9ème Commission*

Le régime juridique des épaves des navires de guerre et des navires d'Etat en droit international

The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law

Rapporteur : Natalino Ronzitti

* Membres/Membership : MM. Caflisch, Caminos, Degan, Francioni, Lady Fox, MM. Hafner, Kateka, Lowe, Momtaz, Oxman, Simma, Thürer, Wolfrum, Yee.

I. Travaux préparatoires

Table of Contents

A. Introduction: The Preliminary Report (Rhodes Session)

The Ninth Commission was constituted at the Santiago (Chile) Session (2007) with the aim of studying The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law. As Rapporteur I briefly introduced the subject to the Members of the Ninth Commission at the Naples Session (2009) in order to prepare a Report which was presented at the Rhodes Session (2011) and discussed in plenary. Both the Report and the debate have been published in the *Annuaire de l'Institut de Droit international*, vol. 74 at pages 131-177 and it is not necessary to reproduce them. A questionnaire was also annexed.

B. Questionnaire

Question 1 Should sunken warships and State-owned vessels operated for non-commercial purposes be subject to a special regime different from the one dictated for UCH? May we differentiate according to the time of sinking (for instance more than 100 years)?

Question 2 Should sunken warships and State-owned vessels operated for non-commercial purposes be exempted from salvage and find rules?

Question 3 Should sunken warships and State-owned vessels operated for non-commercial purposes retain sovereign immunity? If the answer is yes, for how much time will sovereign immunity persist?

Question 4 Should sunken State-owned vessels operated for non-commercial purposes be differentiated from sunken warships as far as immunity is concerned?

Question 5 Should sunken warships as a resting place for dead sailors deserve special respect?

Question 6 Should sunken warships and State-owned vessels operated for non-commercial purposes remain the property of the flag State, even though they do not possess sovereign immunity?

Question 7 Should the property over sunken warships and State-owned vessels operated for noncommercial purposes belong to the flag State wherever the wreck is located and notwithstanding the passage of time, unless expressly abandoned?

Question 8 Should the flag State be responsible for any damage caused to the environment and/or navigation?

Question 9 Should IDl's draft Resolution recommend the negotiation of a Convention on the status of wrecks of warships and State-owned vessels?

C. Comments received before the Tokyo Session

The Rapporteur received the following comments in writings:

Comments by Mr Degan

After being co-opted in the Ninth Commission I carefully read once again your Preliminary Reports of 4 September 2011 on "The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law". I congratulate you on the comprehensive legal analysis you have done. Previously, I was not familiar with some of its aspects and in this respect it was very useful to me.

Still, there are some aspects which should be the matter of our further discussions. At pages 11 to 15 of your Preliminary report you described some dissimilar situations which are not fit for general conclusions. You also discussed of the sovereign immunity of that kind of ships and on the entitlement of ownership of flag States in all circumstances. The situation is not like that.

The matter is of inter-temporal law. You correctly noted at p. 21 of your Report that the modern notion of warship is difficult to apply to ancient ships, for instance to Spanish galleons. There is also the problem of State-owned ships operated for non-commercial purposes. Prior to the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels their situation was not regulated. It was, for instance unclear whether before 1926 they fell under the 1907 Hague Convention Relating to the Conversion of Merchant Ships into Warships. In latter codification conventions they were easily assimilated to warships in respect of their immunity, but all the consequences of this status were never resolved.

In all these matters the rules of warfare at the seas should not be neglected, especially in respect of ships sunken before the entry into force of the 1945 UN Charter. In case of outbreak of a war between States at the seas, or in modern situations when the UN Security Council authorizes an enforcement action against a State under Chapter VII of the UN Charter, warships become entitled to take part in hostilities, like combatants in a war on land. In relations between belligerent States these ships lose their sovereign immunity until the conclusion of a treaty of peace or of another mode of termination of the state of war. Sovereign immunity of warships persists only in relations between the belligerents and neutral States.

If during the hostilities one belligerent captures or sinks an enemy warship it becomes its property without the prize adjudication (which is necessary only for merchant ships). The precise rules on wrecks of warships as the object of legitimate booty are very scarce. Nevertheless, there is no rule that for the acquisition of ownership on such a sunken enemy warship a formal act of capture is necessary, or that in absence of such an act its abandonment should be presumed by acquiescence.

In many cases the belligerent party which has sunken an enemy warship does not display interest for its recuperation. But the flag State should reestablish its ownership on such a wreck only in agreement with the opposite belligerent party. It usually happens that the flag State shows more interest for such a wreck than the former enemy, and the matter can be of its position at the seabed. In any case any bilateral agreement between the interested parties overwhelms these rules of general character. Treaties of peace, as I know, did not deal with the ownership on wrecks of warships.

It is, however, important to stress that the above rules do not apply in time of peace, and especially if a warship had an accident in a polar expedition. In these situations the flag State retains its property on such a wreck. That wreck can even preserve sovereign immunity of the flag State, especially if it can later be repaired.

There can still be unresolved disputes on ownership of wrecks, especially between the coastal State on whose seabed a wreck is situated and its former flag State. There is a presumption that wrecks of warships that have been under water for more than hundred years becomes underwater cultural heritage. In these cases the rules from the 2001 UNESCO Underwater Cultural Heritage Convention apply between its parties. The State parties must observe its rules, although this Convention does not deal with the ownership on such wrecks. Instead of ownership it deals with the distribution of jurisdiction between the coastal State and the flag State, depending on the actual location of the wreck. That problem you discussed it in your Preliminary Report.

Now, here are my answers to your Questionnaire:

(1) I do not see reasons for differentiation of sunken warships, and especially of other State owned vessels from other UCH. It is the merit of the 2001 UNESCO Convention that it avoids the question of ownership on such wrecks and stresses the importance of their preservation as cultural heritage. The term of hundred years seems to be appropriate.

(2) This is very desirable in the light of the need to preserve cultural heritage.

(3) As I explained above, warships engaged in hostilities during a war lose their immunity in respect to other belligerents. In these situations their wrecks are also devoid of immunity. However, sunken warships in time of peace can in some circumstance preserve their immunity.

(4) See my explanation above. Because there is probably not a plenty of wrecks of such ships, the question is whether the future Resolution of our Institute should deal with them at all.

(5) It can be argued that such a respect became a rule of positive law, but within the limits provided in the 2001 UNESCO Convention.

(6) I argued above that the flag State loses its property entitlement on wrecks of warships, if sunken in a recognized war.

(7) Not at all.

(8) That question should be of special concern of our Commission. I have no clear answers to it.

