below after the position of wrecks in the EEZ has been examined and that of artefacts from these wrecks has been considered.

## CHAPTER IV

### JURISDICTION OVER WRECKS IN THE EXCLUSIVE ECONOMIC ZONE

The provisions of art 59 of LOSC have already been mentioned above under the heading 'Boundaries of the continental shelf', where it was seen that the provisions of this article relate to disputes over activities for which jurisdiction has not been reserved either to the coastal state or to any other state in the EEZ - the so called non regulated uses of the EEZ.

Wrecks and activities related to them in the exclusive economic zone have not been reserved under LOSC either to the coastal state or to any other state and thus must fall under this category.

It is stipulated that disputes must be resolved on the basis of equity in which the interests of the parties, the interests of the international community and all relevant circumstances are taken into account.

It must also be understood that the provisions relate only to non-regulated use disputes in the exclusive economic zone and not to continental shelf disputes per se.

A further point to note is that art 59 is relevant only to 'foreign' wrecks in the EEZ and not, in all probability, to 'national' wrecks or wrecks which are *res nullius*, as 'national' wrecks will be regulated by the coastal states legal system while *res nullius* will not be covered by the legal system of any state.

Foreign wrecks will of course be governed by the legal system of the (foreign) wreck state.

This provision will also be seen to be relevant later when the position of artefacts in the EEZ is considered.

In all other respects the position discussed above relating to wrecks on the continental shelf will apply to those in the EEZ.

It would appear that the wording of art 59 is such as to permit of a wide latitude for the finding of common ground between the parties.

It is submitted that should a vessel which is of great historical significance to its home (flag) state founder on the other side of the world in the waters of a state which has no interest, either historically or culturally in it, the flag state should, in terms of art 59, be permitted to recover the vessel or its artifacts. All activities necessary for such recovery should be undertaken by the flag

state. It is submitted that this would particularly be the case if such recovery would be in the interests of the international community as a whole e.g. in the case of the salvage of a Dutch East Indiaman off the coast of a small Pacific state.

## CHAPTER V

### ARTEFACTS ON A WRECK SITE

#### 5.1 Ownership

The question of ownership of goods and artefacts found at a wreck site is a further complicating factor which has to be considered when the coastal states rights to assert jurisdiction over historic wrecks and their contents is being discussed.

Van Meurs writes 'no state may lay claim to any marine archaeological objects which are subject to a prior claim of ownership by another state or individual'.<sup>56</sup>

It will be seen that the position of artefacts is similar to that of a wreck itself, though the consequences of rules or ownership may be more complicated, and this will be discussed later. As was mentioned above under the heading 'Historic Wrecks' the Danish 'Law Concerning the Protection of Historical Wreckage' of 1963 does not distinguish between derelict vessels and 'objects' found in Denmark on the sea bed and which are more than 150 years old. These are claimed by the state which will therefore exercise jurisdiction over both the wreck, if any, and any historic objects which it contained. This situation is obviously preferable to one in which a variety of claims to objects contained in the wreck is made quite independently of any claims of ownership which may be made as regards the wreck itself.

The Danish law is governed by two factors which determine the states right to assert jurisdiction over the objects. One is the time criterion of 150 years (which is a time limit set at the discretion of the state and is not a generally accepted provision of international customary or conventional law) and the other is the provision in the Danish law that the objects must have been found in Denmark, which will include the territorial seas but not the continental shelf.

The point is that, though the historic wreck and the artefacts which were contained in it and which were found at the wreck site might reasonably be treated as being part of the same 'closed find' by a state wishing to protect it for historical reasons, the artefacts contained in the wreck (though not necessarily all might become subject to numerous claims of ownership, though the ownership of the wreck itself might have passed to the coastal state possibly by way of occupation in the case of an abandoned wreck. This might indeed be the situation in the case of artefacts found at the *Titanic* wreck site, some of which, like the jewelled

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56 At 36.

copy of the Ruba'iyat of Omar Khayyam<sup>57</sup>, would be of priceless historic value aside from any monetary value they might possess.

The disposition of the artefacts following on the settlement of the various claims of ownership could materially affect the historic value of the wreck site. This would be so particularly if a number of salvors were to work the site in the interests of the various claimants, as their activities could do incalculable harms to the historic wreck and those artefacts remaining.

This type of 'free for all' activity at a wreck site may also make it impossible for later salvors to locate, identify and retrieve valuable remaining artefacts for preservation and historical display. An example of the damage done as a result of uncontrolled activity at a wreck site is that of the *Birkenhead* off the Cape's south east coast. Though not situated on the continental shelf the wreck is undoubtedly one of the most historic off the South African coast and it is unfortunate that considerable damage has been done to the fabric of the wrecks over the years by various treasure hunters, some of whom have even used explosive charges.<sup>58</sup>

Having briefly considered the position of artefacts at a wreck site (and this applies particularly to an historic wreck site), the discussion will be continued under the same headings as those under which the ownership of wrecks was dealt with above.

## 5.2 Owned artefacts on the continental shelf

Once again the 'linking' principle is necessary to establish a states jurisdiction over the artefact. The owner would have to fall under one of the following categories.

- (a) He would have to be a person domiciled in the state under whose law it is sought to establish legislative and enforcement jurisdiction over the artefact or artefacts in question, or
- (b) be a national of that state, or
- (c) the state itself might own the artefact.

It is possible (and indeed likely in the case of a 'new' historic wreck that a situation could arise in which multiple jurisdiction over the artefacts could occur. This would in turn give rise to a number of enforcement

57 Lord W A Night to Remember 1956 87.

58 Turner M Shipwrecks and Salvage 1988 80.

authorities which could result in a considerable degree of chaos and which might cause the type of permanent damage to the wreck and wreck site discussed above and may nullify attempts to inspect an historic wreck properly and to salvage such artefacts as might be recoverable.

