When Lost Liners Become Found: An Examination of the Effectiveness of Present Maritime Legal and Statutory Regimes for Protecting Historic Wrecks in International Waters with Some Proposals for Change

Rob Regan*

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* The author is presently completing his LL.M. thesis, *Sovereign Immunity and the Lost Ships of Canada's Historic Merchant Fleet*, at Queen's University, Ontario. LL.B. 2004, Queen's University; B.A. 1988, University of British Columbia.

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> "Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveller, must be ready for the morrow. It must have a principle of growth."
>
> —JUSTICE BENJAMIN N. CARDOZO,
> THE GROWTH OF THE LAW 19-20 (1948)

> "When Erasmus mused that '[a] common shipwreck is a source of consolation to all', Adagia, IV.iii.9 (1508), he quite likely did not foresee inconcinnate free-for-alls among self-styled salvors."
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> —Justice Selya,
> *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked and Abandoned Steam Vessel*,
> 833 F.2d 1059, 1061, 1988 AMC 1109, 1109-10 (1st Cir. 1987)

I. INTRODUCTION

In January 2000, delegations from the governments of Canada, the Republic of France, the United Kingdom of Great Britain and Northern Ireland, and the United States of America entered into the final stages of an international agreement to protect the wreck of the R.M.S. TITANIC and its contents.[1] The impetus for this agreement came from several years of international litigation by various scientific and commercial interests over the right to salvage the wreck of the TITANIC and its contents since its discovery in 1985.[2] However, the legal debate over the TITANIC is not an isolated incident. The advent of new and better deep-sea diving submersibles and remote exploration devices has made the dream of discovering and exploring deep-sea wrecks a reality. As is so often the case with various other issues in maritime law, the law lags far behind improvements in technology, and problems develop when the law

1. R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 327 F. Supp. 2d 664 (E.D. Va. 2004).

2. *See* R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 2002 AMC 1136 (4th Cir. 2002); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 1999 AMC 1330 (4th Cir. 1999); Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 1993 AMC 2799 (4th Cir. 1993).

attempts to adapt legal principles long considered the *jus gentium* of most seafaring states to conform to new situations.

Legal and policy issues surrounding ownership and salvage rights of wrecks date back to the very dawn of time, when fishermen and traders first took to the sea to trade their wares.[3] The first known written laws relating to ownership rights of salvors are almost three-thousand years old, and the general principles informing these laws changed little over time.[4] Up to about the middle of the twentieth century, the procedure of property retrieval from sunken ships occurred without significant legal and policy debate.[5] Historically, if a ship sank in deep water beyond the reach of divers, it simply remained unsalved.[6] If it sank in shallower waters, the ship's owners or salvors would retrieve whatever items or freight were salvageable and abandon the rest to the sea.[7] Given the cost of retrieving human remains from the wreck, as well as the practical difficulty of transporting them to shore in the days before refrigerated morgues aboard ship,[8] they were often left behind in the wreck[9] or buried at sea in a ceremony performed above the wreck site.[10] Developments leading to the aqualung in the 1940s and deep-ocean exploration equipment in the 1960s made most long-lost shipwrecks accessible for the first time.[11] Some spectacular discoveries, like the Spanish treasure galleon NUESTRA SENORA DE ATOCHA,[12] the

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3. DAVID W. STEEL & FRANCIS D. ROSE, KENNEDY'S LAW OF SALVAGE 1-9 (5th ed. 1985).

4. GEOFFREY BRICE, MARITIME LAW OF SALVAGE ch. 1 (3d ed. 1999).

5. *Id.*

6. *Id.*

7. The Spanish government mounted various salvage operations whenever possible to recover the gold from their treasure galleons immediately after their sinking. *See* Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978).

8. JOHN MALCOLM BRENNAN, THE SWAY OF THE GRAND SALOON 375 (2d ed. 1986). One of the first shipboard "morgues" was the one on the MACKAY BENNET, a cable-laying ship chartered to search for and retrieve victims from the TITANIC immediately after the sinking. The "morgue" consisted of coffins placed on the forward deck and covered over with ice. *See id.*

9. This was the case even as late as the twentieth century, such as in the EMPRESS OF IRELAND sinking in 1914 and the PRINCESS SOPHIA sinking in 1918. *See* Henrik Ljungström, *The Great Ocean Liners*, *at* http://www.greatoceanliners.net/empressofireland.html (last visited Mar. 18, 2005); SS Islander Web page, *The Wreck of the Princess Sophia*, *at* http://www.ssislander.co.uk/sophia.html (last visited Mar. 18, 2005).

10. *See generally* BBC, *The Diving Archaeologists*, *at* http://www.bbc.co.uk/history/archaeology/marine/marine_2.shtml (last visited Mar. 18, 2005).

11. *Id.*

12. The NUESTRA SENORA DE ATOCHA foundered in a hurricane in 1622 off the coast of Florida while carrying a cargo of gold and other treasure estimated at $250 million. *See generally* R. DUNCAN MATHEWSON, TREASURE OF THE ATOCHA (1986).

Swedish warship VASA,[13] and the steamships R.M.S. REPUBLIC[14] and the S.S. CENTRAL AMERICA,[15] among others, attracted the interest of the public, scientific community, and commercial salvors alike. For the first time, serious policy considerations emerged as people debated what to do with these wrecks and their contents.

A. Competing Policy Issues

The prohibitive costs associated with the modern exploration and recovery of deep-sea merchant shipwrecks have given rise to a series of competing policy issues and ethical concerns. It is impossible to explore many of these wrecks without engaging in commercial activity to subsidize the project, either by selling off documentary and other media rights or valuable items recovered from the wreck. Often, parties engage in joint projects where a commercial salvage company will supply the recovery and exploration equipment in exchange for salvage rights. This has understandably led to a perceived notion by the public that these expeditions are not really scientific, but rather a thinly veiled attempt to plunder various sunken vessels under the guise of scientific research.

A recent additional problem is the increase of recreational divers who have begun to salvage items from merchant wrecks lying in shallower waters, like the ANDREA DORIA and the EMPRESS OF IRELAND, for the purpose of selling these items to the public.[16] Although this practice is technically in violation of the principles of salvage law, it is done on a regular basis, with various salvaged items, such as ship's china, fittings, and passengers' belongings, often appearing on a collector's "black market."[17] This unmonitored "pirate salvage" of various wrecks has also caused public concern regarding the potential for damage to the underwater environment and the unmonitored taking of ship's and passengers' property in an activity that essentially amounts to grave robbing.

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13. *See generally* Martha Kolasinska, *The Life of the VASA*, *at* http://www.port21.pl/article_1062.html (last visited Mar. 18, 2005).

14. The White Star liner R.M.S. REPUBLIC sank in 1909, taking with it a rumored $1 billion worth of gold coins destined for the Russian Czar. *See* Martha's Vineyard Scuba Headquarters, Inc. v Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1061, 1988 AMC 1109, 1111 (1st Cir. 1987).

15. The S.S. CENTRAL AMERICA sank in a hurricane in 1857, carrying a cargo of gold bullion and coins valued at an estimated $1 billion. *See* Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co., 56 F.3d 556, 561, 1995 AMC 1985, 1988 (4th Cir. 1995).

16. *See generally* Ljungström, *supra* note 9.

17. Arnold J. Bartow, *Underwater Cultural Resources and the Antiquities Market*, 5 J. FIELD ARCHAEOLOGY 232 (1978).

Finally, there is the issue of disturbing human remains entombed within the shipwreck. In previous times, remains were left to the sea due to the difficulty of recovery, but with the assistance of modern technology, remains can be successfully recovered with much more ease. Recent wreck explorations have also indicated that human remains last much longer in the sea than once thought possible,[18] making it likely that intensive wreck exploration will probably disturb human remains. At what point does a wreck cease to become a graveyard and instead become an archaeological site? At what point do salvage activities cease to become grave robbing and become *legitimate* scientific activity? At what point does the retrieval of items from the TITANIC, the REPUBLIC, and their twentieth century sunken sisters pass into the same realm as the retrieval of items from the S.S. CENTRAL AMERICA, the ATOCHA, and the VASA?

This Article will focus on the problems surrounding the determination of ownership of long-abandoned wrecks and their contents. Is there a point at which the rights of the owner or the successor-in-interest lapse? Does inaction by the owner, due to the technological limitations of the past, constitute true abandonment, thus giving a would-be salvager the right to claim ownership? In the case of sunken warships, the doctrine of sovereign immunity, where the flag state holds indefinite title to its sunken vessel, applies.[19] Could this doctrine provide some protection for merchant ships operating under government control? Until recently, there was a general presumption in maritime law that title in a sunken merchant ship did not pass with the efflux of time; however, this presumption has been challenged in recent years by aggressive salvage claims. These claims have generally been played out in the U.S. appellate courts, which have been willing to award title to these wrecks to successful salvors and have extinguished the rights of the true owners or successors-in-interest when such parties fail to make a timely claim to their property.[20]

This need to address the issue of wreck ownership at an international level was considered by the drafters of the United Nations

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18. Human skeletons have been found in numerous wrecks dating back more than 300 years. *See* BBC, *supra* note 10.

19. Jason R. Harris, *Protecting Sunken Warships as Objects Entitled to Sovereign Immunity*, 33 UNIV. MIAMI INTER-AM. L. REV. 101, 110-11 (2002).

20. *See, e.g.*, Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 1999 AMC 1330 (4th Cir. 1999); Martha's Vineyard Scuba Headquarters, Inc. v Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987).

Convention on the Law of the Sea (UNCLOS),[21] an international convention intended to govern most of the major issues affecting international maritime law and adopted into most member nations' shipping or admiralty legislation. This convention was intended to augment and clarify the general principles of customary maritime law and clearly define the rights and obligations of member states with respect to historic wrecks.[22] In an effort to go beyond the limitations of the customary legal definition of "wreck,"[23] UNCLOS makes a distinction between historic and archaeologically important objects and historic and archaeologically important sunken vessels.[24] This is presumably so that other items that are not specifically "wreck," such as sunken cities and other nonmaritime property, will fall under the protection of UNCLOS. These items are covered under article 149:

> All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.[25]

However, the wording of article 149 could also include maritime property, such as cargo, which has become separated from the sunken vessel. Article 303 covers the specific matter of sunken vessels:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
2. In order to control traffic in such objects, the coastal State may . . . presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

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21. Opened for signature Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) (UNCLOS) [hereinafter UNCLOS]. Canada formally became a signatory to the Convention in 2003.