(9) I do not believe that such a recommendation in a Resolution adopted by our Institute should be of any practical use. It seems better to advise that parties to the 2001 UNESCO Convention stick to their obligations assumed, than to dilute its importance as a source of law. This is in spite o probable arguments that all its rules did not transform into general customary international law.

Comments by Lady Fox

(1) I doubt whether there is much that I can usefully contribute as my expertise lies in the field of State immunity, but I attach a few suggestions.

(2) State immunity is a procedural bar to the exercise of jurisdiction by one State over another State and its property. Its relevance to your study would be as a bar to proceedings and to enforcement measures relating to the recovery or disposal of sunken ships lying within the jurisdiction of the coastal State, such ships being owned by a foreign State and operated at the time of sinking for government non-commercial purposes. Heightened protection is afforded by the 2004 UN Convention on Jurisdictional Immunities of States and their Property Article 21(1)(b) to property of the State 'of a military character or in use or intended for use in the performance of military functions'. The US and Canadian legislation on State immunity contain a similar provision and the Australian Foreign Sovereign Immunities Act 1985 s.3(1) spells out the definition of 'military property' as …' warships, a Government yacht, a patrol vessel, a police or customs vessel, a hospital ship, a defence force supply ship or an auxiliary vessel, being a ship or vessel that, at the relevant time, is operated by the foreign State concerned (whether

pursuant to requisition or under a charter by demise or otherwise)'. The 1978 UK State Immunity Act contains no such express provision barring enforcement measures against State property in military use or used for the performance of military functions. Further, in its provisions for the removal of both immunity from jurisdiction and exemption from liability provided in the 1926 Brussels Convention relating to the Immunity of State Owned Vessels Article 3 provides an exception which makes no reference to 'military use or purposes but merely sets out a list - 'warships, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by the State, and used at the time a cause of action arises exclusively on Governmental and non-commercial services'.

(3) On this somewhat slender basis I would seek so far as it applies to *sunken State ships* to draw, in respect of immunity from enforcement jurisdiction or other coercive measures by a Coastal State, a distinction between sunken warships coming strictly within the definition of a warship in international conventions on the law of the sea and other State operated ships.

(4) Given the considerable state practice applicable to the first category, I would, therefore, maintain that state immunity continues to provide a procedural bar to the recovery or disposal of such a sunken warship of a State lying within the jurisdiction of another State which at the time of sinking was operated 'in use or intended use for the performance of military functions'. State practice in support includes exclusion clauses and the special treatment afforded to warships in international conventions relating to the law of the sea as well as bilateral arrangements made between States such as those relating to the *Juno 1802,* the *Birkenhead 1852,* the *Alabama* 1864, German warships in WWII, UK Denmark re battleships 114 BSP 196 and others referred to in your preliminary report. Continued immunity from enforcement jurisdiction for a sunken State warship as strictly so defined may also be justified by the principles and rules to which you refer relating to respect for war graves, the Flag State principle, and the archaeological, historical and cultural heritage of the State in respect of such ships.

(5) The recognition of such a plea of State immunity as a preliminary check on proceedings in the court of the Coastal State to recover or dispose of a sunken warship, regardless of the length of time since it sank, secures that any other State, international organisation or other person seeking to take measures of recovery or disposal will have first to notify and obtain the consent of the State of the sunken warship.

(6) Arguably such immunity should extend to military auxiliary ships on the ground of their military use, that is that such ships supporting a warship which are engaged in military use at the time of sinking equal to the engagement of the warship itself and form a part of the 'historical heritage' of a State under military command. [If such an extension is thought appropriate it maybe it should apply regardless of whether the military auxiliary ship was or was not owned by the State when sunk.]

(7) Apart from a State ship within the category of a warship in military use there are, as included in the Brussels Convention definition, many other categories of ships which at the time of sinking may be 'in use or intended use' for government non commercial purposes. The residuary category of ships both owned by the State and at the time of sinking 'in use or intended use' for government non commercial purposes would thus include '… Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by the State, and used at the time a cause of action arises exclusively on Governmental and non-commercial services'.

(8) Strictly on the law as set out above, state immunity should continue to bar proceedings in the national courts of other States against this larger category of State ships. However, it may be that some differentiation in the law should be made in respect of *sunken wrecks* of such State ships.

(9) If State immunity is thought to be an unnecessary obstacle to recovery or disposal of wrecks relating to this category, two solutions seem possible.

(i) If one construes the rule of immunity from enforcement jurisdiction as applying only to the sunken wrecks of ships which satisfy both the requirement of State ownership and of use for the performance of government non commercial functions, all ships privately owned though engaged in the performance of such functions may be denied immunity.

(ii)Ownership **and** use for government non commercial purposes being both necessary conditions, State immunity does not apply to a sunken State ship by reason of the fact that when sunk it is no longer in use or intended use for the State purposes for which it was operated at the time of sinking. As you set out in your report, once on sinking the use as a State ship is lost –it being unnavigable, unmanned and no longer under State control and any equipment has ceased to have military or security value, the performance by the ship of its former government functions is terminated. Consequently, there being no present use for that function, immunity from the enforcement measures ceases and any court with jurisdiction in international law over the seabed where the sunken State

wreck is lying may take proceedings in respect of its recovery or disposal. Any surviving claim of the State on which to base a claim to the ship will rest solely on ownership.

(iii) Alternatively to 2 and 3, Immunity continues to apply to this residual category of State owned and operate ships but the burden of proof, which is generally treated as on the claimant to show a non government use of the State property claimed, is reversed and on the sinking of the ship placed on the State to establish State ownership and continued use for a government purpose.

Comments by Mr Francioni

(1) I have read with great interest the Preliminary Report prepared by our *confrère* Ronzitti and I have found it remarkable for the depth and breadth of research, which covers aspects of general international law, such as jurisdiction, maritime law, and sovereign immunity, as well as specific aspects of cultural heritage law, environmental protection and human rights.

(2) General comment. I concur with his conclusions that, at present, international law suffers from a regulatory gap because practice in this field is not conclusive enough to permit the re-construction of specific rules of customary international law and the patchwork of treaty regimes, which has been developed to address discrete issues, such as cultural heritage protection, safety at sea, WMD, and environmental safeguards, does not provide a satisfactory answer because of its fragmentary nature and the lack of a universal support for some such regimes (notably, the 2001 UNESCO Convention on the protection of underwater cultural heritage).