The above remarks are probably, it is submitted, an accurate statement of the present state of the law, both customary and as set out in art 303(3) of LOSC.

Naturally in the case of the owners of the artefacts falling into one of the categories listed above, where the state referred to is the coastal state, no problems re coastal state jurisdiction arise. This of course is due to the operation of the law relating to ownership and has nothing to do with the coastal states proximity to the wreck on its continental shelf.

### 5.3 Res nullius artefacts on the continental shelf

The position here is that the artefacts which were once owned will have been abandoned and thus the original owners will have lost their ownership. It is submitted that should there, however, be any lawful heirs (for example descendants of passengers in the *Titanic* who lost valuables when the ship sank) living today, their rights of ownership would remain unimpaired, notwithstanding the fact that they have done nothing to claim their property. Up until the present time it has not been technologically possible even to establish the exact position of the wreck, much less recover any part of it or its cargo.

Until recently too, it is probable that no person alive believed that the wreck would ever be seen again, much less that anything would ever be recovered from it, yet this has happened and there is reason to believe that in the future, far more artefacts will be recovered. France is planning an expedition to the wreck site in the near future and other countries have also expressed an interest in it. However, to raise artefacts of any real value deep sea submersibles would have to be used and at present only the US and France possess these.<sup>59</sup>

In short, abandonment should not be presumed too lightly, though if the property is not easily accessible or if the whereabouts of the vessel is unknown (as in the case of the *Waratah*, a Blue Anchor liner which disappeared off the south east coast of South Africa in 1909 and which would be a most valuable historic find if it could be located) it would not be unreasonable to assume that a private owner had abandoned all hope of recovering his property again.

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59 Ballard RD The Discovery of the Titanic 1987 210.

This would not necessarily apply, however, to an insurance company which might have paid out the original owner for his loss and which could now claim ownership of the recovered property.

The private ownership dimension of this problem will, it is submitted, diminish with the age of the wreck. With increasing age the number of traceable owners of artefacts, their heirs or assignees will diminish, and in the case of very old wrecks and artefacts the ownership of the wreck and all its contents will probably become a matter of contention between the state of origin of the wreck (wreck state) and any subsequent salvor who has recently happened upon the wreck.

The issue here will be one of abandonment. In the case of an old wreck whose whereabouts has been known for years a person or state claiming ownership by occupation might be able to argue convincingly that the wreck and artefacts were *res nullius*.

Modern dating techniques are now so advanced and the accumulated mass of historical knowledge so large that most ancient artefacts now found will be able to be identified with some degree of accuracy and linked to a state of origin<sup>60</sup>, though whether such state still exists in modern form or, if so, whether it is capable of or interested in preserving such artefacts would very likely depend on whereabouts in the world they were discovered. An area which comes to mind in this regard is the Mediterranean Sea containing as it does so much of Europe's submarine history.

A most important point which can be mentioned at this stage and which will be considered more fully below is whether, because of the unique link with man's oldest recorded history that many of these artefacts represent, they should be protected from the operation of the *res nullius* rule and should not be susceptible to ownership by occupation, as great damage could result.

The fact that this problem is viewed in a serious light is evident from the wording of a Greek proposal to the Council of Europe in 1978 that the correlation of all submarine antiquities laws of European states be undertaken to provide a guide for defining the principles and conditions of the

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60 It is submitted that even if such a state of origin could be identified, no specific rights in respect of such artefacts would accrue to that state unless an existing owner who was linked in some way to the state came forward. Article 303(3) of LOSC reads 'Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges'.

European submarine heritage. It was suggested that no submarine archaeological research be undertaken without the assurance that the facilities for the preservation of antiquities were available.<sup>61</sup>

Greece also suggested that the Council of Europe should give attention to the proclamation of the Mediterranean as the 'sea of civilisation of mankind'.

These and other suggestions relating to the granting of sovereign rights to coastal states over objects of an historical nature will be further examined below after briefly considering the case of artefacts in the exclusive economic zone by way of comparison with those on the continental shelf.

#### 5.4 Foreign owned artefacts in the EEZ

The position in the economic zone is substantially the same as that which obtains in respect of artefacts on the continental shelf with the added proviso that in certain circumstances art 59 of LOSC will also apply.

This, as has been seen, relates to the resolution of conflicts regarding the attribution of rights and jurisdiction in the EEZ. Any conflict is to be resolved between the coastal state and any other states on the basis of equity, taking into account the respective importance of the interests involved to the parties concerned as well as to the international community as a whole.

The conflict should be resolved in the light of all relevant circumstances, and this will apply where the Convention does not attribute rights or jurisdiction to the coastal state or to other states within the EEZ.

Article 59 will only apply in the case of foreign owned artefacts, should there be a conflict between that foreign state and the coastal state over jurisdiction.

#### National artefacts in the EEZ

As these are owned in a manner linked to the coastal state there will be no conflict with any other state's legal system.

#### 5.5 Res nullius artefacts in the EEZ

Again, no conflict should arise and there will be no operation of art 59

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61 Van Meurs 47.

## CHAPTER VI

### SUMMARY OF JURISDICTION OVER WRECKS AND ARTEFACTS

#### 6.1 Wrecks on the continental shelf

As we have seen, a wreck is not a natural resource in terms of art 77 of LOSC and it is submitted that the coastal state does not possess sovereign rights to 'exploit' or control any wreck, whether historic or otherwise, on its continental shelf based on any of the provisions of art 77.

The concept of historic wrecks was discussed and jurisdiction and control over wrecks on the continental shelf was then examined under the headings 'National wrecks', 'Foreign wrecks' and '*Res nullius* wrecks'.