22. *See generally* United Nations, *The United Nations Convention on the Law of the Sea (A Historical Perspective)*, *at* http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm (last visited Mar. 18, 2005).

23. *Id.*

24. UNCLOS, *supra* note 21, arts. 149, 303.

25. *Id.* art. 149.

> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.[26]

Unfortunately, these guidelines have proven largely ineffective in protecting deep-sea historic wrecks. Articles 149 and 303 provide only general guidelines, leaving the actual regulation and execution of these principles to the member coastal states. These member states have implemented the articles of UNCLOS in varying degrees, which means that many countries pay only lip service to these specific articles and leave the actual implementation of protective measures to the courts and salvors' consciences.

B. The Need for a Comprehensive Legislative Regime

It is clear that the customary law among coastal states is no longer adequate to deal with this issue. Like most other issues in maritime law, changes in shipping technology and public policy necessitate the need for further sophistication of the law in this area. Absent a comprehensive international convention, the duty of protecting wrecks falls to the court system—a system which evolves at glacial speed. The majority of coastal states have signed on to and indicated their support for the various provisions of UNCLOS, as well as most other maritime conventions, but the issue of merchant wreck ownership seems to have gone largely unnoticed. Even in Canada, the Canada Shipping Act,[27] which governs shipwrecks in territorial waters, is silent with regard to historical and archaeological wrecks and their contents.[28]

In 1994, representatives of a number of member states made an attempt to resolve the problems created by the vague provisions in the UNCLOS articles. The Buenos Aires Draft Convention on the Protection of the Underwater Cultural Heritage (Draft Convention),[29] although as yet unratified, provides specific time limits for considering when a ship qualifying as "underwater cultural heritage" is considered abandoned.[30] The Draft Convention also sets out the scope of the Convention in article 2, which gives protection under the Convention to any sunken vessel under water for a period of no less than one hundred

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26. *Id.* art. 303.
27. R.S.C., ch. S-9 (1985) (Can.).
28. *See id.*
29. *Reprinted in* Int'l L. Ass'n, *Report of the Sixty-Sixth Conference* 432 (1994), *available at* http://www.tufts.edu/departments/multi/texts/buenos.txt (last visited Feb. 18, 2005) [hereinafter Buenos Aires Draft Convention].
30. *Id.* art. 1(2)(a)-(b).

years and to any military vessel to which a government may lay claim to under the concept of sovereign immunity,[31] a concept discussed more fully in Part IV of this Article. The Draft Convention is helpful in that each article is expanded with various case law abridgements; however, the fact that it has not yet been ratified limits its use to that of a judicial "road information" sign, rather than any sort of binding directive. Without a comprehensive international convention detailing specific protection, coverage, jurisdiction, and sanctions enshrined in member countries' legislation, the courts are left to their own devices to arbitrate salvage and wreck ownership issues, a process which is more likely to revolve around the contest between the commercial and property rights of the salvors and the property rights of the owners or successors-in-interest, rather than around such things as environmental considerations and historical and archaeological benefits to posterity.

This Article proposes a comprehensive international regime to protect all historic merchant shipwrecks from unregulated exploration and salvage through the tightening of existing customary law and the various conventions that are already in existence, a process which will only work if there is consistent international agreement. We have the machinery in place: There is adequate customary law to build upon, and the international conventions in existence indicate a recognition of the problem and a willingness among nations to work toward a practical solution. A basic set of international rules is needed for a concrete determination of what constitutes truly "abandoned wrecks" and for the articulation of a proper test to determine at what point the rights of the original owners or successors-in-interest lapse and are subrogated to the rights of the finders or salvors. Such a test must be both workable and satisfy the requirements of the world's major judicial systems, not unlike other effective maritime conventions.

In making this proposal, this Article will examine the present major legal and policy considerations that go into determining the rights and obligations of would-be salvors and wreck explorers through an examination of the customary law of salvage and the present competing legal regimes for determining the ownership of deep-sea merchant wrecks. In addition, this Article will examine the principles of sovereign immunity that are used to protect naval vessels and then advance a proposal that this principle be extended to cover various merchant ships sunk while engaged in bona fide military or governmental activities. Finally, this Article will consider the issues raised by litigant choice of

31. *Id.* art. 2.

forum, the efficacy of the various international conventions presently in place, and how these issues interact with the national laws of coastal states.

II. CUSTOMARY LAW OF SALVAGE

A. Introduction

A consideration of the principles framing the current dispute over deep-sea wrecks would be incomplete without an examination of the law of salvage. Salvage is the concept of the saving of life and property from the perils of the sea.[32] The general principle is that a party who successfully saves a person or maritime property from the sea earns the right to an award from the owner of the property so saved.[33] Laws relating to salvage have been a fixture of general maritime law among seafaring nations since merchants of various nations first traded with each other by ship. The oldest existing written code relating to salvage specifically is the Rhodian Code, which dates from around 800 B.C. and was later adapted into various European legislation, such as England's Law of Oleron:

> Article XLV. "If a ship be surprised at sea with whirl winds, or be shipwrecked any person saving anything from the wreck, shall have one-fifth of what he saves."
> Article XLVII. "If gold or silver, or any other thing be drawn up out of the sea eight cubits deep, he that draws it up shall have one-third, and if fifteen cubits, he shall have one-half, because of the depth."[34]

This award is broadly based on the value of the property saved and the efforts of the salvor.[35] The award was originally intended to compensate the salvor only for his time and effort expended, not to give him a profit; however, the advent of modern shipping has made a reward in addition to expenses part of the general rule. It is important to note that the salvor does not normally obtain an ownership interest in the items salved, only to the right to a reward.[36] The rationale for granting salvage awards was set out succinctly by Justice Story in *Rowe v. The Brig*:

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32. BRICE, *supra* note 4, ch. 1.
33. EDGAR GOLD, MARITIME LAW 594 (2004).
34. R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 962, 1999 AMC 1330, 1348 (4th Cir. 1999).
35. BRICE, *supra* note 4, ch. 1.
36. *Id.*

> In cases of salvage, the measure of reward has never been adjusted by a mere estimate of the labor and services performed by the salvors. These, to be sure, are very important ingredients; and are greatly enhanced in value, when they have been accompanied by personal peril and gallantry, by prompt and hardy enterprise, and by severe and long-continued exposure to the inclemencies of the winds and waves. But an enlarged policy, looking to the safety and interest of the commercial world, decrees a liberal recompense, with a view to stimulate ambition, by holding out what may be deemed an honorable reward.[37]

In considering the size of the award to be given, tribunals have normally considered that three elements must be present within the salvage act: voluntariness, danger, and success.[38]

B. The Three Elements of a Successful Salvage Claim

Voluntariness is concerned with whether or not a salvor has a legal duty to assist the stricken ship.[39] If there is a commercial contract or other legal or statutory obligation between the salvor and ship's owner or master, such an obligation will generally preclude voluntariness.[40] Such persons barred from a salvage award will normally include coast guard and naval personnel and a ship's pilots and crew (unless the ship has formally been abandoned and the pilot or crew's contract of service has ended at some point previously).[41] Additionally, crew members and passengers of a ship in distress are generally not entitled to a salvage award, as they are considered to be acting in the interests of their own self-preservation.[42] However, professional salvors under the control and direction of a third party are considered "volunteers" within the meaning of the salvage principle.[43]

Danger as a legal concept in the law of salvage applies in three ways: (1) whether the vessel was in actual or apprehended danger,[44] which includes the vessel being lost or the master being unaware of local navigational dangers[45] (the test is the reasonable apprehension of danger); (2) whether there was a real or apprehended danger to the life or property

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37. Rowe v. The Brig, 20 F. Cas. 1281, 1283 (C.C.D. Mass. 1818) (No. 12,093).
38. 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 16-5 (4th ed. 2004).
39. *Id.* § 16-1.
40. *Id.*
41. *Id.*
42. *Id.*
43. GOLD, *supra* note 33, at 607.
44. Clayoquot Sound Canning Co. v. S.S. "Princess Adelaide," 48 D.L.R. 478, 482 (Ex. C.R. 1919).
45. The Eugenie, (1844) 3 not. of Cas. 430.

of the salvors when performing their tasks;[46] and (3) whether there was a real or apprehended danger to the property being salved, as in the case of *Gardner v. Ninety-Nine Gold Coins*.[47] The onus of proving that such a danger exists rests on those claiming a salvage award.[48]

Finally, the element of success is required.[49] If the would-be salvor is unsuccessful despite expending his efforts, he is disentitled to a reward.[50] Even if the salvor only assists in the rescue or is one of many different parties involved, he will be entitled to share of the reward.[51] However, he must save something of the ship, its passengers, or its property.[52] As the salvage award is calculated on the "salved value" of the property saved, absent a contractual arrangement between the parties, the "no cure-no pay" principle generally prevails in the adjudication of salvage claims, and an unsuccessful salvor will be sent away empty-handed.[53] This is also the case in the event that the salvor negligently damages the property while in the act of salvaging it,[54] or, alternatively, is unable to remove it from danger before it is damaged, rendering it valueless.[55]

These basic principles were finally codified in the 1910 Assistance and Salvage Convention,[56] which was adopted by a majority of coastal states.[57] In addition to affirming the general principles surrounding property and life salvage that had existed since the earliest times, the Assistance and Salvage Convention provided a mechanism for court intervention in salvage agreements under dispute, as well as the formal recognition of commercial salvage contracts.[58] It also confirmed that a master at sea was bound, as so far as it would not involve danger to the