(3) Specific comments. I would like to start with the apparent confluence in the report of the notion of "property/ownership" of the wreck, and of the items contained therein, and "jurisdiction" of the state that has a relevant connection with wreck (territorial, national, historical-cultural etc.). The two concepts are obviously distinct. But since there is no internationally recognized notion of "property", it seems to me that one the important contributions of this project would be to propose a set of criteria for a uniform notion of "property" applicable to the wreck and to the items it transported. This is an important aspect of the future regulation, for two reasons. First, because the treaty regimes developed so far, such as the 2001 UNESCO Convention, do not address this private law issue; second, because the practice of many states – including Italy – tends to assert public property rights over archaeological objects and this practice would extend to shipwrecks which have been under water in

coastal areas for more the one hundred years. The report, in its provisional conclusions, expresses a clear preference for a decisive role of the flag state (…The best solution is to submit any activity directed at sunken ships to the consent of the flag State, that has the title to intervene as the owner of the ship [emphasis added]). The trouble with this approach is that the coastal state may well consider its property any underwater cultural item (more than one hundred year old) found in its coastal zones (this is well illustrated by the current dispute between Italy and the Getty museum over the so called Atleta di Lisippo , a classical statue serendipitously retrieved from a shipwreck in a not identified area of the seabed of the Adriatic sea and claimed by Italy as public property after it was brought to shore and clandestinely exported to the United States. The Getty museum maintains that Italy has no title because its mandatory rules on cultural heritage (Codice dei Beni Culturali e del Paesaggio) with the result that there is an irreconcilable conflict between the notion of property advanced by the museum on the basis of contractual acquisition and the idea of property asserted by Italy on the basis of eminent domain and public interest. The non coincidence of "property" *lato sensu* with jurisdiction is attested also by other manifestations of the practice: in the Odyssey Marine Exploration v. Unidentified Shipwrecked Vessel, Kingdom of Spain case, now pending on appeal before the Federal Courts of the district of Florida, Spain claimed sovereign interests in the shipwreck – the Mercedes, a Spanish naval vessel sunken in 1804 after engagement with the British fleet - and immunity from foreign interference with it. But, at the same time Peru advanced a claim to the valuable cargo of silver and gold coins on the basis of the argument that the "…property physically, culturally and historically originated in Peru" since the gold and silver were local natural resources and the coins were minted in Lima at the time Peru was a Spanish colony. These cases highlight the importance of clear criteria to determine who is the legal "owner" of a shipwrecks and its cargo: (1) what is the role of possession? (2) what is the role of international norms on state succession? (3) what influence of public international law on traditional rules of conflict of laws? (4) can salvage law and the law of finds remain applicable with respect to underwater cultural heritage?

It seems that these questions could be taken as a starting point to elaborate some international law criteria for the identification of what constitute "property" over a shipwreck and its cargo.

Another specific comment concerns the role of human rights in the definition of a legal regime of wrecks of warships and other governmental ships. I agree with the report that the risks connected to

forms of serious environmental degradation can involve human rights breaches, and certainly the hypothesis of shipwrecks containing hazardous substances and exposing humans to the danger for health or life presents a human right issue. The report cites to this effect General Comment n. 14 of the Committee on Economic, Social and Cultural Rights on the right to health the ECtHR's judgment in the case of Lopez Ostra v Spain. These are important precedents, but aside from the fact that Lopez Ostra is rather dated, it did not concern Article ECHR on the right to life: the judgment used Article 8 on the obligation respect private and family life to hold Spain responsible for exposure of applicants to noxious interference. Environmental degradation as a threat to the right to life is specifically addressed in the case Oneryildiz v Turkey where the European Court emphasized the obligation of States to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life. This precedent is relevant to construe a due diligence obligation of the flag state and in appropriate circumstances (ICJ Corfu Channel case) also of the coastal state to take positive measure to prevent exposure of people to lethal harms originating from a shipwreck and its cargo (explosives, nuclear contamination, toxic substances etc.).

But, in my opinion, the most significant role of human rights in the regulation of risks arising from hazardous shipwrecks, can be played at the procedural level. This role is important for shipwrecks qualifying as underwater cultural heritage, for which the principle of transparency and mutual information is essential to combat looting and as such it has been incorporated in the 2001 UNESCO convention; but it is important also for sunken ships less than one hundred year underwater, which may present hazards for the safety of the environment, of navigation and of peoples health or life. The procedural obligations in this respect concern the provision of public information about actual or potential dangers arising from the shipwreck, consultation whenever necessary, especially between the flag state and the coastal state, cooperation. Again, we can find support for procedural obligations as human rights guarantees in the case law of the ECtHR. In Taskin v. Turkey, the Court put great emphasis on procedural duties of information and consultation with affected parties as a condition for the fulfillment of obligations arising from substantive provisions of the Convention. This requirement of informed process was borrowed from two environmental treaties: the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and the 1991 Espoo Convention on Environmental Impact Assessment in a Trans-boundary

Context. (For a review of this case see Francioni, "International Human Rights in an Environmental Horizon", EJIL 21 (2010) 41-55.

The report considers the duty of information and consultation only in relation to the flag state and the territorial state (coastal state). The problem with this formal approach is that the responsibility to deal with hazards caused by sunken vessels and their cargo may fall on flag of convenience states whenever certain governmental functions are outsourced to private contractors who on turn use flags of convenience to carry out the delegated governmental function. This problem may be avoided by a strict adherence to the title of the report "State-owned ships / navires d'Etat". But the reality today is that many governmental functions are outsourced to private entities, so it would be useful to consider, besides the flag state and the coastal state, also the state of the operator as an addressee of due diligence obligations arising from the wreck of the vessel.

Comments by Mr Lowe

Many thanks for your report. The review of treaty-drafting is very helpful. I have a few comments, which I make page-by-page (hoping that my pagination is the same as yours):

Page 6: On TSC Art. 22/UNCLOS Art. 32. It may be helpful to make explicit the point that the immunity of warships and State vessels is generally considered (as I understand it) to be limited to immunity from enforcement jurisdiction. I do not think that they are beyond the legislative/prescriptive jurisdiction of the coastal State while they are within the maritime zones of that State. Only on the high seas are they beyond the legislative/prescriptive jurisdiction of a coastal State, at least in so far as that jurisdiction is based upon maritime zones (jurisdiction based upon, for example, the protective principle or the nationality principle might be different.

Page 7: I'm not sure that the question whether a sunken ship continues to enjoy immunity notwithstanding the fact that it has sunk is the same as the question "whether a sunken ship is still a ship for the purposes of immunity". Diplomatic premises, diplomatic bags, etc. enjoy immunity. So do State-owned aircraft and war planes. Perhaps military vehicles do, too. Does the immunity not flow from the relationship with the State whose immunity applies to the ship/wreck, rather than from anything to do with its character as a ship?