##### 6.1.1 'National' wrecks

It was seen that there was no problem here as regards coastal state jurisdiction. These wrecks are those over which the coastal state has jurisdiction. The coastal states laws prevail in respect of them and this remains the position anywhere.

##### 6.1.2 'Foreign-owned' wrecks

It was established that these wrecks could be owned directly by a foreign state, a company registered in that state, a national of that state or a person domiciled in that state.

A discernable 'link' between the claimant and the wreck was necessary to establish ownership.

In any of the above cases it would seem that at the present time the law of such state (including the personal law of the private owner) will prevail and will give jurisdiction to the state.

##### 6.1.3 'Res nullius' wrecks

The point was made that these wrecks were not owned at all and therefore were not linked to any state.

The law relating to ownership being acquired by occupation was discussed and it was seen that anyone who took possession of the wreck with the intention of acquiring ownership could so acquire it in most legal systems.

The discussion then moved on to the laws relating to wrecks in the EEZ. This was necessary because of the overlap of seabed and subsoil in part of the EEZ and

the continental shelf and it was seen that the position here was the same as that which obtained on the continental shelf with the additional requirements of art 59 to consider, should disputes arise between the coastal state and another state over a non-regulated use right.

The rather unusual provisions of art 303(2) relating to objects of an archaeological and historical nature in the contiguous zone (referred to in art 33 of LOSC) were also touched on and it was noted that since the provisions of this article rendered the situation in the contiguous zone different from that applying to the remainder of the continental shelf area as regards historical objects, the area under discussion for the remainder of this dissertation would commence at the 24 nautical mile point from the baseline and extend to the outer limits of the continental shelf as provided for in art 76 of LOSC.

## 6.2 Artefacts on the continental shelf

The situation as regards these was discussed and it was seen that similar provisions apply to owned artefacts on the continental shelf as to wrecks.

6.2.1 'National' ownership of artefacts permits the coastal state to exercise its jurisdiction over them as it deems fit.

6.2.2 'Foreign-owned' artefacts are similarly subject to the jurisdiction of the state to which they are linked.

6.2.3 'Res nullius' artefacts were also discussed and it was seen how the situation at a wreck site could become confused and how damage to valuable historic remains could occur by the indiscriminate assertion of rights in respect of *res nullius* artefacts by individual salvors and 'treasure hunters' who might have no interest in the preservation of the wreck site or its artefacts for historical purposes and are intent only on their own immediate gain.

Suggestions by Greece to help remedy this state of affairs were mentioned.

## 6.3 Artefacts in the EEZ

Finally the status of artefacts in the EEZ was briefly examined for the sake of completeness.

It was seen that the situation in regard to these was similar to that of the continental shelf with the proviso

that art 59 would apply should a dispute arise between the coastal state and another state over the exercise of a right not attributed by the Convention to either state. This applies in the case of wrecks which are not dealt with specifically by the Convention. Article 303(1) provides only that 'states have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose'.

Neither nationally owned artefacts owned by the coastal state, or by nationals of that state or by persons domiciled in that state nor *res nullius* artefacts which are susceptible to ownership by occupation will be affected by the provisions of art 59.

It will be seen therefore that coastal state control over historic wrecks situated on the continental shelf as defined by art 76 of LOSC is effectively no greater than those of any other state and the mere accident of proximity of the coastal state to the wreck on its continental shelf confers no additional rights in this regard.

Before going on to discuss the possible development of the law in this area, and the desirability of such development, one further type of historic wreck should briefly be mentioned.

Though not as common a concept as the historic wreck which can be explored and possibly raised and from which artefacts can be recovered for historical research and education purposes, the idea of an historic wreck which is protected as a memorial should be considered.

There is precedent for this. As has already been mentioned, a proposal for joint state action in respect of the *Titanic* has been made, and the question bears directly on possible future increased state jurisdiction over historic wrecks.

## CHAPTER VII

### THE HISTORIC WRECK AS A MEMORIAL

Until recently the idea of a wreck becoming a memorial was generally confined to ships still afloat and which represented either a significant historical occasion, for example *HMS Victory* now preserved at Portsmouth or *HMS Belfast*, a Town Class Cruiser moored in the Thames, or possibly a period of shipbuilding, such as the *Cutty Sark* at Greenwich or the *Great Britain* at Bristol.<sup>62</sup> The idea of a ship becoming a memorial is thus not a new one and it has been extended to sunken vessels, possibly the most famous being the *USS Arizona* sunk at Pearl Harbour. Though the vessel is submerged a platform has been built over the sunken superstructure and from this colours are flown appropriate to a naval vessel in commission.

It is submitted that there is no reason why a ship which has sunk on the continental shelf should not be protected as a memorial to those who lost their lives in the disaster. The protection would have to take the form of a prohibition of interference with the fabric of the wreck (which should be declared a national monument) and artefacts relating to it and found within the wreck area.<sup>63</sup>

Possibly the best way to go about this in future would be to declare the wreck area a 'protected area', the delimitation of its boundaries being precise. This would enable any activities by unauthorised persons within this area to be prohibited and thus the wreck would be protected from the depredations of salvors, 'treasure hunters' and the like.

As has been mentioned above, the US has passed the RMS Titanic Memorial Act 1986 by which it is hoped to encourage international efforts to protect this wreck as a memorial. The Act authorises the Secretary of State to negotiate with Canada, on whose continental shelf the wreck lies, France who, together with the US explored the wreck site and who intends to mount a further expedition in the near future to recover more artefacts from the scene, and the UK under whose flag the ship originally sailed.