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46. *Clayoquot Sound Canning Co.*, 48 D.L.R. at 482.
47. 111 F. 552, 554 (D. Mass. 1901).
48. GOLD, *supra* note 33, at 605.
49. 2 SCHOENBAUM, *supra* note 38, § 16-5.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. The Tojo Maru, [1972] A.C. 242, 293, [1971] 1 Lloyd's Rep. 341, 361 (H.L.). Negligent salvage operations conducted on an oil tanker by a salvage company set off an explosion which severely damaged the ship. Salvors were held to be liable in negligence. *See id.*
55. The Bremen, 111 F. 228, 230 (D.C.N.Y. 1901). Negligent activity by tug in beaching a burning vessel in close proximity to another caused increased damage to the other vessel, resulting in no reward. *See id.*
56. Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea, Sept. 23, 1910, 37 Stat. 1658 (1913).
57. 2 SCHOENBAUM, *supra* note 38, § 16-9 n.2.
58. *Id.*

salving vessel's crew and passengers, to render assistance to any person in danger at sea.[59]

The substantial increase in shipping after World War II created a twofold problem for salvors. The first problem was the exponential increase in oil tanker traffic and a number of serious maritime accidents, like the TORREY CANYON,[60] which caused serious environmental damage. Salvors faced a special problem in that the wreck's salvage value might not cover the potential liability of a salvor for the risk of ensuing oil spills or other environmental damage caused from an attempt to salvage a wrecked tanker.[61] They also faced the additional problem that the oil spilled into the ocean and later salvaged was worthless due to its contact with seawater—and a worthless cargo means no award to the salvor.[62] These two facts made potential salvors reticent to enter into other salvage agreements and increased the risk of untimely responses by salvors to shipping incidents involving tankers. In fact, a delay in negotiations between the owners and salvors of the AMOCO CADIZ[63] over remuneration led to a delay in salvaging the vessel, which resulted in an increase in the amount of crude oil which entered the environment.[64]

The other problem was that the increased size and complexity of ships in distress had commensurately increased the difficulty of salvage operations.[65] It therefore became necessary to statutorily protect a salvage party from being liable for further damage to the environment, which would ensure speedy response by salvors to marine pollution disasters. As a result of widespread concern of salvors and other shipping interests, the International Maritime Organization (IMO) led discussions towards the creation of a new convention, the 1989 Salvage

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59. GOLD, *supra* note 33, at 596.

60. The M/V TORREY CANYON was an oil tanker that broke up and sank off the English coast in March 1967, dispersing over 800,000 barrels of crude oil into the environment over a period of twelve days. It was the world's first large oil spill and prompted the reform of existing shipping laws. Green Nature, *Oil Spills: The Torrey Canyon*, http://greennature.com/article228.html (last visited Mar. 18, 2005).

61. 2 SCHOENBAUM, *supra* note 38, § 16-9; *see also* 1 ROBERT FORCE & MARTIN J. NORRIS, THE LAW OF SEAMEN § 9:57 (5th ed. 2004).

62. 2 SCHOENBAUM, *supra* note 38, § 16-5.

63. The M/V AMOCO CADIZ broke up off the coast of France, releasing more than 220,000 tons of crude oil into the environment. WWF-UK, *Notable Tanker Incidents*, *at* http://www.wwf.org.uk/filelibrary/pdf/tankerincidents.pdf (last visited Mar. 18, 2005).

64. *Id.*

65. *See, e.g.*, Semco Salvage & Marine Ltd. v. Lancer Navigation (The Nagasaki Spirit), [1997] A.C. 455, [1997] 1 Lloyd's Rep. 323 (H.L.).

Convention,[66] which superseded the 1910 Convention and is presently in force. The 1989 Convention has also been implemented into the Canada Shipping Act.[67]

It is now rare that salvage services are performed by casual passersby. Most salvage undertakings are provided by commercial salvage companies offering a host of services, from towing to the raising of sunken vessels in deep water. These services are usually performed under a commercial salvage contract, such as Lloyd's Open Form of Salvage Agreement, which provides a schedule of remuneration for salvage claims. Historically, salvage claims have been litigated under principles of equity, although modern claims are often litigated under the law of contract or in common law. This allows a would-be claimant a wide choice of remedies against the ship as a legal person, its cargo, its owners, or other related parties, such as the insurers.

C. Modern Salvage and Historic Wrecks

Salvage activities with respect to deep-sea historic wrecks are conducted in essentially the same way as current wrecks: the would-be salvor contracts with the various service providers to seek out and raise items from the wreck. However, there is a twofold difference between salvage claims over modern wrecks and those over long-abandoned historic wrecks. The first of these differences is the increased cost of searching for historic wrecks. Often, there are no accurate last positions given at the time the ship sank, which requires substantially more historic research of various records and search time by the salvors as they map the ocean floor. The wrecks themselves have often broken up, with their valuable contents scattered over the surrounding area, which takes much more time to salvage. In such a case, the customary scale of salvage awards may be insufficient for the salvors to recover their costs, and so larger rewards, such as in the case of very complicated commercial salvage operations, are required.

The other difference is that when a historic wreck has been abandoned, there may be no owner or successor-in-interest from whom the salvor can obtain a reward. In this case, the salvor must bring an action against the recovered property itself (the res) or make a claim for

66. International Convention on Salvage, Apr. 28, 1989, IMO Doc. LEG/CONF.7/27 (May 2, 1989), *available at* http://www.jus.uio.no/lm/imo.salvage.convention.1989/toc.html (last visited Feb. 18, 2005) [hereinafter 1989 Salvage Convention].

67. R.S.C., ch. S-9 (1985) (Can.).

the ownership under the law of finds and claim title to the property.[68] This can pose a problem in jurisdictions that operate under the law of sovereign prerogative, where the title of all unclaimed property passes to the state. Application of this principle deprives the salvor of keeping a treasure find that might be his in a jurisdiction employing the law of finds. Such a restriction may dissuade salvage behavior or, alternatively, encourage salvors to pursue their claims in a jurisdiction that does not operate under sovereign prerogative.

D. A New Element of Salvage

In a series of recent decisions, U.S. courts have extensively considered these issues, as well as the need for salvors to preserve the integrity of the wreck while engaged in salvage operations. In *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*,[69] the United States Court of Appeals for the Fourth Circuit considered at length the issue of wreck protection and added another element for salvage tribunals to consider when adjudicating the quantum of wreck awards in the specific instance of historical wrecks: The Salvor's Preservation of the Historical and Archaeological Value of the Wreck and Cargo.[70] Justice Russell, writing for the majority, noted that "salvors who seek to preserve and enhance the historical value of ancient shipwrecks should be justly rewarded."[71] In coming to this conclusion, the court followed the lower court ruling in *MDM Salvage, Inc. v. The Unidentified, Wrecked and Abandoned Sailing Vessel*:

> Archaeological preservation, onsite photography, and the marking of sites are particularly important in the instant context, as the public interest is compelling in circumstances in which a treasure ship, constituting a window in time provides a unique opportunity to create a historical record of an earlier era. These factors constitute a significant element of entitlement to be considered when exclusive salvage rights are sought.[72]

Although this decision is relatively new and only has precedential value in the United States, it remains a breakthrough case because it rewards the preservation efforts of careful salvagers and takes into

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68. Armory v. Delamirie, 93 Eng. Rep. 664, 664 (K.B. 1722) (stating that "the finder . . . does not by such finding acquire an absolute property or ownership, yet he has such property as will enable him to keep it against all but the rightful owner").

69. 974 F.2d 450, 1992 AMC 2705 (4th Cir. 1992).

70. *See id.*

71. *Id.* at 468, 1992 AMC at 2724.

72. MDM Salvage, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 631 F. Supp. 308, 310, 1987 AMC 537, 539-40 (S.D. Fla. 1986).

account the salvors' increased costs in searching and locating these wrecks. It also explicitly indicated when the law of finds will be imposed instead of the law of salvage. Hopefully, this decision will prove to be persuasive in other jurisdictions. If this element is eventually accepted in other jurisdictions, it could ultimately become enshrined in later amendments to the 1989 Salvage Convention[73] or the planned IMO convention on wreck,[74] which could lead to an internationally accepted guideline for preservationist-oriented salvage activities of historic wrecks.

III. COMPETING LEGAL CONCEPTS OF WRECK OWNERSHIP

A. Introduction

In the world of maritime law, the term "wreck" has a variety of meanings. It not only applies to a shipwrecked vessel, but also to any derelict property cast ashore from a wrecked vessel by the ebb and flow of the tide.[75] "Wreck" also applies to flotsam,[76] jetsam,[77] and lagan[78] (provided that these items are found on or near the shore); sunken vessels and their cargoes; aircraft that have crashed into the sea; fishing nets and other implements; and marine artifacts of historical or archaeological significance.[79] In short, the definition of "wreck" applies to any derelict property, whether vessel or cargo, abandoned at sea by those in charge of it without hope on their part of recovering or intention of returning to it.[80]

However, despite its derelict status, maritime property classed as "wreck" generally has a true owner, even if that ownership may be unknown or uncertain at the time the wreck is discovered. There may also be the possibility of multiple claims to the property, such as a contest between the true owner, the salvor, the insurer who may have paid out on the loss, and even the state. In order to prevent disputes and rank

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73. *See* 1989 Salvage Convention, *supra* note 66.

74. *See* UNCLOS, *supra* note 21.

75. 35 HALSBURY'S LAWS OF ENGLAND ¶ 1092 (3d ed. 1961).

76. Flotsam is defined as cargo or other parts of the ship that have floated away from a distressed or sunken ship. GOLD, *supra* note 33, at 599.

77. Jetsam is defined as cargo or other parts of the ship that have been jettisoned or otherwise cast overboard to lighten a ship in distress or otherwise prevent additional danger to the ship. *Id.*

78. Lagan is a term denoting cargo or parts of a ship that have been jettisoned but have been marked so that the items can be recovered later. *Id.*

79. STEEL & ROSE, *supra* note 3, at 81-88.

80. 35 HALSBURY'S LAWS OF ENGLAND, *supra* note 75, ¶ 1092, at 721-22 (stating that "whenever the question arises whether a vessel is derelict or not, the test to be applied is the intention of the master and crew at the time of quitting her, and, in the absence of direct evidence, that is determined by consideration of all the circumstances of the case").

claims between these competing interests, most coastal states developed legislation to deal with these issues centuries ago, and these have changed little with the passage of time.