There is also a question of what the immunity covers. Does it extend to inviolability, so that no-one may 'board' the wreck? What if

exploration of the wreck is necessary in order to establish its identity and age?

Page 14: On the 'warship abandoned by the crew' point, is there an analogy with UNCLOS Art 102, which assimilates acts of piracy committed by a warship whose crew has mutinied to acts committed by a private ship? Art 102 only assimilates **acts of piracy:** it does not explicitly assimilate the status of the warship to that of a private ship – though that may have been the intention, and may be implied by UNCLOS Art 105.

On the SMCA: I imagine that at some point it will be necessary to explore the relationship between a sovereign's property rights, and a sovereign's immunity, and immunities attaching to a sovereign's property – which may be three independent, if inter-related, concepts.

I also wonder about the role of private international law here. Would the applicability of the SMCA to **private** vessels and/or goods on board not be a matter of private international law? And what about the personal property of the crew, or private (non-State) property carried on board a warship?

Page 16: On UNESCO Rule 5: in what circumstances would it be 'necessary' to disturb human remains? The wreck could (almost) always be left untouched.

Page 17: On UNCLOS Art 149: does this entail an obligation to determine what the 'State or country of origin, or the State of cultural origin' (or, presumably, its successor) imply an obligation and a right to investigate the wreck in order to determine what that State or country is?

On UNCLOS Art 303: does this represent customary international law?

Page 18: On nationality/immunity/jurisdiction: I can see that a wreck in the territorial sea is under the jurisdiction of the coastal State, even though property rights in it may belong to the flag State: but may the flag State not also retain jurisdiction – e.g. to forbid interference with the wreck of a modern warship? Could the flag State have immunity in respect of the wreck without having jurisdiction over it?

My answers to your specific questions are tentative, and I preface them by asking whether it is not necessary to have a fuller analysis of the questions in public and private international law before embarking upon a codification.

1. I think that it is desirable that sunken ships and State-owned vessels that have residual military or non-commercial value, e.g. because they carry secret material, should be treated separately from the UCH regime.

A 100-year period should be a sound basis on which to proceed; and it should be relatively easy to identify such ships.

2. For practical reasons I would favour exempting them from the law of salvage and finds, and requiring in every case at least the co-operation of the flag State that in any measures that disturb the wreck. It is the flag State that is best able to say what, if any, hazards there are on the vessel.

3. On the persistence of immunity: think that we should consider in detail precisely what immunity means and entails before we take a view on its persistence.

4. Ditto. On the general point, I think that the category of warships is not entirely clear. What of naval auxiliary vessels, or (private) ships taken up from trade in order to give logistical support for naval operations? Where does one draw the line?

5. Yes, I think that graves are always entitled to 'special respect'. The problem lies in knowing what the content of that respect is.

6. Assuming, *arguendo,* that the ship has lost immunity, I do not see why it should follow automatically that the State loses its property rights in the vessel. Who would acquire those rights? But can it be assumed that everything on board the sunken vessel belongs to the State?

7. If the regime applies only to ships that sank within the past 100 years, I do not think that it should be presumed that property rights in them have been abandoned. Again, *quaere* the position of goods on board.

8. I do not see how flag States can carry responsibility if they do not have a right of access to the sunken ship and to take measures on that ship to avoid environmental and navigational damage. If that is correct, some accommodation with the coastal State will be necessary.

9. I think that the question of the form of an IDI Resolution should be considered only when the study is complete. But I would not easily be persuaded that another Draft Convention would be the best course to pursue.

Commentaires de M. Morin

Ce propos préliminaire a pour but d'explorer la démarche et les méthodes de notre Commission dans son objectif d'élaborer un énoncé des règles de droit international applicables aux épaves de navires de guerre et de navires d'État.

Certes, le droit coutumier est souvent incertain dans ce domaine qui touche de près à la puissance et à la défense des États, mais, depuis quelques années, sous l'impulsion d'organisations internationales telles

que l'OMI et l'UNESCO, des régimes conventionnels sont venus développer le droit pour pallier ses lacunes. La Convention sur l'enlèvement des épaves (Nairobi, 2007) est ici pertinente quoique non applicable aux navires d'État, à moins que le navire réduit à l'état d'épave n'ait été exploité par une société privée (art. 1er par. 8) ou à moins que l'État ne décide de soumettre ses navires de guerre au régime de la Convention (art. 4, par. 3). Celle-ci énonce des objectifs et des principes de même qu'elle établit des mécanismes et procédures assurant l'enlèvement des épaves. À ce titre, cette Convention peut servir de point de départ à notre démarche puisqu'elle vient bien près d'inclure en principe les navires de guerre ou d'État.

Il en va de même de la Convention de l'UNESCO sur la protection du patrimoine culturel subaquatique (Paris, 2001), laquelle ne manque pas de rappeler le principe des immunités souveraines des États à l'égard des navires d'État (art. 2 par. 8). Cependant, une intervention peut avoir lieu sur l'épave d'un navire d'État avec l'accord de l'État du pavillon dans la Zone ou sur le plateau continental (art. 10 par. &). Il reste évidemment à définir avec le plus de précision possible les règles applicables aux épaves de navires de guerre ou d'État, immergées depuis moins de 100 ans. Pour ce faire, on peut partir non seulement de la Convention de Nairobi, mais de la Convention sur la protection du patrimoine culturel subaquatique, en adaptant les principes et les règles de ces Conventions aux navires de guerre ou d'État.

Sans doute la Convention de l'UNESCO n'a-t-elle pas recueilli un grand nombre de ratifications, mais elle a le mérite d'exister et de distinguer les espaces maritimes où les épaves peuvent se trouver : mer territoriale, zone contigüe, plateau continental et zone économique exclusive.

L'objectif principal de la Convention de l'UNESCO est la protection du patrimoine culturel que peuvent constituer les objets, navires et véhicules qui font partie de ce patrimoine subaquatique immergé depuis l00 ans au moins. Il reste donc les navires de guerre ou de navires d'État plus récemment naufragés et l'objectif des règles à établir ne peut être exactement le même : la sécurité de la navigation et la protection de l'environnement deviennent des besoins cruciaux; il en va de même du respect des restes humains. On peut certes discuter du critère des 100 ans pour distinguer les deux régimes juridiques, mais cela correspond grosso modo à la charnière que constitue la Ière Guerre mondiale et au passage désormais acquis à l'acier dans la construction maritime. Le choix d'une autre délimitation dans le temps risquerait de créer la confusion.