In this instance, should agreement be reached between these states on the status of the *Titanic* wreck it will simply take the form of a mutual understanding between a number of these states who are physically capable of reaching the

62 Throckmorton P Diving for Treasure 1977 18.

63 This would mean the exercising of jurisdiction by the coastal state over the wreck and this could conflict with foreign rights of ownership. Possible future development of customary law in this area is discussed below.

wreck site or are in close proximity to it and it will not in any sense be binding in theory or practise on any other states.

The matter of who should have jurisdiction over this wreck, who should determine the disposition of any artefacts recovered and who should exercise control over the wreck site will not be resolved by an informal agreement or a treaty binding on two or three states except possibly in the short term.

Any state able to exploit this or any other *res nullius* wreck (should it so be) will be at liberty to do so outside the territorial waters of another state.

It is submitted that this will continue to be the case until international customary law has evolved in the area of wreck management and commonly accepted rights regarding jurisdiction over wrecks beyond the territorial waters and the declaration of specified wrecks as historic are generally acknowledged to have become part of the customary law.

## CHAPTER VIII

### A NEW AND IMPROVED REGIME ?

#### 8.1 The vulnerability of the historic wreck

As has been seen, no provisions regarding wrecks, historic or otherwise, have been included in LOSC and the rights of the coastal state in this area are confined to those relating to natural resources. By implication therefore, the coastal state has no specific right to extend its jurisdiction to such wrecks.

This position is obviously unsatisfactory, particularly as there is no compensating right known to international customary Law either and it is submitted that it is to this area of law we must look for evolution of a future continental shelf wreck regime.

In recent times there has been a great increase in awareness among the developed states of the historical significance and value of historic wrecks and of the fact that time for their preservation and the recovery of artefacts is not unlimited due in part to the natural destructive action of the sea and also to the increasingly rapacious activities of salvors, not all of whom are possessed of a high sense of responsibility as regards the preservation of valuable antiquities, even if they recognise them as such when they find them.

#### 8.2 Protecting the historic wreck

Whilst it is probably unlikely that the matter of historic wrecks on the continental shelf will excite the interest of coastal states in the area in the same way as natural resources such as oil and gas do, some states are already beginning to show an interest in this direction which will probably increase. Australia's Historic Shipwrecks Act 190, 1976, already mentioned above, is a step in this direction and even though Australia's continental shelf delimitation is in accord with the provisions of CSC and not those of art 76 of LOSC 1982, it is nonetheless a clear extension of Australian legislative power to the continental shelf (for whatever reason) in a manner not sanctioned by international customary or conventional law up to the present time.

It is also contended by Van Meurs<sup>64</sup> in the article entitled 'Legal Aspects of Marine Archaeological Research' at page 73 that, in terms of the USA's Antiquities Act of 1906 which authorises the President to declare objects of historical or scientific interest situated on lands owned or controlled by the Government of the US to be national monuments, submerged

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64 At 73.

antiquities located on the outer continental shelf might be held to fall under the act. This would presumably require the exercise of US control over an object so designated, and, in the event of the US deciding to enforce this self proclaimed right to protect such a declared national monument by physical means, such as sending a warship to the scene to drive off nationals of other states, one might anticipate protests from such states and accusations that the US is indulging in 'creeping jurisdiction'.<sup>65</sup>

At UNCLOS III in 1979 Greece suggested that an additional provision be added to art 77 of the proposed LOSC which would grant a coastal state sovereign rights over 'any object of purely archaeological and historic nature on or under its continental shelf for the purposes of research, salvaging, protection and proper presentation'. Provisions for safeguarding the rights of the countries of origin were also added.

Despite a number of revisions the Greek draft was opposed by the US, the UK and the Netherlands on a number of grounds, one of which was that it granted the coastal state rights over the continental shelf which did not relate to natural resources.

It was however generally agreed by delegates that states should be under a duty to protect submarine antiquities whilst respecting the rights of identifiable owners.<sup>66</sup>

It is interesting to note that all the above activity by various states, unconnected as it is and occurring as it has at different times and at different places indicates a collective move in the same direction, namely the wish by responsible coastal states to legislate for and control historic wrecks situated on their continental shelves.

A pointer to the direction in which the evolution of the law in this respect might be moving is of course art 303(2), the provisions of which have been discussed above.

In the event, despite the representations of Greece, no provision was made in LOSC granting sovereign rights to coastal states over submarine antiquities, but the inclusion of the provisions of art 303(1), vague and general as they are, offer perhaps a starting point from which the possibility of a development of conventional law in this area could be explored.

65 The same might be said of Australia and it remains to be seen what the reaction of other states will be to the extending of Australia's jurisdiction to wrecks on its continental shelf under the Historic Wrecks Act 190 1976.

66 Caflisch 17.

Article 303(1) of LOSC reads as follows: 'states have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose'. The wording of this paragraph would seem to encourage a degree of co-operation between states which would necessarily be the result of a fair degree of discussion between them at an official level. This in turn would lead to bi-lateral or multi-lateral treaties between these states in respect of such archaeological and historical objects.

To be effective such treaties would probably have to cover *inter alia* the question of the ownership of the wreck and the possible use of coastal state facilities by those working on the wreck (assuming wreck state or foreign state jurisdiction is agreed upon). Of course, if coastal state jurisdiction over the wreck is conceded by the treaty, the need to include such provisions will fall away.

Naturally only those states party to such a treaty will be bound by it and it will not preclude valid claims to ownership of artefacts and objects from the wreck made by private persons or to jurisdiction by states not party to the treaty.

Such a treaty could be a 'one off' entered into by two or more states to clarify and agree their respective positions with regard to a specific wreck (such as the US proposed agreement relating to the *Titanic* discussed above) or its provisions might be of a more general nature and include agreement on rights in and to a number of wrecks of historic interest.