Although there is presently no international agreement on wreck removal standards between the various coastal states, the IMO is in the process of creating a draft convention on wreck removal to complement the relevant provisions of UNCLOS,[81] the International Convention on Salvage,[82] and various other international conventions. Although the draft is not final, there seems to be consensus among the participants on issues relating to the definition and reporting of wrecks, wreck removal or marking of wreck locations, and obligations to remove wrecks posing a navigational hazard. There is also some consensus on the issue of financial liability of shipping interests and insurers for locating, marking, and moving wrecks, but this has yet to be fully developed.[83] It is the intention of the drafters that this convention will also govern the removal of wrecks in international waters and have a global application. However, this proposed convention is silent with respect to historic wrecks. As the draft convention is focused more on wreck as a navigational hazard than wreck as an object of historical and archaeological interest, it is unknown how this subject will be dealt with, if at all. However, this proposed convention would certainly provide an excellent opportunity to regulate the issues of salvage and historic wreck ownership at an international level.

B. English Legal Concepts and Sovereign Prerogative

From the time of Edward I, English law provided that the ownership of unclaimed wreck vested ultimately in the Crown and required all finders of wreck to turn over their find to government officials or risk prosecution:

> Concerning wrecks of the sea, it is agreed, that if a Man, a Dog, or a Cat escape quick out of the Ship, that such Ship nor Barge nor any Thing within them shall be adjudged wreck: (2) but the goods shall be saved and kept by View of the Sheriff, Coroner or the King's Bailiff, and delivered into the hands of such as are of the Crown, where the Goods were found; (3) so that if any sue for those Goods, and after prove that they were his, or perished within his keeping, within a Year and a Day, they shall be restored to him without Delay; and if not, they shall remain to the King, and be seized by the Sheriffs, Coroners and Bailiffs, and shall be delivered to them

81. *See* UNCLOS, *supra* note 21.
82. *See* 1989 Salvage Convention, *supra* note 66.
83. GOLD, *supra* note 33, at 625-26.

> of the Town which shall answer before the Justices of the Wreck belonging to the King. (4) And where Wreck belongeth to another than to the King, he shall have it in like manner. (5) And he that otherwise doth, and thereof be attainted shall be awarded to Prison, and make fine at the King's Will and shall yield damages also.[84]

This concept of sovereign prerogative has been promoted by various authorities, including John Selden in *Mare Clausum seu de Domino Maris*,[85] and has long been a controlling factor in admiralty cases involving wreck.[86] Sovereign prerogative provides a basis for the present legislation in most if not all Commonwealth jurisdictions, and it is important to consider its potential influence over any salvage or other proceedings involving claims over wreck. In the event that the rightful owner cannot be found, sovereign prerogative presumes a residual ownership interest in wreck passing to the Crown.[87] This presumption is present in all salvage claims and effectively usurps the use of the law of finds.[88] Under the law of finds, the finder or salvor does not normally obtain an ownership interest in the wreck, regardless of whether or not the rightful owner can be found, and instead must content himself with a salvage award granted by the courts of a portion of the salvaged wreck, which he may secure against the wreck or its proceeds.[89]

Evolution in English admiralty law eventually led to the creation of the office of the Receiver of Wreck, an official who replaced the "hands of such as are the Crown,"[90] with extensive powers to take charge of wreck and protect and preserve it while determining the rights of the various parties to it. This model has been followed in most Commonwealth countries.

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84. What Shall Be Adjudged Wreck of the Sea, and What Not, 3 Edw. 1, c. 4; *see also* His Prerogative in Having the Wreck of the Sea, Whales, and Sturgeons, 17 Edw. II, c. 11 ("Also the King shall have the Wreck of the Sea throughout the realm . . . except in certain places privileged by the King.").

85. JOHN SELDEN, MARE CLAUSUM SEU DE DOMINO MARIS (1635).

86. *See* The Aquila, 165 Eng. Rep. 87, 89 (1798) (stating that it depends upon "the law of each country to determine, whether property so acquired by occupancy, shall accrue to the individual finder, or to the sovereign and his representatives" and that it is considered "to be the general rule of civilized countries, that what is found derelict on the seas, is acquired beneficially for the sovereign, if no owner shall appear").

87. BRICE, *supra* note 4, at 262-65.

88. *Id.* at 303-06.

89. *Id.*

90. *Wreck of the Sea*, *supra* note 84, § 2.

C. Canadian Legal Concepts

In Canada, this official is appointed by virtue of the Canada Shipping Act, under the authority of the Ministry of Fisheries and Oceans, and is usually a senior customs officer with the statutory power and authority of the chief officer of customs.[91] The Act also grants extensive powers of appointment, arrest, investigation, and the right to sell or otherwise dispose of unclaimed wreck.[92] The Receiver has the choice of either preserving the wreck itself until disposition or, in the event that it is dangerous, perishable, or otherwise impracticable to keep, he may sell the wreck by public tender and retain the proceeds until disposition.[93]

In the event that the rightful owner or someone with a valid property interest can be found, the wreck itself or its proceeds will be turned over to them, less deductions for the payment of any salvage awards and the Receiver's administrative charges.[94] In the event that the owner has truly abandoned the wreck or the owner cannot be found, after a statutory period of time, the wreck or the proceeds will revert to the Crown.[95] Thus, in Commonwealth jurisdictions, there is no immediate right of a salvor to the found property but only to a salvage award as determined by the Receiver of Wreck.

It is also the responsibility of the Receiver of Wreck to supervise the removal or marking of derelict vessels within Canada's territorial waters, whether such vessels are aground, afloat, or sunk in such a way that they pose a navigational hazard.[96] There may also be issues of pollution or dangerous cargoes, or of the ship breaking down further and in some way becoming a further hazard. It is within the Receiver's mandate to raise, mark, move, or destroy wrecked vessels and their equipment as he or she sees fit and bill these charges back to the ship's owner, insurer, or against the proceeds of sale.[97]

Unfortunately, the Act is primarily concerned with the protection and regulation of shipping; it is silent with respect to matters of underwater cultural heritage.[98] There are presently no provisions to control access to historic sunken wrecks which lie in Canadian territorial

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91. Canada Shipping Act, R.S.C., ch. S-9 (1985) (Can.).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

waters, although arguably this is within the scope of the Receiver of Wreck's powers by virtue of Canada's accession to UNCLOS.[99] It is presently within the Receiver's discretion as to whether a wreck is to be removed or simply marked with a buoy, like the EMPRESS OF IRELAND, which permits indiscriminate access by recreational divers, treasure hunters, and others to various wreck sites, a practice that often results in the removal of artifacts, various other valuable articles, and the disturbing of human remains.

D. U.S. Legal Concepts

The foundation for the admiralty law of the United States was the extant English jurisprudence that was imported by the first settlers.[100] Until the adoption of the United States Constitution, jurisdiction in maritime cases was distributed between the Confederation and the individual states.[101] Upon the adoption of the Constitution, a system of exclusive federal admiralty jurisdiction was incorporated,[102] which placed both substantive and procedural law under national control. However, unlike its English origins and Canadian counterpart, U.S. admiralty law pertaining to the ownership of wreck is not governed by a comprehensive act, like the Canada Shipping Act, but rather by a collection of acts, codes, and common law, which have evolved as the situation required. There is not the same overarching residual ownership of the Crown. The intention by the original framers of the Constitution was for the admiralty law to adapt quickly to emerging issues, rather than to be limited to the comparatively glacial pace of parliamentary change.

The issue of property interests in wreck originally followed the English concept of sovereign prerogative with the ownership vesting in the state, which remained a presumption in American law until the turn of the last century.[103] In *Gardner v. Ninety-Nine Gold Coins*,[104] the United States District Court for the District of Massachusetts distinguished earlier jurisprudence based on the unique facts of the case and awarded a portion of the recovered money found on a body at sea directly to the

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99. UNCLOS, *supra* note 21, arts. 149, 303.

100. BRICE, *supra* note 4, at 10-30.

101. 1 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-6, at 16-18 (4th ed. 2004).

102. U.S. CONST. art. 3, § 2, cl. 1.

103. BRICE, *supra* note 4, at 280, 303.

104. 111 F. 552, 554 (D. Mass. 1901). The government intervened in an action by the salvors for the residue of money recovered from an unidentified body found at sea. The court had retained the money remaining after payment of a liberal salvage award in its registry for two years. *See id.*

finder in addition to the salvage award already paid.[105] The following year, the United States Court of Appeals for the First Circuit revisited the issue in *United States v. Tyndale*.[106] In affirming the judgment of *Gardner*, the court put to rest the spectre of royal prerogative:

> While there can be no question that the sovereign peoples in Anglo-Saxon America, whether the various states or the United States, did, in some way, succeed to all the rights of the English king and of the English people, yet, until some recognized line of procedure or some action of congress intervenes, it is not within the province of the courts to determine that the treasury of the United States represents any particular royal prerogative.[107]

This position was echoed seventy-six years later in the much publicized case of *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*,[108] one of the first "modern" cases involving a dispute over the ownership of a long-lost wreck in international waters.[109] In that case, the court sought to determine the ownership of the wreck of the NUESTRA SENORA DE ATOCHA, a Spanish galleon which sank off the coast of Florida in 1622, and the artifacts, gold, and other treasure found within it.[110] Justice Gewin, speaking for a unanimous court, explicitly denied that sovereign prerogative in the ownership of wreck presently exists in the United States: "While it may be within the constitutional power of Congress to take control of wrecked and abandoned property brought to shore by American citizens (or the proceeds derived from its sale), legislation to that effect has never been enacted."[111]

Until recently, there was no specific legislation to deal with questions of abandoned wreck ownership. It was generally thought that customary law was suitable to adjudicate any issues which had come up in the area. However, with the recent improvements in diving technology permitting larger numbers of recreational divers to access wrecks, the United States Congress introduced the Abandoned Shipwreck Act of 1987.[112] Under the Act, the U.S. government asserted title to three

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105. *Id.*

106. 116 F. 820, 823 (1st Cir. 1902) ("It is worth while to notice that our colonial policy radically differed from the severe common-law rules as to wrecks and as to property floating on the high seas under such circumstances that it might well be regarded as an incident of some maritime misfortune, and that this difference is now accepted as a part of our common law.").