Si les conventions existantes peuvent servir de point de départ pour l'élaboration de règles dans les espaces visés, elles ne règlent pas pour autant tous les problèmes; sans doute les temps n'étaient-ils pas mûrs pour la codification ou le développement des principes et règles applicables aux situations nouvelles créées par le progrès technique, notamment au-delà des espaces soumis aux compétences des États riverains. En haute mer notamment, la Convention de Nairobi ne s'applique pas (sauf pour exclure la souveraineté des Parties (art. 2 par. 4); l'État du pavillon peut revendiquer ses droits souverains sur tout navire de guerre et, s'il n'y a pas de telle revendication, c'est la liberté d'intervention et de récupération des autres États qui s'applique. Cela ne signifie pas que la haute mer ne puisse être soumise à des règles conventionnables, comme elle l'est déjà en cas de pollution par les hydrocarbures ou d'autres substances. À mon avis, notre Commission doit se pencher sur le régime des épaves de navires de guerre en haute mer en énonçant la règle des droits souverains de l'État du pavillon, mais également sa responsabilité en cas de dommages causés par son défaut de prendre les mesures nécessaires. En outre, nous pourrions préciser les conditions de l'intervention des États pouvant être affectés par une épave dangereuse sans que l'État du pavillon ne juge opportun d'intervenir. La liberté des mers de devrait pas jouer en faveur du seul État du pavillon.

Tout en servant de point de départ à nos travaux, il nous faudra sans doute étudier l'opportunité d'en modifier certaines règles. Par exemple, dans la Convention de l'UNESCO, l'État riverain qui découvre une épave n'est pas clairement soumis à l'obligation d'informer l'État du pavillon de la chose : il « devrait » le faire. On peut penser que le devoir d'information pourrait être plus strict.

L'adoption d'une convention multilatérale entraîne souvent la désignation d'une instance internationale lorsque les questions à régler supposent une gestion suivie des interventions des États : l'UNESCO dans la personne du Secrétaire général et l'OMI dans celle de son Directeur général. S'agissant des épaves de navires de guerre ou de navires d'État, la Commission devra sans doute proposer de désigner un tel organisme propre à soutenir la mise en œuvre du projet de convention. Ce pourrait être l'OMI, à moins que les règles applicables à la haute mer, mentionnées ci-dessus, n'appellent la désignation d'un autre organisme, par exemple l'Autorité internationale des fonds marins.

Bien que les objectifs visés par le développement du droit relatif aux épaves de navires de guerre et navires d'État ne sauraient être exactement les mêmes que ceux qui recherche la sauvegarde du patrimoine subaquatique, portant sur la sécurité et la protection de l'environnement

plutôt que sur le patrimoine culturel, notre projet pourrait s'inspirer de l'Annexe à la Convention de l'UNESCO, mais en l'adaptant : principes généraux, descriptif du projet, études préalables, méthodes et techniques, financement, calendrier, compétences et qualifications, préservation et gestion du site, documentation, sécurité, rapports et archives.

Permettez-moi, en terminant, d'esquisser des réponses aux questions soulevées à la fin de votre rapport préliminaire.

l. Régime spécial : les épaves des navires d'État et navires de guerre doivent être soumis à un régime conventionnel distinct de celui qui a été élaboré à l'UNESCO sur le patrimoine culturel subaquatique. Ce régime représente une avancée pour le droit et il a le mérite d'exister même s'il n'a pas encore été largement ratifié. La délimitation des 100 ans devrait être retenue.

2. Assistance et droit des trésors : avec les exceptions mentionnées à l'article 4, aucune activité relative aux épaves de navires de guerre ne doit être soumise à ces droits.

3. Immunités souveraines : elles devraient être maintenues pendant un certain laps de temps permettant à l'État du pavillon de procéder aux mesures nécessitées par la condition de l'épave, mais la longueur du délai devrait nous être indiquée par des experts en la matière.

4. Distinction entre navires de guerre et navires d'État quant aux immunités : je suis enclin à penser que l'immunité doit être la même en raison du fait que certains navires d'État peuvent contenir des équipements hautement importants pour la sécurité de l'État propriétaire.

5. Cimetières marins : la préoccupation du respect dû aux restes humains devrait être réaffirmée dans tout énoncé de règles sur les épaves de navires de guerre. Dans le cas d'enlèvement, ce devrait être une obligation de l'État qui y procède.

6. Propriété et immunité souveraines : la propriété continue d'appartenir à l'État.

7. Propriété de l'État du pavillon : Jusqu'où et pour combien de temps? On peut admettre que la propriété de l'épave soit limitée dans le temps surtout lorsqu'elle est située dans la mer territoriale de l'État riverain impliqué.

8. Responsabilité de l'État du pavillon pour les dommages : elle doit être affirmée lorsque la propriété de l'épave ou les immunités souveraines sont invoquées sans que l'État du pavillon ne procède aux mesures qui s'imposent pour protéger l'environnement ou la navigation.

9. Nouvelle Convention : le travail de la Commission devrait aboutir à proposer une convention qui viendrait compléter les solutions dégagées

notamment par l'OMI et l'UNESCO dans les Conventions existantes et combler les lacunes de celles-ci au sujet des épaves de navires de guerre et autres navires d'État.

D. The Addendum

For the Tokyo Session (2013) the Rapporteur prepared an Addendum to the Preliminary Report, which was circulated among the members of the Ninth Commission and distributed to the other *consœurs* and *confrères* attending the Session, but not published in the proceedings.

The Addendum is reproduced below together with a Draft structure Resolution that the Members of the Ninth Commission asked the Rapporteur to prepare.

Introduction

The Preliminary Report was presented at the Rhodes Session (2011) both in the IX Commission and in the Plenary. I could benefit by the written comments of the *consœurs* and *confrères* and by the discussion both in the Commission and the Plenary.

It was decided to stick on the wrecks found at sea and not to deal with wrecks found in lakes and rivers, even though warships and State vessels (for instance coast-guard ships) navigate inland waters.

The Commission recommendations on how to proceed were as following:

(a) we have to rely on what it is certain (for instance on the law of prize which is settled law) and identify rules coming both from customary and conventional international law;

(b) we have to elaborate a set of rules/principles which integrate into the existing regime, in order to construe a coherent whole. In this connection it should be taken into account not only the law of the sea, but also rules on immunity of State property and State succession;

(c) for the definition of underwater cultural heritage, the preference should be given to the UNCLOS , since the UNESCO Convention did not attract many ratifications and a number of States criticized the rules on warships during the negotiation;

(d) A major problem is to establish when a sunken warship becomes cultural property. The UNESCO Convention has the merit to state a fixed date (100 years)which approximately corresponds to the change of material for building the ships;

(e) Supposing that a sunken warship becomes cultural property, which regime applies? Should the law of salvage and find be abolished?