It is submitted that the value of such a general treaty would lie not only in the fact that it would resolve the problems arising out of possible claims by a number of states to rights in respect of several wrecks each of which could have become a separate problem requiring settlement, but it could also set a precedent which might be followed by other states in future disputes.

Should agreement be reached in cases in which the facts are substantially the same though occurring in different parts of the world, a body of law might slowly develop which could point to these agreements as the 'correct' ones in any similar future situations.

For example, a number of treaties might be concluded in which coastal states acquire ownership of wrecks on their continental shelves and in turn pay compensation to the former owners concerned or for various reasons it might be decided that the wreck state should retain jurisdiction over the wreck.

One such treaty, in which a wreck state or state of origin of a number of historic wrecks has transferred all its rights, title and interest in and to its wrecked vessels to the coastal state on whose sea bed (and continental shelf) they lie, was concluded between the Netherlands and Australia on the 6 th November 1972.

In terms of this agreement the Netherlands transferred its ownership of Dutch East India Company ships (which ownership it had acquired as successor to the property and assets of the old Vereenigde Oostindische Compagnie on this company's demise as a trading concern) wrecked off the coast of Western Australia to the Australian government.

This agreement is appended to Schedule I of the Commonwealth of Australia's Historic Shipwrecks Act 1976 which, as we have seen, purports to extend Australia's protection and control over any wrecks, deemed by the Minister to be of historic significance, which are situated in Australia's waters or waters of its continental shelf.

No age qualification is placed on the definition of 'historical significance'.<sup>67</sup>

### 8.3 Single state jurisdiction over historic wrecks?

It is submitted that under the present conventional and customary law a coastal state has no jurisdiction over a foreign-owned wreck on its continental shelf. It cannot simply declare the wreck to be historic and apply blanket provisions to it under which measures to control the wreck site and prevent interference in the area by other states can be implemented.

The provisions of arts 81, 85 and 211 have been discussed among others. The abovementioned articles deal respectively with coastal state rights to drill on the continental shelf and, because this is a sovereign right, to prevent other states from doing so, to tunnel in the sea bed and subsoil, likewise a sovereign right and to prevent, reduce and control marine pollution from vessels by establishing international rules acting through the competent international organisation. A further article, namely art 210 relating to dumping was also examined.

It was submitted that the domain of natural resources was the only area in which a coastal state could exert its authority over the activities of other states. The chances of such activities relating to historic wrecks seemed to be remote.

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67 Van Meurs 52.

In terms of the law as it stands therefore, the coastal state cannot even make provisions regarding the removal of the wreck from its continental shelf, nor could it compulsorily nationalize the wreck even on the payment of compensation to the established owner.

Further, the question of the multiple ownership of artefacts has been discussed and here the same problems relating to the coastal state's extension of its jurisdiction to these objects applies.

Taking into account, therefore, the disadvantages of the present loose and uncontrolled system of jurisdictional rights over wrecks, and artefacts from such wrecks on the continental shelf resulting in, amongst other things, difficulties in declaring suitable wrecks historic and thereafter protecting them, it becomes apparent that the evolution of a single state regime of wreck control would have great advantages. We shall now discuss this possibility.

#### 8.4 Which state?

The heading of this section exactly summarizes the problem. Having proposed the regime of single state jurisdiction over wrecks on the continental shelf as being the most appropriate for the resolution of the problems arising out of foreign ownership and the status of *res nullius* wrecks, the question which now arises is which state should have jurisdiction.

There would appear to be only two possible choices:

- (a) The coastal state ?
- and
- (b) The wreck state ?

The respective claims of these states will be discussed and thereafter an attempt will be made to determine in which way the present law could be evolved to achieve the desired result.

##### 8.4.1 The coastal state?

A major problem to be overcome when proposing that jurisdiction over the continental shelf wrecks be accorded to the coastal state is the undoubted resistance that this will meet from other states who will see this as an unwarranted extension of the coastal states sovereignty over a further portion of the sea bed and who might perceive this to be an erosion into generally established international rights on the High Seas as well as an exercise in 'land-grabbing'.

As regards the question of High Seas rights, a moments reflection will be sufficient to realise that rights over a wreck on the sea bed will not unduly interfere with any states traditional rights on the High Seas in any way.

Traditional rights in this area generally relate to the water column superjacent to the sea bed or subsoil and activities above a wreck here by the coastal state should not interfere with other states rights any more than, at the most, the positioning of a platform or other installation at the same point to exploit natural resources would. Indeed, interference should be less as a salvage ship would probably only remain in the vicinity for comparatively brief periods of time while the installation would be a more or less permanent fixture.

The question whether a coastal state would be indulging in 'land grabbing' using a specious interest in preserving an historic wreck as an excuse for extending its sovereignty over new areas - should it seek to declare a wreck to be historic and to extend its jurisdiction over the wreck site - is one which, because it is so often linked to accusations of 'creeping jurisdiction', should be more carefully examined.

At the outset the importance of locating the situation of a wreck by means of fixed map co-ordinates which relate to a point on the sea bed must be understood. The whole area of the wreck site containing the remains of the sunken ship and any cargo and artefacts it might have carried, would have to be delimited by reference to ascertainable fixed points on the sea bed along the boundaries of the wreck site which could then be plotted on a map.

The object of this delimitation would be twofold, namely to enable the area to be publicised and identified as a protected area or site closed to unauthorised persons. The second reason for such delimitation is that wrecks cannot be considered immovables so their link with an immovable and clearly identifiable area of land is desirable.

This in turn leads to the question as to whether or not the *lex rei sitae* would automatically apply to such an area.

The problem here is that the continental shelf is not part of the coastal states territory and thus the coastal states jurisdiction does not extend to any part

of it except in the case of certain clearly specified activities discussed above.