107. *Id.*

108. 569 F.2d 330, 333, 1978 AMC 1404, 1405 (5th Cir. 1978).

109. *See id.*

110. *See id.*; Captain Carl Fismer, *Tragedy of the Nuestra Senora de Atocha*, *at* http://www.nvo.com/treasure/nuestrasenoradeatocha/ (last visited Mar. 18, 2005).

111. *Treasure Salvors*, 569 F.2d at 341, 1978 AMC at 1418.

112. 43 U.S.C. §§ 2101-2106 (2000).

categories of abandoned shipwrecks: (1) those embedded in the submerged lands of a state, (2) those embedded in coralline formations protected by a state on submerged lands of a state, or (3) on submerged lands of a state and included in or determined eligible for inclusion in the National Register.[113] Present interpretation of this act suggests that these categories are exhaustive.

Upon asserting title, the U.S. government then transferred its title to the majority of the subject shipwrecks to the respective states to manage, with the exception of those that remain on public lands.[114] Title to wrecks that lie on Indian lands has been granted to the tribes that own those lands.[115] The purpose of this legislation was specifically to protect those wrecks which have historical significance, as well as to permit public access to them in the same way that historic sites on land are protected and monitored. Unfortunately, the act does not address the specific issue of historic wrecks lying in international waters or set out any guidelines with respect to salvage activities or other protections and monitoring activities. These activities have been left exclusively to the courts.

It is interesting to note the strange parallel that exists: Commonwealth countries retain to a greater or lesser extent the notion of sovereign prerogative, which suggests a residual ownership interest by the Crown in all historic wrecks, once they are flagged under that state, whether lying in international waters or in territorial waters belonging to a coastal state. There is, therefore, an underlying presumption that all such wrecks are never truly abandoned. These countries seem to provide little or no protection to wrecks of historical or cultural significance. However, given that there is an underlying presumption that such wrecks belong by right to the Crown, there is, historically, little policy reason why more protection would be required.

On the other hand, the United States has abandoned the concept of sovereign prerogative, which means that there is no presumption of underlying ownership rights in the wreck by the state. In the event that there is no ascertainable rightful owner or successor-in-interest, the state is on equal footing with the salvors and all other claimants, and the court will instead apply the law of finds in adjudicating a salvage dispute. Given this lack of presumptive ownership, it makes sense that the United States would enact legislation to protect some of the wrecks within its territorial waters in order to ensure some certainty with respect to historic wrecks that should be monitored and protected as archaeological,

113. *Id.* § 2105(a).
114. *Id.*
115. *Id.* § 2105(c)-(d).

historical, and cultural resources. This would probably explain why, in the case of abandoned vessels lying in international waters, the U.S. courts are the forum of choice, in that ultimately salvors are likely to take a higher salvage award through the U.S. courts than in other jurisdictions.[116]

IV. OWNERSHIP CONCEPTS OF SUNKEN WARSHIPS AND GOVERNMENT VESSELS

A. The Concept of Sovereign Immunity

Throughout history, warships and other craft in the service of the government have been accorded special protection under the concept of sovereign immunity, which exempts a warship or other governmental vessel in noncommercial service from the jurisdiction of any other state.[117] This was thought necessary in past times in order to permit diplomatic communication and trade envoys between coastal states.[118] A warship or government vessel took on the legal persona of a visiting army passing through the host state and was considered an extension of the sovereignty and system of laws of its flag state.[119] In an era before other forms of communication, safe passage for these craft was essential. In the modern era, this doctrine has been accepted as customary law by the courts in most jurisdictions[120] as well as having been enshrined in articles 95 and 96 of UNCLOS:

> Article 95. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.
> Article 96. Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.[121]

There are also additional policy reasons that have been used in recent years to bolster the concept of sovereign immunity in the courts. Sunken military vessels often contain military or diplomatic material and naval technological modifications of a sensitive nature which may compromise national security. They also often contain the remains of naval personnel, which entitles them to the same protection as military

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116. Eleazer Holmes, *The Recovery of Vessels, Aircraft, and Treasure in International Water*, *in* SOME CURRENT SEA LAW PROBLEMS 26, 34-35 (S. Wurfel ed., 1975).

117. BRICE, *supra* note 4, at 147-52.

118. *Id.* at 147.

119. *See* Harris, *supra* note 19, at 112-16.

120. *See, e.g.*, The Schooner Exch. v. McFadden, 11 U.S. 116 (1812); The Prins Frederick, 2 Dods. 451 (1820).

121. UNCLOS, *supra* note 21, arts. 95-96.

gravesites on land. Finally, there are safety concerns, both for divers and the surrounding environment, in that careless activity could trigger off unexploded ordnance or release nuclear or other fuel material into the ocean environment.[122]

Most major coastal states, and the United States in particular, have been very aggressive in using this doctrine as a rationale for protecting their sunken warships and denying access to them or the pursuit of salvage claims against them since the nineteenth century.[123] An argument has also been recently advanced that there is a presumptive nonabandonment of nineteenth- and twentieth-century vessels,[124] but this presumption has not always been accepted by the courts. The courts in adjudicating disputes will always consider the conduct of the flag state with respect to their sunken craft and, in certain circumstances, will consider the vessel abandoned and award salvage rights to the salvor, such as in the case of the ATOCHA.[125]

The general process by which governments exert their claim of sovereign immunity over warships and government vessels in international waters is through formal statements made to the world at large of their intent to assert control and by aggressive prosecution of unauthorized salvage activity.[126] The official statement by the German government concerning the wreck of the BISMARCK is typical of these types of statements:

> The Federal Republic of Germany considers itself the owner of the former sovereign Battleship Bismarck. Diving excursions to the interior of the wreck as well as recovery attempts require consent of the Federal Government. This has been categorically denied in other cases of sunken ships of the World Wars, because one must expect to find remains of the dead in the wreck. The Federal Republic feels it is its duty to protect the seamen who went to their death in the sinking of the ship. Following

122. *See* Harris, *supra* note 19, at 123-24.

123. Gardner v. Ninety-Nine Gold Coins, 111 F. 552, 553 (D. Mass. 1901).

124. MARIAN NASH LEICH, 8 CUMULATIVE DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 999, 999-1006 (1980) (citing memorandum attached to letter by Deputy Legal Adviser of the D.O.S., James H. Michel (Dep't of State File No. P81 0004-0338) in response to a request for DOS's view on the ownership of a Japanese vessel sunk by the United States during WWII).

125. Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 333, 1978 AMC 1404, 1406 (5th Cir. 1978).

126. As noted by the court in the *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Rep. 116: "*The notoriety of the facts,* (and) *the general toleration of the international community*" creates customary international law.

> international customs, we view the wreck of the Bismarck as a seamen's burial site that must be accorded proper respect.[127]

There is also the protection of customary international and national law pertaining to the respect to be given to military gravesites. Wreck locations of sunken warships are generally considered to be gravesites, and the flag state may avail itself of this protection.[128] Control may also be exerted presumably by the flag nation conducting patrols over the location of the wreck.

B. When Is Sovereign Immunity Lost?

The doctrine of sovereign immunity provides that, like the principles governing the ownership of merchant wreck, absent express abandonment, gift, or sale, the rights of the true owner are generally not extinguished by the efflux of time.[129] The only other way that sovereign immunity may be lost and a transfer of title occurs is through the capture of the warship in battle before actual sinking.[130] Once a warship is "captured," the capturing state acquires physical possession plus an immediate transfer of title.[131] However, even in such cases, the conditions surrounding acts of physical possession can be problematic. Such was the case in the dispute in 1980 over the possessory rights to the ADMIRAL NAKHIMOV, sunk in 1905 during the Russo-Japanese War in Japanese territorial waters.[132] The Japanese took the position that the NAKHIMOV had been captured when it raised a white flag and stopped fighting in order that her crew could be rescued.[133] The Japanese warship S.S. SADOMARU rescued the crew, boarded the NAKHIMOV, and raised the Japanese flag before it sank.[134] On the other hand, the Russians took the position that, though still afloat, the ship was already sinking by the bow at the time the crew of the SADOMARU boarded her, so the question of whether title was transferred remains unresolved.[135]

There have also been a number of U.S. cases where, in disputes over salvage rights between salvors and the U.S. government, the courts have held that the U.S. government had abandoned its interests through

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127. *The Wreck of the Bismarck*, *at* http://www.kbismarck.com/wreck.html (last visited Mar. 18, 2005).
128. BRICE, *supra* note 4, at 284-85.
129. STEEL & ROSE, *supra* note 3, at 528-83.
130. *Id.*
131. Harris, *supra* note 19, at 117.
132. *Id.* at 120.
133. *Id.* at 120-21.
134. *Id.* at 121.
135. *Id.*

inaction and was therefore unable to assert a claim based on sovereign immunity.[136] However, given the age of these cases and the greater willingness of the U.S. courts in recent years to follow the doctrine of sovereign immunity, it is unknown what the present precedential value of these cases is. Another influence in the U.S. legal system is the recent Abandoned Shipwreck Act,[137] which imposes yet another consideration on decision makers, but this act has no application in international waters. It seems clear, however, that in order for a government to assure itself of adequate protection for its wrecks under the concept of sovereign immunity, it must unequivocally manifest its intention to maintain ownership interest in the wreck.

C. Can the Rule of Sovereign Immunity Be Extended to Protect Merchant Shipwrecks?

It is the position of this Article that the doctrine of sovereign immunity might be extended to protect certain British shipwrecks and possibly those of other nations. From the dawn of the steamship age until the advent of nonstop, intercontinental jet aircraft, merchant shipping was the safest and most reliable form of transportation.[138] As such, merchant shipping enjoyed handsome government subsidies, as the various European nations, Canada, and the United States vied with each other for shipping supremacy on the high seas and for the honor of being the holder of the Blue Riband, the award presented to the nation whose flagged liner was able to make the fastest Atlantic crossing.[139] The navigation company whose liner was fortunate enough to surpass her rivals on her maiden Atlantic crossing would be assured of both government subsidies and lucrative transportation contracts for years to come.[140]

Naturally, this government largesse came at a cost to the navigation companies. As the nineteenth century came to a close and steamships became larger and more costly, subsidy agreements between the shipping companies and their flag states became the norm.[141] These typically took the form, particularly in England, of contracts with the British Admiralty in the form of special charters, to carry mail and government dispatches,

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136. *See generally* Balt., Crisfield & Onancock Line, Inc. v. United States, 140 F.2d 230 (4th Cir. 1944); Somerset Seafood Co. v. United States, 193 F.2d 631 (4th Cir. 1951).