Who should have the responsibility to locate ancient warships? Should private enterprises have a role?

(f) Our topic deserves being addressed also under the perspective of sunken warships as public property of the flag State;

(g) The cargo on board is also relevant, taking into account that it may be made of both public and private property.

Bowett Synopsis

During the Rhodes Session it was pointed out as Professor Derek Bowett, member of the International Law Commission, was invited to start a reflection on the topic of wrecks. He prepared a synopsis of the issues likely to be involved in a Codification of International Law on the Topic of Wrecks[1]. He considered the competing interests of those involved in discovery and recovery of wrecks and their cargoes facilitated by the advance in science and technology. As far as the jurisdiction of the coastal State is concerned he stated that jurisdiction could take various forms:

- power to remove the wrecks in the interests of the safety of navigation;
- jurisdiction to entertain salvage claims;
- jurisdiction to "protect" the wreck and regulate access to the site of the wreck
- jurisdiction to entertain claims to ownership of the wreck and /or its cargo

In relations to the archaeological objects he noted that UNCLOS Article 303 sets out the jurisdiction of the coastal State, but that a major uncertainty reigned for the continental shelf and the high seas beyond the national jurisdiction. He concluded that the UNCLOS "has not established any comprehensive regime to cover wrecks".

Bowett noted that a few States wanted to establish a regime for wrecks over their continental shelf, but this policy was opposed by other States.

As far as the archeological and historical nature beyond the outer limit of the continental shelf, he said that Article 149 UNCLOS is largely devoid of content if there is no authority regulating protection of wrecks and their disposal.

Bowett also wondered whether there are certain categories of wrecks entitled to special rules and he identified two categories: (a) naval vessels

[1] I was kindly given the Synopsis by our Consoeur Manoush Arsanjani.

and other State-owned vessels operated for non – commercial purposes and (b) wrecks of archeological or historical interest. As far as the first category of vessel is concerned, Bowett affirmed that the existent practice is in the sense that there a presumption against abandonment of the title over such vessels, due to security reasons and to desire to keep the wreck "untouched as a war grave". As far as the second category, Bowett noted that the attempt by some States to introduce a special regime for such wrecks in the UNCLOS failed, "but the Convention does contain certain limited provisions" (i.e. Articles 149 and 303).

The subject of wrecks has been included in the "long-term programme" of the work of the ILC since 2001 and it has been again quoted as part of the long-term programme in 2011[2]. Bowett outline offers valid suggestions for our topic.

The Odyssey Final Judgment

We have already referred to the case of the *Nuestra Senora de las Mercedes* in the Preliminary Report. The District Court in Tampa (Florida) rendered a judgment in favour of Spain which asserted its sovereign immunity over the wreck (2009). On 21 September 2011, the Court of Appeals for the Eleventh Circuit upheld the District Court Decision. On 9 February 2012 the US Supreme Court rejected a motion by Odyssey Marine Explorer directed at nullifying the injunction by the US Court of Appeals for the Eleventh Circuit to return the treasury recovered from the *Nuestra Senora de las Mercedes* to Spain. The Court ordered the restitution to Spain of the treasure recovered by Odyssey consisting of 594,000 recovered coins and other artifacts. A new attempt was made to obtain a writ of certiorari, but it was rejected by the Supreme Court on 14 May 2012. Thus the Court of Appeals judgment, rendered on 21 September 2011, became definitive. There was a follow-up since an small number of coins were located in Gibraltar. The Tampa Division of the Middle District Court of Florida reiterated, on 30 May 2012, the order of 20 March 2012 to release all artifacts to Spain (Case No. 8:07-cv-614-T-23 MAP). On 25 June 2012 fragments of the *Mercedes* craft together with a small number of coins were delivered to the receiver of the wreck in Gibraltar pursuant the Merchant Shipping Act 1935 (*Lloyd's List Intelligence*, 2 June 2012). It is to be noted that the *Mercedes* saga concluded with a complete victory for the Spanish claim.

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[2] The topic is referred to as "Ownership and protection of wrecks beyond the limits of national maritime jurisdiction": see ILC, *Report of the Sixty-third Session* (2011), A/66/10, paragraph 369.

The *Mercedes* judgment is relevant for our purposes in several respects:

- The *Mercedes* was a warship and the wreck of a warships is entitled to sovereign immunity
- The *Mercedes* was not operating in a commercial capacity and was not acting like a private capacity in the course of ordinary business even though it was also transporting private goods. The Court quoted the view of Spanish naval historians, who stated that "providing protection and safe passage to property of Spanish citizens was a military function of the Spanish Navy, especially in times of war or threatened war". The Court therefore concluded that the *Mercedes* was not conducting commercial activity and was immune from arrest under the FSIA (Foreign Sovereign Immunity Act).
- The cargo on board of the *Mercedes* was not belonging in its entirety to the Kingdom of Spain, but was also made up of private property. Thus it was claimed by a number of individual claimants as descendants of the original owners and by Peru which claimed historic rights since the coins were minted in that part of the Spanish colonial empire. The Court stated that the cargo and the shipwreck were interlinked for immunity purposes. The cargo enjoyed the same immunity as the vessel. The Court reached that conclusion grounding its reasoning on both the SMCA (Sunken Military Craft Act) which protects sunken military craft and its cargo and on the Abandoned Shipwreck Act (ASA) which incorporates the vessel and its cargo in the definition of shipwreck. The United States is obliged to give Spain the same treatment afforded to its vessels under the 1902 Spain-US Treaty and is thus obliged to qualify the cargo as part of the shipwreck as would happen where the sunken vessel belonged to the United States.
- Consequently, the Court held, "the FSIA immunity from in rem suits in the U.S. courts given to the *Mercedes* applies to the shipwreck as a whole, including the cargo, even if such cargo was owned by private individuals or has been salvaged from the wreck". Therefore the principle of sovereign immunity precluded any action in U.S. courts by Peru or individual claimants.
- The Court rightly pointed out that immunity from jurisdiction and holder of property are separate issues. As a matter of fact the Court affirmed: "We do not hold the recovered *res* is ultimately Spanish property. Rather, we merely hold the sovereign immunity owed the shipwreck of the *Mercedes* also applies to any cargo the *Mercedes* was carrying when it sank".