On the other hand, should it become accepted practise in the future for coastal states to extend their jurisdiction to wrecks which they have declared to be historic on their continental shelves, the description of such wrecks would have to relate to the sea bed area on which they rest.

The anomaly here is that though foreign states might be prohibited from interfering in any way with any such wreck on a designated area of sea bed, the coastal state's jurisdiction would not actually extend to that area of sea bed but only to the wreck itself. This would not give the coastal state sufficient powers to control the wreck site effectively. It is submitted that the provisions of art 78(2) LOSC which require the coastal state to refrain from infringing or interfering with navigation and other rights of other states in the course of its exercising its own rights will not help balance the interests of the various parties as the coastal states rights referred to are those relating to natural resources.<sup>68</sup>

Should international customary law finally evolve to accommodate coastal state claims to historic wrecks on the continental shelf, such claims it is submitted would have to include jurisdiction over the area of sea bed containing the historic wreck and any cargo and artefacts it may have contained.<sup>69</sup>

In deciding on the relevant merits of the claims of the coastal state to jurisdiction over the wreck site vis-a-vis those of the wreck state consideration of the question of proximity to the wreck is important.

Proximity is a most persuasive factor in the coastal states claim to jurisdiction as the advantages of having the coastal states resources comparatively close to the wreck site are great. These resources would include ease of access to the wreck without the need for (perhaps) a long ocean journey from the wreck state, the availability of coastal state protection of the wreck site should this prove necessary, the ability to maintain a concentrated salvage effort at the site

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68 LOSC art 77(1).

69 It is submitted that no such problem exists in the case of 'areas' containing natural resources. LOSC art 77 refers to the 'sovereign rights to explore and exploit natural resources'. Such rights, it is submitted, include jurisdiction over the area containing the natural resource being worked.

which might tax the endurance of distantly based ships, and the relatively lower costs of mounting a coastal state operation as opposed to a distant state one.

Other considerations might well play a part, such as a more easily maintained public interest (and hence a source of funds) in the historic value of the wreck in the coastal state, particularly if it has strong local links, rather than the more academic interest among fewer people in a distant wreck state.

At this stage an argument might be advanced by some coastal states (possibly one which is more emotional than rational) should be mentioned.

It might be argued that as the continental shelf is the prolongation of the coastal states land territory to the outer edge of the continental margin (or its permitted limit in terms of the provisions of art 76 of LOSC), albeit underwater, everything on it, even if placed there fortuitously, should belong to such coastal state. This is really the 'proximity' argument again, but it does carry some weight if linked to the provisions of art 77 which refer to the coastal states sovereign rights to exploit the continental shelf's natural resources. After all, the argument might run 'why stop at natural resources?' If the continental shelf is sacrosanct then the coastal state should surely not be granted any rights to resources on it at all; if, on the other hand, the international community has accepted (as it has) the coastal states rights to exploit its natural resources, why should the coastal state not be allowed to claim the comparatively few man-made resources which may be found there? An historic wreck containing valuable artefacts must surely be a resource?

This argument, though possibly not acceptable to many states contains, it is submitted, a measure of logic.<sup>70</sup>

If all coastal states enjoyed a similar high standard of technological expertise, financial independence and interest in conservation of historical objects, as for example Greece, the US, France, UK and Australia or the money other first world countries whose legislation regarding historic wrecks has been discussed above, these arguments would be quite persuasive. However, this is not always the case.

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70 Conversely though cases could occur in which distant states which have no interest in the natural resources of a coastal state might nonetheless have individual and specific interests in wrecks lying in the maritime zones of such a state.

Wrecks tend to be scattered indiscriminately about the world and will not necessarily be found only on continental shelves of first world states who possess both an interest in historical objects and the expertise to salvage them and preserve them for posterity.

In the case of the salvage of the *Mary Rose* for instance, a very great deal of time was spent studying the remains of the ship and subsequently considerable skill has been required to devise methods of preserving the timbers of the wreck on dry land. A solution is continually being pumped over the timbers which were brought to the surface to prevent them from literally disintegrating under the influence of the change of environment from that to which they have been accustomed.<sup>71</sup>

The point here is that the skills of various disciplines, professions and people have been brought to bear on the unique problem of recovering the remains of an ancient ship, preserving them and adding what is learnt from them to the existing fund of historical knowledge of the period, much of it gleaned up to now from extinct documents.

Had this historic wreck been found on the continental shelf of for example a small poor coastal state elsewhere in the world, the story might have been very different. Quite understandably that state might not have had any interest in the wreck or in the history of its times. These simply would not relate to that state. In any event the coastal state would probably not have had either the skilled historians and shipwrights available, nor the money to recover the wreck and also would very likely have had no facilities for the preservation of the wreck or its artefacts.

This raises the important question of whose history is to be studied and, possibly, venerated and to whose background the historic wreck or object relate. It would be as incongruous for a coastal state to claim an historical link with a foreign wreck lying on its continental shelf and for this reason claim ownership of the wreck as it was for General Stanley in 'The Pirates of Penzance' to claim the ancestors of the previous owner of his house as his own simply because he had acquired their portraits when he bought the house!

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71 The Argus 16/10/1982 'Under 24 hour guard and is being sprayed with water to prevent its timbers drying out'. See also The Argus 18/10/82 17.

Jurisdiction might of course be claimed for reasons other than historical ones. The wreck might, for example, be situated at the exact place on the sea bed where the coastal state might wish to drill to exploit an oil deposit which has been discovered there. This would be quite within the coastal state's sovereign rights to exploit its natural resources.