137. 43 U.S.C. §§ 2101-2106 (2000).

138. Merseyside Maritime Museum, *The Age of Sail*, *at* http://www.liverpoolmuseums.org.uk/maritime/archive/pdf/Ships-Age%20of%20Sail%20no1.pdf (last visited Mar. 18, 2005).

139. *Id.*

140. *Id.*

141. *Id.*

granting the carrying ship the unique designation of R.M.S. prefixed to her name.[142] Other European nations followed suit with similar arrangements.[143] As Europe drew closer to World War I, most European navies entered into further subsidy arrangements with navigation companies, whereby in return for the subsidies, their passenger liners and merchant ships could be requisitioned at any time by the navy and commissioned as armed merchant cruisers, troop transports, and hospital ships, commanded by a combination of civilian and naval officers and crew.[144] During the war, this is in fact what happened, and the whole issue of joint control and ownership became increasingly problematic, as passenger liners, such as the R.M.S. LUSITANIA,[145] effectively became legitimate military targets and liable to be sunk with substantial losses of civilian life.

This Article submits that this close relationship between the various governments and their subsidized "merchant navies" could render such vessels, if sunk while engaged in their official government duties, protected under the sovereign immunity provisions of both customary international law and the relevant provisions of UNCLOS.[146] Article 96 provides that "ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."[147] Although article 96 specifies "only on government non-commercial service," the British Admiralty has variously considered these wrecks, such as the LUSITANIA, to be military sites and off-limits to civilian divers. Other European nations have taken a similar stance, and it seems likely, given their conduct, that an argument could be made that these vessels could be protected under sovereign immunity. In the previously noted dispute between Russia and Japan over the ADMIRAL NAKHIMOV, the question of ownership turned on effective control of the ship at the time of the sinking. If the same principles are considered in determining the rights of ownership of merchant wrecks, then it would be conceivable that the rights of the sovereign over wreck by its flag state

142. *Id.*

143. *Id.*

144. *Id.*

145. The R.M.S. LUSITANIA was torpedoed by a German U-boat in 1917 while engaging in civilian passenger service, but operating under the joint control of the British Admiralty as an "armed merchant cruiser." She sank with a loss of approximately 1200 lives and this spurred the United States to declare war on Germany. Lusitania Online, *Torpedo*, *at* http://www.lusitania.net/torpedo.htm (last visited Mar. 18, 2005).

146. *See* UNCLOS, *supra* note 21.

147. *Id.* art. 96.

have never been extinguished. This Part of the Article will consider the two general ways in which it could be asserted that sovereign immunity arguments could be advanced and the efficacy of each.

1. Royal Mail Ships

The year 1838 marked the first successful Atlantic crossing of the steamships SIRIUS and GREAT WESTERN.[148] For the first time in history, the possibility for regular, year-round Atlantic crossings in any weather became a reality.[149] The British government was anxious to maintain its continued naval superiority, and that same year, the Admiralty invited tenders from interested parties for the conveyance of mails by steamship between England and North America.[150] The only taker was Samuel Cunard, a Nova Scotia businessman, who entered into a contract with the Admiralty in 1839 for £55,000 a year for the following seven years.[151]

Later, similar arrangements were finalized between other navigation companies and the British Admiralty, and provisions of these individual charters granting certain ships the prestigious designation of "R.M.S." prefixed to the ship's name were eventually codified under the Mail Ships Act, 1891.[152] The act guaranteed certain privileges, immunities, and exemptions to these ships under international convention while travelling on the high seas and in foreign ports.[153] These exemptions included exemption of the ship from arrest and detainment[154] and for priority treatment and processing at port by convention countries.[155] These ships were also generally chosen by diplomats and other visiting dignitaries and would be used to carry sensitive cargoes, dispatches, and materials.[156]

Given the privileged status granted these ships, both by virtue of their special Admiralty Charters and the act, is there a reasonable argument for sovereign immunity under article 96 of UNCLOS? Consider the case of the R.M.S. REPUBLIC. At the time of her sinking

148. Ljungström, *supra* note 9, *at* http://www.greatoceanliners.net/greatwestern.html (last visited Mar. 18, 2005).

149. *See id.*

150. 1 N.R.P. BONSOR, NORTH ATLANTIC SEAWAY 72 (1975).

151. Incidentally, the first scheduled mail sailing took place on July 4, 1840, on the BRITANNIA and took twelve days and ten hours. *Id.* at 74.

152. 54 & 55 Vict., c. 31 (Eng.).

153. *Id.*

154. *Id.* § 5(1).

155. *Id.*

156. *Id.*

in 1909, the REPUBLIC was en route to Europe, her running costs defrayed in part by her Royal Mail charter.[157] In addition to her usual list of passengers and freight, the REPUBLIC carried the U.S. Atlantic Fleet's payroll, mails, and dispatches.[158] She was also rumored to be carrying two politically sensitive and secret shipments of gold that had been consigned originally to the Czar of Russia.[159] The gold shipment allegedly consisted of fifteen tons of gold bars and a $3,000,000 (1909 face-value) five-ton shipment of American Gold Eagle coins contained in seventy-five cases.[160] This money had come from the Federal Reserve Bank, borrowed by Russia's Czar Nicholas II from France to finance the Russo-Japanese War.[161] Although the argument of sovereign immunity with respect to the ownership of the valuable cargo or the ship itself was never advanced during the litigation surrounding salvage ownership of the wreck by any of the governments involved,[162] it would be interesting to ponder what, if any, weight a U.S. federal court would have given this argument.

If the ownership rights to the ship and its contents under sovereign immunity never lapse, then, theoretically, property rights in the United States Navy payroll would revert to the United States, and property rights in the gold shipment to Czar Nicholas II would revert to either the French or Russian governments, in addition to a portion of the value of the wreck reverting to the British government under the provisions of her Admiralty Charter. As no other party-in-interest ultimately came forward, the First Circuit ultimately decided the case on the principle of the law of finds.[163] If a claim under sovereign immunity had been advanced successfully, it would presumably have trumped the rights of the successful salvors. Thus, the property rights of the REPUBLIC and her cargo would have been divided among the various rightful owners, and only a salvage award would have been paid to the salvors, based on a portion of the value of what was salved.

Consider, too, the wreck of the TITANIC. At the time of her sinking, she was also operating under an Admiralty Charter and had been built with a substantial government subsidy presumably with the right of

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157. The Official R.M.S. Republic Web site, *Treasure of the R.M.S. Republic*, *at* http://www.rms-republic.com/index1.html (last modified Jan. 17, 2005).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. Martha's Vineyard Scuba Headquarters, Inc. v Unidentified, Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1064, 1988 AMC 1109, 1113 (1st Cir. 1987).

163. *See id.*

the Admiralty to requisition her for wartime duties in the event of war.[164] Interestingly, both her sister ships, R.M.S. OLYMPIC and BRITANNIC, were so commissioned at the onset of World War I, two years later.[165]

Would the "blending" of sovereign interests and private capital with a view towards potential British Admiralty control in the event of a major armed conflict give the British Admiralty the right to advance a claim? At the time the wreck was discovered, UNCLOS had been in effect for three years, and an argument could theoretically have been advanced under article 96. During the litigation, the presumed true successor-in-ownership interest, the Liverpool and London Steamship Indemnity Association, entered into a settlement agreement with the ultimately successful salvor.[166] It would be interesting to speculate, had the insurer prevailed at trial, whether the issue of reimbursing the British government for its subsidy would have arisen. Unfortunately, as this argument was never advanced, the validity of such a claim is not known.

2. Government Subsidies with a Right of Requisition in Wartime

a. Armed Merchant Cruisers

As the various European powers drew closer to war during the first decade of the twentieth century, Britain in particular became preoccupied with her ability to retain effective control of the seas and to have the necessary shipping tonnage to be able to transport troops and supplies to the four corners of the British Empire. This was not an unreasonable concern. In June 1914, British shipping tonnage accounted for 45.2% of the world's steam tonnage, and British-flagged ships carried half of the world's sea-borne trade.[167] At the same time, Germany was in second place at 12% and the United States was fifth at 4.3%, behind Norway and France.[168] In the race towards armament, handsome subsidies were given to various navigation companies to adapt their ships for the purpose of carrying deck armaments in time of war as armed merchant ships.[169] A 1902 Parliamentary Inquiry indicated that these subsidies were shared in most part between Britain's largest and fastest liners.[170]

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164. *See id.*

165. The BRITANNIC, as H.M.H.S. BRITANNIC, struck a mine in the Mediterranean Sea in 1916 off Greece and sank. Ljungström, *supra* note 9, *at* http://www.greatoceanliners.net/britannic2.html (last visited Mar. 18, 2005).