- The distinction between sovereign immunity and holder of the property is also pertinent for deciding on the claim by Peru that, as State of historic and cultural origin, it was affirming its rights to the coins since they were minted within its territory at the time of Spanish domination. Title to the property should be an issue to be resolved by courts of State holding jurisdiction, i.e. Spain, and not by US tribunals[3].

Other Elements of the State Practice

We like to cite other elements of State practice in addition to those referred to in the Preliminary Report.

The battle of Vis

In 1866 during the battle of Vis/Lissa two Italian warships, the *Re d'Italia* and the *Palestro* were sunk by the Austro-Hungarian naval squadron under the command of Admiral Tegethoff. The two ships were lying close to the Island of Lissa (Vis) which now belongs to Croatia. The wrecks are thus situated in Croatian territorial waters. Rumors that the *Re d'Italia* had on board a treasure of gold coins were never confirmed. In 2005 the French company Comex conducted an operation for the recovery of the ship under the supervision of the Croatian Conservation Institute. As it may be evinced from the answer to a question before the Parliament, Italy is still interested in the wreck. It is said that the Ministry of Foreign Affairs, jointly with Ministry of Defense, instructed the Italian Embassy in Zagreb to take the necessary steps in order to preserve Italy's rights over the Italian military vessels *Re d'Italia* and *Palestro*[4]. Vis sunken warships should be considered under several heads. Under the law of State succession, since Croatia succeeded to the Socialist Federal Republic of Yugoslavia which in its turn was a successor of Austro-Hungarian Empire as Kingdom of Serbia, Croatia and Slovenia. Under the law of naval warfare, since the two Italian ships were not captured by

[3] We have not considered the recent judgment by the International Law of the Sea Tribunal on Saint Vincent and the Grenadines *v*. Kingdom of Spain handed down on 28 May 2013 (ITLOS, Case No. 18). The Spanish authorities arrested the Saint Vincent and Grenadines vessel, *Louisa*, and detained a number of crew members with the accusation that the ship illegally recovered pieces of underwater cultural heritage while it was surveying the bed in Spanish waters for oil and gas. The judgment, in which ITLOS declined jurisdiction, is unrelated to our topic.

[4] Camera dei Deputati (Italian Parliament). Question time, Question of 5/5/2005, answer of 21/11/2005 (Doc. 4/14243). See also *Exploring Underwater Heritage in Croatia*. *A Handbook* (L. Bekic, I. Miholjek, eds, International Center for Underwater Archeology, Zadar, 2009)

the squadron of Admiral Tegethoff and thus their ownership was not transferred to Austria-Hungary. Under the law of the sea, since Italy still claims its rights, notwithstanding the passage of the time and the location of the wrecks in Croatia's territorial waters.

Our *confrère* Professor Degan argues that the "Re d'Italia" became "booty of war" of the Austrian-Hungary Empire, as soon as it was sank after the naval engagement. However this assumption cannot be shared as the precedents of *Alabama, Admiral Nakhimov* and *U-boat 895* prove the contrary (see the Preliminary Report). On the other hand, as Professor Degan affirms, the "Re d'Italia" falls under the regulation of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, since both Croatia and Italy are parties to it and the wreck has been under waters for more than 100 years[5]. Article 7(1) of the UNESCO Convention states that the coastal State has the exclusive rights to regulate and authorize activities directed at underwater cultural heritage in its territorial sea. The UNESCO Convention does not deal with title to property but only regulates the issue of preservation of cultural property. The territorial State has an hortatory duty (a "should" type obligation) to inform the flag State of the discovery of State vessels sunk in its territorial waters. Thus the powers of the coastal State are nearly exclusive from the point of view of jurisdiction, unless one can demonstrate that Article 7(1) should be interpreted in the light of Article 2(8) and that it cannot deviate from the existing practice on sovereign immunity and flag State's rights and provided that Article 2(8) is deemed applicable not only to warships in operation, but also to their wrecks[6].

The Regina Margherita

It was an Italian battleship sunk with 674 members of the crew in 1916 off the Albanian coast. On 16 August 2005, the Italian consul in Valona thanked the local authorities for the help given in exploring the

[5] V.-D. Degan, "The Legal Situation of the Wreck of the Ironclad 'Re d'Italia' Sunk in the 1866 Battle of Vis (Lissa), 51 *Comparative Maritime Law*, *Poredbeno Pomorsko Pravo* (2012), No 166, 1 -10.

[6] Article 2(8) of the UNESCO Convention is a kind of a clause that should be regarded as an example of "constructive ambiguity" allowing different readings. It is however incontrovertible that it was inserted at the initiative of the Group of 77 to meet the concerns of major naval powers and that it was meant, according to the proponents, to cover only seagoing warships and not their wrecks.

vessel and said that Italy regarded the wreck as a shrine for the sailors who lost their lives[7].

Pollution in the Pacific Ocean

According to Craig Forrest 3,800 vessels were lost in the Pacific and East Asia during the World War II, mostly belonging to Japan (86%) and to the US (11%). They were warships and oil tankers converted in auxiliary vessels and are a major source of pollution unless recovered[8].

International Conventions

In addition to the Conventions listed in the preliminary report, other multilateral conventions which may be relevant, do not apply to warships/State owned vessels should be mentioned[9]:

- 1910 Brussels Convention for the Purpose of Establishing Uniformity in Certain Rules Regarding Collisions (Art. 11);
- 1923 Statute Attached to the Geneva Convention on the International Regime of Maritime Ports (Art. 13);
- 1926 Brussels Convention on Maritime Mortgages and Liens (Art. 15);
- 1934 Protocol to the Brussels Convention (Art. I);
- 1954 Oil Pollution Convention (Art. II(1)(d);
- 1965 Convention on Facilitation of International Maritime Traffic (Art. II(3);
- 1966 Convention on Load Lines (Art. 5(1)(a);
- 1969 Convention on the Tonnage Measurement of Ships (Art (1)(a);
- 2001 International Convention on Civil Liability for Bunker Oil Pollution Damage (Art. (4)(2) (however the parties may decide for its application).

On the other hand there are maritime conventions which expressly affirm that they also apply to warships/State vessels:

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[7] The case of the German submarine sunk in the Malacca Strait during the World War II has already been referred to in the Preliminary Report. *Adde* as element of bibliography Georg Ress, "Die Bergung kriegsversenkter im Lichte der Rechtlage Deutschlands-Bemerkungen zu einem Urteil des High Court von Singapur vom 24 October 1974, ZaoRV, vol. 35 (1975), 364-374.

[8] See the slides by Craig Forrest, "New Challenges for the Law of the Sea: Hazardous and Historic Sunken Warships", www. unfalumni.org/.../Craig_Forrest_WW2Shipw...