Under these circumstances, control might have to be exercised by the coastal state over the wreck to enable it to proceed with its lawful exploitation of its continental shelf resources. On the other hand the 'due regard' rule contained in art 78 LOSC does require that the coastal state exercises its rights over the national resources in a manner which does not inconvenience others. In such a case possibly the coastal state would have to refrain from drilling. Undoubtedly a solution would be found.

Not all third world states are lacking in interest as regards wrecks of historical significance however. In January 1977 Kenya declared the wreck of the Portuguese ship *San Antonio de Janna* which sank off Fort Jesus in Mombassa in 1697 to be a monument. The ship had been involved in the siege of Fort Jesus during which the fort had been captured by the Arabs from the Portuguese, and was consequently very much a part of Kenya's history. Hopefully the wreck will now be preserved and a unique link with an historic episode in the country's history retained.<sup>72</sup> Had the wreck been situated on Kenya's continental shelf however, the situation might have been different. The costs of mounting an expedition to recover the wreck or artefacts from it or even to survey it properly might have been too great to make it worth the states while. (The wreck lies within 300 metres of the flagpole at Fort Jesus.)

Following on these observations and comments it is submitted that a coastal state that is both able and willing to take the necessary steps to survey a wreck on its continental shelf and satisfied that it is of historic significance, may declare that wreck to be a monument and preserve it and any artefacts belonging to it in the most effective way possible. A good case can be made for such a coastal state to extend its jurisdiction to such a wreck.

Thereafter the coastal state should be able to enforce such jurisdiction as it sees fit to ensure the wrecks

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72 Van Meurs 47.

protection as a monument or as an historic wreck and the preservation of any recoverable artefacts.

Legislation would be necessary to regulate questions relating to who would be permitted to dive on the wreck, what remuneration he would receive, what artefacts the state would claim etc. This legislation could only be enforced following a claim to a particular wreck by the coastal state unless the coastal state has publicised the fact that it regards all wrecks on its continental shelf to be its own property (in which case the class of *res nullius* wreck would fall away).

Such a claim would be difficult to sustain in respect of owned wrecks and could result in a strong diplomatic protest from the wreck state of the owner, particularly in the case of a modern wreck.<sup>73</sup> At the very least, compensation would probably have to be paid to the wrecks owner and to persons who could prove their ownership of goods and artefacts known to exist and to have been transported in the wrecked ship and which are now being claimed by the coastal state.<sup>74</sup>

It is submitted that the coastal state would be in a much better position to claim jurisdiction over a wreck in the case of a very old wreck, and also one which is linked historically to it.

The real problem here is that there is no provision in customary law for a state simply to assume ownership of property owned by a foreign owner or state outside its own territory. Any such change of ownership would in the normal course of events have to be preceded by discussions and an agreement between the owner of the thing and the state wishing to acquire ownership, such agreement in all probability being conditional on the

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73 Protests from wreck states might effectively prevent the eventual development of coastal state claims into international customary law.

74 Akehurst at 93 quotes at 2(2)(c) of resolution 3281 (xxix) of the UN General Assembly adopted on 12 December 1974 which relates to the question of compensation for expropriation. It reads 'appropriate compensation should be paid by the [expropriating] state taking into account its relevant laws and regulations and all circumstances that the state considers pertinent'. Akehurst does however observe that it is doubtful whether the provisions of this resolution could be invoked as evidence of customary law against the states which voted against it. Payments should be 'prompt, adequate and effective'.

payment of compensation in an agreed sum by the coastal state.

Naturally, as we have seen above, no problems will arise in the way of coastal state ownership in the case of national wrecks or *Res nullius* wrecks, which have been occupied by the coastal state or its nationals.

The only way in which the international customary law could evolve would be if a fairly large number of coastal states began making claims to wrecks on their continental shelves. If enough claims of this nature were made and other states did not object to them, international customary law could develop to a stage where coastal state jurisdiction over unowned wrecks on its continental shelf was generally accepted.

The position as regards foreign owned wrecks does not appear to be as clear and, as has been remarked above, should a coastal state wish, for historical reasons, to expropriate a wreck owned by another state, fair payment at least would be expected which should be promptly tendered. Even if the coastal state wished only to extend its jurisdiction and control over the wreck without expropriating it, the rights of the owners would have to be respected.<sup>75</sup>

Objections by owners or wreck states to their wrecks being expropriated, compensation notwithstanding, could in the long run prevent the development of international customary law with regard to such expropriation and the consequent general acceptance by states of the coastal states rights in this regard.

It would seem in any case that art 303(3) of LOSC which reads: 'nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practises with respect to cultural exchanges' would apply to the 'protecting' of an historical object and thus preclude the possibility of a coastal state expropriating it or preventing others from enjoying accepted salvage rights etc. At the same time it must be accepted that art 303(3) was not drafted in anticipation of a major evolution in international customary law in respect of the claims to wrecks and artefacts on its continental shelf by a coastal state; therefore, it is submitted that paragraph (3) refers in turn to paragraph (2) which relates to objects of an historical nature found in the contiguous zone and paragraph (1) which refers, generally to the protection of archaeological and historical objects, only.

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75 LOSC art 303(3).

It is suggested therefore that, should the largely undisciplined diving on wrecks of all types increase (and there is every reason to believe it will) and result in increasing damage to valuable historic wrecks and artefacts, one of the possible counters could be the regular claiming of continental shelf wrecks by large numbers of coastal states. This, it is submitted, would help to stabilise the situation and regain control over the unchecked damage being done.

This solution is attractive despite the fact that as discussed above, some coastal states may not be in a position at present to exercise much control over a wreck site, much less to salvage and preserve wrecks, parts of wrecks and other artefacts.

It may be objected to by some states as constituting a further erosion of the freedom of the seas, but the alternative may be a state of near anarchy in certain areas (eg the Mediterranean) which could result in the irreplaceable loss to mankind of historical treasures.