166. BRICE, *supra* note 4, ch. 1.

167. C. ERNEST FAYLE, A SHORT HISTORY OF THE WORLD'S SHIPPING INDUSTRY 275 (1933).

168. *Id.*

169. *Id.*

170. *Id.*

An example of a typical naval subsidy arrangement was the subsidy agreement that Cunard entered into with the British Admiralty. In exchange for the subsidy, the specifications for the R.M.S MAURITANIA and LUSITANIA were to include speed capability in excess of 24.5 knots, deck strengthening for the installation of guns, and deliberate positioning of the coal bunkers to protect the engine compartments as much as possible from enemy fire.[171]

When war was declared, all of these subsidized ships were ordered to return to England, where they were armed, sent to Portsmouth for ammunition, and staffed with naval personnel in addition to the regular officers and crew.[172] Contemporary naval logic had envisioned a grand naval battle on the scale of Trafalgar, where these ships would have been invaluable, but that was not to be. These ships spent the war engaged mostly in various naval support duties, or the ships carried on in their prewar commercial activities, albeit under the control of the British Admiralty.[173]

The question posed by the wrecks of these vessels sunk before, during, and immediately after the war, however, is when, if ever, can these wrecks acquire the protection of sovereign immunity? It seems clear that if they were sunk as a result of hostilities while officially designated as an armed merchant cruiser and under the command of a mixed naval and civilian crew, they would be off-limits. But what about before hostilities have been declared or after they have ceased? They have still had the benefit of naval subsidies and were constructed in part for the purpose of war. There does not seem to be a unified approach by the various flag states on this point. The wreck of the LUSITANIA was considered off-limits for many years as a military site, but yet she was sunk while engaged in predominantly civilian activities and commanded by civilian officers.[174] On the other hand, the R.M.S. CARPATHIA, sunk while performing convoy duties off the coast of Ireland in the last months of the war, has been largely ignored by the British government. More importantly, the wreck was found in 2000, long after the provisions of UNCLOS came into effect. Most other coastal states have also been inconsistent in establishing claims to their wrecks or in articulating a sovereign immunity argument for this class of wreck.

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171. JOHN MAXTONE-GRAHAM, THE ONLY WAY TO CROSS 11 (1972).

172. *Id.*

173. *Id.* at 125.

174. *See* Lusitania Online, *supra* note 145, *at* http://www.lusitania.net/chronology.htm (last visited Mar. 18, 2005).

b. Troopships and Hospital Ships

Both World Wars saw various nations requisition their merchant ships for a variety of military duties, usually as troopships and hospital ships. The requisition was often through a contractual right of various countries' naval authorities, as noted in the above section. Although these are theoretically civilian ships and may have been carrying some civilian cargoes, they sank while in the process of engaging in predominantly naval duties, which should bring them within the scope of UNCLOS article 96 protection. Until now, there has been an inconsistent treatment by their flag states in disputes over access to these vessels. For instance, the British Admiralty has not opposed dives to the former White Star Liner H.M.H.S. BRITANNIC, which sank in 1916 while carrying out her duties as a naval hospital ship, although there have been no attempts to date by private parties to conduct a major salvage operation.[175]

On the other hand, England actively opposed the salvage of the troopship H.M.S. BIRKENHEAD, which sank off the coast of South Africa in 1858 carrying a combination of civilian and military passengers, and possibly a large amount of gold intended for the army payroll.[176] Ultimately, an agreement was reached between South Africa, the salvors, and the British Admiralty, which allowed various salvage operations to occur.[177]

The German government has typically been aggressive in protecting the sites of her lost transports and hospital ships. A poignant example of this is the former KDF Liner WILHELM GUSTLOFF, which was torpedoed and sank in the Baltic Sea in 1945, killing more than 5000 civilian refugees and wounded soldiers.[178] The wreck has long been considered a military gravesite and is off-limits to most visitors.[179]

The major factor that seems to strongly influence the possibility of contentious claims by salvors and governments over access and ownership rights to these vessels is the possibility of finding valuable items at the wreck site. The BIRKENHEAD was carrying a large army payroll in gold coins destined for the British troops, whereas the

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175. The BRITANNIC, *HMHS BRITANNIC 98, Technical Diving Expedition*, *at* http://website.lineone.net/~britannic98/ (last modified Sept. 18, 1999).

176. Harris, *supra* note 19, at 111.

177. *The Sinking of the Birkenhead*, *at* http://www.overberg.co.za/birkenhead/story.htm (last visited Feb. 18, 2005).

178. Jason Pipes, *A Memorial to the Wilhelm Gustloff*, *at* http://www.feldgrau.com/wilhelmgustloff.html (last visited Mar. 18, 2005).

179. *Id.*

BRITANNIC and the WILHELM GUSTLOFF had nothing of material value on them when they sank and remain items of historical interest, rather than something of commercial value to exploit. Although claims for protection under sovereign immunity by various countries historically been inconsistent, this can be explained by the interest of the states in the contents of the wrecks. It would seem that, unless the wreck has substantial political or patriotic importance, such as the WILHELM GUSTLOFF, the BIRKENHEAD, and the LUSITANIA, governments are content to take a hands-off approach and let the salvors fight out their rights through the courts.

This attitude may change, however, as there is presently more public interest in protecting these sites for their historic and archaeological value. The inevitable political pressure caused by this heightened public interest may spur the various coastal states into doing more to protect these sites than has been the case previously. The protection afforded by sovereign immunity to these types of wrecks has already been enshrined to a large extent by official statements, custom, and respect for the tragic circumstances surrounding these losses—what is needed is simply more aggressive enforcement.

D. The Effectiveness of Sovereign Immunity in Protecting Merchant Wrecks

Although there seems to be general concurrence among nations with respect to true warships, lost either during hostilities or peace time, that such wrecks are off-limits, there is no such consensus regarding these hybrid merchant/governmental vessels. If the doctrine of sovereign immunity were extended to bring merchant wrecks within the scope of UNCLOS article 96,[180] this might provide the most effective form of protection for these wrecks. The rights afforded by sovereign immunity would effectively trump the rights of salvors by circumscribing their opportunity under the law of salvage of the right to a reward, absent an express contract entered into between the salvor and the flag state. The salvors would also be prevented from advancing an argument under the law of finds. This would effectively kill the interest by potential salvors in any commercial salvage venture not officially sanctioned by the flag state, such as the case with the salvage dispute over the BIRKENHEAD. Protection under sovereign immunity could be obtained either by the ship's conduct during wartime, naval, or governmental control, or by the use of naval or government subsidies in its construction.

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180. *See* UNCLOS, *supra* note 21.

Ultimately, governments are left with the pragmatic problem of funding. The patrol and protection of these sites is expensive, as are court costs when countries play the parts of principal litigants and intervenors. In an era when governments have limited resources, can the expense of drawn-out litigation, such as that which has continued ad infinitum over the wreck of the TITANIC, be justified when, in many cases, there is nothing left of value at the wreck site to salvage? On the other hand, these same governments have also agreed in principle to support the provisions of UNCLOS. There is an underlying assumption that such support should translate into affirmative action on the part of the subscribing nation. In most cases, the general principles surrounding the protection of true warships has not cost most countries much more than an official statement and a "manifest intent to control." When most countries have large and well-funded departments of justice, is the addition of a few more cases really going to affect their bottom line?

V. THE PROBLEMS OF FORUM SHOPPING

As mentioned in Parts II and III on salvage rights and wreck ownership, the litigation in most nations surrounding competing claims to shipwrecks tends to follow one of two general broad legal regimes in the case of truly abandoned maritime property where the rightful owner or successor-in-interest cannot be found. The first regime includes those who follow the English Rule, under which the ownership of recovered maritime property vests ultimately in the sovereign, and successful salvors may only claim a right to a salvage reward.[181] The second regime includes those who follow the American Rule, under which recovered treasure vests ultimately in the finder.[182] In the past, most courts have paid more attention to these two competing legal principles than to either UNCLOS or the Buenos Aires Draft Convention[183] in adjudicating these legal disputes, and it remains to be seen exactly what effect these will have on either legal regime in the future. While the impact of these conventions remains undetermined, it makes the most economic sense, depending on the interests of the parties to the litigation and the nature of the wreck to be salvaged, to bring their action in the forum that utilizes the legal regime that will most support their position.

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181. BRICE, *supra* note 4, ch. 1.
182. Holmes, *supra* note 116, at 34.
183. *Id.* at 28-30.

A. Treatment by Canadian and Commonwealth Courts

Canada, like Britain and the other Commonwealth countries, employs the rule of sovereign prerogative, with ownership of all salvaged items vesting in the state.[184] This situation obviously favors a party interested in preserving the wreck and ensuring that it not be commercially salvaged. However, the problem is that Canada does not strictly enforce the provisions of the Shipping Act[185] with respect to these historic wrecks, and despite the strong enforcement powers given to the Commissioner of Wreck and the Ministry of Fisheries and Oceans, unauthorized salvaging of these wrecks continues. This lapse would appear to be a bona fide problem related to Canadian policy decisions regarding the allotment of scarce patrol resources due to budgetary constraints. Canada has one of the world's larges coastlines to protect and monitor. Due to far more serious matters of illegal immigration, drug smuggling, and other criminal activity, combined with the regulation of fisheries and environmental protection, there simply is not enough manpower to investigate and prosecute these "soft" regulatory offenses. Therefore, historic-wreck monitoring understandably takes a backseat to commercial shipping regulatory issues. It is unlikely that this situation will change in the future, absent significant public pressure.

It is also interesting to note that Canadian jurisprudence in the area of wreck ownership has not substantially changed over the last century. The vast majority of reported cases over salvage matters in Canadian case law have, quite surprisingly, arisen mostly out of the tragic sinking of the EMPRESS OF IRELAND in 1914,[186] and the law in this area has not changed substantially since. Canada has never had an historic merchant fleet on the same scale of either Britain or the United States, and this has understandably limited the number of cases that could conceivably have been brought here. Additionally, there are few, if any, wrecks which contain items of value or military secrets worth litigating over. The sheer lack of salvage-related cases has deprived the courts of the opportunity for judicial activism towards a more preservationist approach when dealing with historic wrecks. Therefore, it is hardly surprising that most litigation is brought either in Britain or in the United States, where there were historically larger shipping fleets, which naturally leads to more salvage cases in the courts. As mentioned

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184. BRICE, *supra* note 4, at 311.

185. *See id.*

186. *See* Canadian Pac. Ry. Co. v. S.S. The "Storstad," [1920] 51 D.L.R. 94; 251 Bars of Silver v. Canadian Salvage Ass'n No. 2, [1915] 15 Ex. C.R. 370.

previously, Britain has the same general legal tradition as Canada and has intermittently been involved with the protection of various historic wrecks. A further analysis of British case law is beyond the scope of this Article.