The development of customary law is not without precedent. In the 1950's coastal state jurisdiction over natural resources arose out of an attempt to prevent a 'scramble' for the resources of the continental shelf. The suggested further development of the law to cover historic wrecks would, it is suggested, only be an extension of this control and the prevention of a possible further 'scramble' for other resources, namely historic wrecks.

In the 1970's international customary law again evolved to give coastal states jurisdiction over the natural resources in the economic zone, and this again prevented a 'scramble' or unchecked rush by other states for those resources.

The alternative to coastal state jurisdiction over these wrecks is wreck state jurisdiction which will be discussed below.

Finally however, it must be repeated that the coastal states proximity to the historic wreck is a most persuasive factor in the argument for coastal state jurisdiction in that it is more practical for security and economic reasons than wreck state jurisdiction despite the difficulties outlined above.

#### 8.4.2 Wreck state jurisdiction ?

The alternative to coastal state jurisdiction over historic wrecks on the continental shelf is, as we have

seen, wreck state jurisdiction. This would result in the state which owns the wreck or whose system of law governs the wreck enjoying total control over it. It is submitted that in the case of very old historical wrecks the position of the wreck state is rather weaker than it is in the case of a 'modern' historic wreck. This is so because the longer the wreck has been lying unattended by its owner, (whether state or other owner) the less convincing such a state's claim to ownership or jurisdiction over it will be. Such a wreck could well be abandoned and thus *res nullius* and susceptible of ownership by any person occupying it with intent to acquire ownership. As has been seen above, this need not necessarily be the case, and abandonment is not usually lightly presumed. The flag state law here should govern abandonment.

In the case of a more modern wreck, abandonment will have to be clearly manifest.

In both these cases (old and new wrecks) the position, should they continue to be owned, will be the same as that discussed under the heading 'The coastal state' above.

As has been suggested, the position regarding coastal states is not uniform and in many cases the state which built, owned and sailed the ship which sank might well be in a much better position to survey the wreck and salvage it, parts of it or historical artefacts from it than the coastal state on whose continental shelf it is situated.

The question of historical interest is also important here. Should there be conflicting but equal claims to an historical interest in the wreck between the wreck state and the coastal state as between perhaps, a former metropolitan power and an ex-colony, the matter might possibly be best resolved by an equitable distribution of artefacts recovered from the wreck, whichever state finally acquired jurisdiction. However, in the case of a wreck which fortuitously foundered on the continental shelf of a coastal state, such coastal state could hardly make a convincing claim to the wreck on the grounds of an historical link.

In short, there may well be cases in which the most suitable state to exercise the jurisdiction over an historic wreck is the wreck state. Here, time is really the most important factor to be taken into consideration. A wreck state which has done nothing about its wreck for a considerable period of time without a reasonable excuse (as in the case of the Titanic) can hardly claim a sudden interest in its

historical properties. Absence of wreck state activity diminishes the force of its claims. Agreement in respect of compensation to be paid can be arrived at in the manner we have previously discussed.

## CHAPTER IX

### CONCLUSIONS

Following a summary of the present state of the law relating to the coastal state's rights of control over historic wrecks on the continental shelf, the advantages of single state control and jurisdiction over a wreck were discussed.

It was also proposed that either the coastal state or the wreck state should assume these powers over the wreck and various factors, both for and against the case for each state, was discussed.

The possible evolution of international customary law to accommodate coastal state claims to jurisdiction over wrecks on the continental shelf, and also the possibility of state's treaties developing into a generally accepted law relating to either coastal state or wreck state ownership was discussed.

Taking all these factors into account, it is submitted that generally speaking, the evolution of the law to provide for coastal state ownership of wrecks and artefacts on the continental shelf would be the best overall solution. This would probably best be achieved by encouraging the evolution of customary law by considerable numbers of coastal states claiming jurisdiction over wrecks on their continental shelves and proclaiming suitable wrecks to be 'historic', as well as the artefacts that they contain, and legislating for their protection.

In the absence of protests from other states a new body of international customary law could emerge which would accord jurisdiction rights over wrecks on the continental shelf to the respective coastal states as a matter of course.<sup>76</sup>

The question of owned wrecks and compensation would have to be settled by agreement.

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76 Whether ownership of foreign owned wrecks could be acquired by the same means by a coastal state is uncertain. LOSC art 303(3) states 'nothing affects the rights of identifiable owners' and it is submitted that this provision will be binding on any state which has signed the convention. It is submitted that such a state should not attempt to disposses the owner of such a wreck. It is further submitted that the principle of respect for rights of ownership of property at sea is universally recognised and that the provisions of art 303(3) reflect international customary law. In view of this it is wholly possible that objections by other states would prevent the acquisition of ownership by coastal states in this way.

Setting a time criterion as to the age at which a wreck becomes 'historic' might well be a help to coastal states. Foreign states would be in no doubt as to when a wreck (possibly one of theirs) would automatically be declared to be historic by the coastal state on whose continental shelf it lay, and, should the wreck state take no further action in respect of the wreck, it could scarcely be heard to complain.

At the same time it might be desirable for the coastal state to declare a newer wreck 'historic' rather than wait for the arbitrary date to be reached by the passage of time.

Provisions should, it is suggested, be made for coastal states to be able to declare any wreck of whatever age on its continental shelf to be historic for good reason. What would constitute 'good reason' is not easy to answer but possibly a strong historical link with the coastal state might be sufficient.

Should opposition from other states delay or prevent the evolution of international customary law in respect of coastal states rights of ownership of wrecks as discussed above, a similar result might result through the development of a growing system of treaty law as was examined above.

This would probably be a slower process than the evolution of customary law and more piecemeal but might prove to be the only alternative.

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