B. Treatment by American Courts

Unlike Canada and other Commonwealth countries, the United States is unique in that most of the major cases involving historic wreck have been litigated there. Through historic circumstance, wrecks that have captured much of the public interest have been located off the coast of the United States or discovered in international waters by U.S.-based concerns. As a result, the United States has had the benefit of several well-reasoned appellate judgments arising in the wake of the discoveries of the S.S. CENTRAL AMERICA,[187] the TITANIC,[188] the REPUBLIC,[189] and various other recently contested historic wrecks. Taken together, these cases suggest a clear judicial recognition of the need to protect these wrecks and for an unequivocal method of determining ownership of wreck.

The nature of the factual situations has enabled U.S. courts to articulate clear guidelines for salvage activities involving historic wrecks, through mandating preservation-based salvage techniques, enjoining other would-be salvors from engaging in a free-for-all over the wreck site, and making a clear statement on where the law of finds can be employed instead of the law of salvage.

Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.[190] is a particularly good example of these principles. In that case, the Fourth Circuit encouraged preservation-based salvage techniques at wreck sites by mandating that such activities in the future be considered as an element for determining salvage award quantum.[191] As mentioned in Part II, this new element of computation for salvage awards will have a significant impact on future salvage awards in the United States, with the potential of being followed in other countries and implemented in future

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187. *See generally* Columbus-Am. Discovery Group v. Atl. Mut. Ins. Co., 56 F.3d 556, 1995 AMC 1985 (4th Cir. 1995).

188. *See generally* R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 2002 AMC 1136 (4th Cir. 2002); R.M.S. Titanic, Inc. v. Haver, 171 F.3d 943, 1999 AMC 1330 (4th Cir. 1999); Marex Titanic, Inc. v. Wrecked & Abandoned Vessel, 2 F.3d 544, 1993 AMC 2799 (4th Cir. 1993).

189. *See* Martha's Vineyard Scuba Headquarters, Inc. v Wrecked & Abandoned Steam Vessel, 833 F.2d 1059, 1988 AMC 1109 (1st Cir. 1987).

190. 56 F.3d 556, 1995 AMC 1985 (4th Cir. 1995).

191. *See id.*

amendments to the 1989 Salvage Convention.[192] In this case and the series of cases involving the TITANIC, there is also the suggestion that salvors' conduct with regard to wreck preservation may well affect a U.S. court's willingness to grant injunctive relief for the benefit of the salvor-in-possession.[193]

Finally, this case also clearly explains the U.S. position on the law of finds to salvage situations and where a claim under the law of finds may be advanced, as opposed to the law of salvage. In a claim against the wreck or its cargo, there is a presumption in admiralty law that there is a true owner somewhere and that the salvor is only entitled to a salvage award. This reflects a public policy intended to encourage good behavior:

> Admiralty's equitable power to make an award for salvage—recognized since ancient times in maritime civilizations—is a corollary to the assumption of non-abandonment and has been applied irrespective of the owner's express refusal to accept such service . . . . These salvage rules markedly diminish the incentive for salvors to act secretly, to hide their recoveries, or to ward off competition from other would-be salvors . . . . In short, although salvage law cannot alter human nature, its application enables courts to encourage open, lawful, and cooperative conduct, all in the cause of preserving property (and life).[194]

As there is no principle of sovereign prerogative in U.S. admiralty law, ownership of truly abandoned property does not automatically vest in the state. The law of finds resolves this problem by awarding abandoned property to its finder, but is applied only exceptionally, as when the rightful owner or successor-in-interest cannot be found. At present, U.S. courts only recognize two categories of cases in which the law of finds will be applied: (1) where owners have expressly or publicly abandoned their property and (2) where items are recovered from shipwrecks and no owner or successor-in-interest comes to claim them.[195]

In the case of the S.S. CENTRAL AMERICA, the Fourth Circuit determined that, due to the fact that no successors-in-interest had come forward to claim ownership in the hull of the ship or the passenger's effects, these items were truly abandoned and subject to the law of finds.[196] The cargo of gold, however, was subject to the law of salvage

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192. *See* MDM Salvage, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 631 F. Supp. 308, 313, 1987 AMC 537, 540 (S.D. Fla. 1986).

193. *See R.M.S. Titanic*, 286 F.3d at 198-200, 2002 AMC at 1140-41.

194. *Columbus-Am. Discovery Group*, 974 F.2d at 461, 1992 AMC at 2716 (citing Hener v. United States, 525 F. Supp. 350, 356, 1982 AMC 847, 852 (S.D.N.Y. 1981)).

195. *Id.* at 461, 1992 AMC at 2717.

196. *Id.* at 464-65, 1992 AMC at 2722.

because the gold had never been abandoned by the various insurers who had paid out on the insurance claims at the time of the loss.[197] The court held that there was no arbitrary time limit at which point the subrogated interests of the insurers had lapsed.[198] In the case of the TITANIC, a successor-in-interest of the insurers who had paid out on the loss of the TITANIC also presented a claim to the salvors, but a settlement was entered into, allowing the salvors to take sole possession of the wreck.[199] In the case of the REPUBLIC and the ATOCHA, no owners came forward, so the salvors in these cases took under the law of finds.[200]

From these cases, it would seem that there is a significant advantage for a salvor to advance a claim for relief in a U.S. court, given the fact that there exists a comprehensive recent body of common law and judicial recognition of the unique conditions surrounding these wrecks. On the other hand, those parties taking the position that these wrecks should be left intact, without invasive exploration or salvage activities, would be better served in advancing their claim in a court in a Commonwealth jurisdiction.

VI. WHAT ARE WE REALLY PROTECTING?

In the search for a comprehensive international agreement on what should be done with these wrecks, it is crucial to address what needs to be protected. In considering the regimes that govern various legal and policy aspects of these historic sites, the situation is not unlike that envisioned in the children's poem about the six blind wise men describing the elephant, in that, separately, the various aspects of historic wreck seem to be addressed effectively by legislation and case law, but nothing addresses the matter in its entirety. On the other hand, is there any real need to?

If technology had not improved, most of these wrecks would have remained lost forever, another tale of a ship and its treasure lost to the perils of the sea. What drives the interest in exploring these wrecks? If the interest is in scientific and historic exploration, and the wreck and its contents have no salvage value, those who embark on their exploration, with numerous research grants and other monetary gifts, will take their

197. *Id.* at 468, 1992 AMC at 2727.

198. *Id.* at 465-68, 1992 AMC at 2723-27.

199. R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 286 F.3d 194, 196-97, 2002 AMC 1136, 1137 (4th Cir. 2002).

200. *See Columbus-Am. Discovery Group*, 56 F.3d 556, 1995 AMC 1985; Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330, 1978 AMC 1404 (5th Cir. 1978).

pictures, make their notes, and record their observations for posterity. They have little interest in the wholesale removal of items from the wreck and are unlikely to return to it in the future. If the interest is in the form of a commercial salvage venture or for the seeking of sunken treasure, such activities will be heavily funded from market sources expecting a good return on their money, and there will be repeated invasive activities spawned by the possibility of finding treasure. Sometimes wrecks attract both sorts of interest.

Ultimately though, everyone loses interest over time. Deep-sea historic shipwrecks are expensive to visit and can only be photographed and documented so often. Once they are stripped of their treasure and the public loses interest, there will be no economic reason to continue conducting recovery work, and commercial salvors will ultimately give the picked-over remains back to the sea, returning these wrecks to the realm of folklore until a new generation returns to visit them again. Since this phenomenon is already occurring and the oceans are running out of their inventory of famous treasure-bearing wrecks, is there a need for more protection than we have already? Or is such a movement simply akin to closing the hatches after the ship has already been swamped?

VII. A MODEST PROPOSAL

To a large extent, customary law of the sea, international convention, and the case law of coastal states provide adequate coverage of most of the general aspects surrounding historic wreck disputes. Advances in the case law of coastal states, such as that of the United States regarding the quantum salvage awards with respect to preservationist-based salvage activities, will likely make its way into the *jus gentium* of international maritime law. The uncertainty in the law seems to be a narrow one, revolving around questions of the ownership of historic wrecks that have truly been abandoned and of the appropriate treatment of those wrecks that have ceased to have any commercial interest and are now merely historic sites of interest.

These two narrow issues need to be focused on in the next amendments of the various international conventions now in effect. Once these amendments are made, they will ultimately be given effect at the level of the coastal state as they are adopted by legislation, and the courts will follow. With respect to UNCLOS,[201] articles 149 and 303 need to be redrafted to include specific time periods during which

201. *See* UNCLOS, *supra* note 21.

inaction by the true owner or successor-in-interest would constitute true abandonment, the boundaries of the ownership rights of salvors-in-possession, more specific guidelines outlining the appropriate treatment, and other relevant matters along the lines of the Buenos Aires Draft Convention.[202] The Draft Convention itself should be incorporated at the earliest possible opportunity.

With respect to the law of salvage, the 1989 Salvage Convention[203] should be amended to give more clarity in dealing with salvage awards for historic wrecks along the lines suggested by the Fourth Circuit, where the level of preservationist treatment accorded the wreck site will be used to adjudicate the quantum of the award. This can be done by amendment in the same way that the 1989 Salvage Convention statutorily amended the quantum of salvage awards to take into account the specific challenges posed by environmental problems arising from oil tanker accidents.

With regard to matters of wreck, there is potential for the IMO's proposed wreck convention to deal with these issues as well. With enough public and industry pressure, protective clauses for historic wreck sites could be added to the convention, which would afford increased protection and guidance to salvors.

Finally, the potential for protection under the doctrine of sovereign immunity for certain merchant ships that sank while operating under various government mandates needs to be explored more fully. Given that such immunity would trump all other rights and conventions in a contest between ownership and salvage rights, this is certainly a fertile area for further analysis and has the potential to provide the most security possible for these wrecks. However, in order for this protection to be effective, governments must get involved, but this will only occur if the public is aggressively behind such a policy.

In summation, all the tools necessary for the job of effective historic-wreck protection are there—they just need to be sharpened and used more effectively in order to provide a greater level of wreck-site protection. The most effective level of historic-wreck protection can only be achieved if all the various protective processes are used—and the public, industry, judiciary, and the coastal states at an international level get on board.

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202. *See* Buenos Aires Draft Convention, *supra* note 29.

203. *See* 1989 Salvage Convention, *supra* note 66.