[9] This list has been compiled taken into account the conventions referred to by J. Asley Roach, Robert W. Smith, *Excessive Maritime Claims*, 3rd ed., Leiden-Boston, 2012,535-540. Regional conventions quoted in the Roach-Smith compilation are omitted.

- 1972 International Regulations for Preventing Collisions at Sea (COLREGS 1972, Rule 1, a);
- 1974 Convention for the Safety of Life at Sea (SOLAS 1974, Art. II).

Recent Scholarly Opinions

The growing of State practice and the *Mercedes* judgment attracted new comments which were published after my preliminary Report.

In her recent book on Underwater Cultural Heritage, Sarah Dromgoole affirms that there is still uncertainty on the status of sunken craft under customary international law because there is "confusion and doubt" on the rationale of immunity claimed by the flag States over their sunken craft and the competitive claims by States on whose territorial waters the sunken vessel lies[10]. "However, " she adds, "given the rate at which new wreck sites are being discovered and the growing willingness of State to act to protect the cultural value of sunken State craft, it seems likely that practice will continue to grow and become more consistent in the future. In time, it is possible that a requirement for the express consent of the flag State to interference with sunken State craft – in whatever waters they are situated – may crystallize into a rule of customary international law".

The other problem is whether the UNCLOS provisions concerning military vessels, which are deemed to reflect customary international law, also apply to sunken warships. This is still unclear, according to some opinions, even though it is affirmed that a customary rule is taking shape, the content of which will mirror the UNCLOS rules on historic protection of cultural property and the respect for the deceased personnel on board, a principle required by human rights and humanitarian law provisions.

According to a recent opinion, "the international law on sunken military craft is still evolving"[11]. However the practice reflects that a number of rules should govern their regime. Sunken warships remain property of the flag State and thus their salvage requires its authorization. Abandonment is not presumed and the recovery of sunken warships and their artifact should be carried out according to marine archaeological protocols. The cargo remains State-owned property, while privately-owned cargo remains with the private owner. Sunken warships and their cargo are entitled to sovereign immunity. The coastal State cannot

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[10] Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, Cambridge, CUP, 2013, Chapter IV.

[11] V. Vadi, "War, Memory and Culture: The Uncertain Legal Status of Historic Sunken Warships", in 37 *Tulane Maritime Journal* (2013), 558.

pretend any title to sunken warships found in its territorial waters, but can only claim that access to them cannot take place without its permission. The coastal State cannot pretend to exercise its control over warships located in its continental shelf. In this case as in the case of warships beneath the high seas, only the flag State may exercise its control. Removal of wrecks that constitute an hazard for navigation or containing dangerous materials should be carried out in cooperation between the flag State and the coastal State. These rules may be applied to relatively recent sunken warships. However is still uncertain the dies a quo and determining whether they apply to ships sunken before the 17 Century and recently discovered[12].

According to another recent opinion ownership and sovereign immunity should be kept separate: The practice shows that the wreck remains property of the flag State, while the immunity is no more enjoyed since the rationale for keeping immunity is lacking: a warship enjoys immunity as an organ of the flag State, while a sunken warship may not be considered as a State organ. It is however held that the flag State may operate on its sunken warships located on the bed of the continental shelf or the EEZ of a foreign State, even if the recovery requests a drilling operation. On the contrary for those wrecks located in foreign territorial waters, the consent of the coastal State is necessary[13].

The Current Status of the Unesco Convention

As of 1st September 2013, 45 States have ratified the UNESCO Convention on the Protection of Underwater Cultural Heritage, which entered into force on 2 January 2009.The latest ratification is that submitted by Belgium on 5 August 2013. Major naval powers as the UK and US are not State parties[14]. A number of declarations (reservations only are allowed in connection with Article 29) has been appended to the instrument of ratification. No one, however, is directly connected with sunken warships or State vessels.

The UN Convention on Jurisdictional Immunities of States and Their Property

The UN Convention on Jurisdictional Immunities of States and Their Property (not yet in force) does not deal with sunken warships. However

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12 Ibid., 542-549.

13 J. Symonides et M. Symonides, "Droits de l'Etat du pavillon sur les épaves des navires de guerre et des autres navires d'Etat utilises à des fins non commerciales", *Revista europea de la navegacion maritima y aeronautica*, 2012, 17-18.

14 On the contrary France ratified on 7 February 2013.

the Convention has an Article dealing with cargo on board of warships and State owned vessels employed in non-commercial purposes which might be relevant for our purposes. The cargo is dealt with separated from the vessel if it is owned by the State and used or intended to be used for non-commercial purposes. On the contrary if the cargo is on board of warship or State vessel it is subject to sovereign immunity and it is not relevant whether it is private property or State property.

Immunity of Sunken Warships and the Notion of Cultural Heritage

We have seen that State practice is oriented toward recognizing sovereign immunity to sunken warships. This finding is supported by the final judgment on Odyssey. We have also seen that the notion of immunity and that of property coincide, as usually a warship is under the sovereign immunity of the flag State that it is also its owner. The decoupling between sovereign immunity and ownership might happen for the cargo on board, which may belong to another subject but, being interlinked with the vessel, falls under the jurisdiction of the flag State for the purpose of immunity.

Neither the notion of ownership nor that of sovereign immunity conflict, in themselves, with the notion of cultural heritage. The law may impose a duty to preserve the asset of historical or cultural origin to the State that is titular of ownership and/or exercise jurisdiction over the sunken warship and its cargo. The phenomenon is well known also under domestic law. It happens that a physical person is owner of an historical mansion or of a famous artifact, but that the law subjects the ownership of the asset to a number of obligations aimed at its preservation.

Those limitations may well also be imposed by the international law. For objects of an archaeological and historical nature found in the Area, UNCLOS Article 149 affirms that they shall be preserved or disposed of for the benefit of mankind as whole. If one assumes that Article 149 applies to sunken warships, the provision limits the notion of sovereign immunity of the flag State and its rights as owner of the wreck. Article 303, paragraph 1 UNCLOS, on the other hand, imposes a general duty to protect objects of an archeological and historical nature found at sea, including an obligation to co-operate. As may be inferred by Article 303 paragraph 2, the obligation of protection is non incompatible with the ownership of the object by somebody else than the State which is the addressee of the duty of protection.

Recent Bibliography

A. Blunt, "Wrecked but Salvageable. Current Governance of Underwater Cultural Heritage and the New Framework of Investment Law", 24 *Georgetown International Environmental Law Review* (2012), 195-220.

J. Huang, "Legal Battles over Underwater Historic Shipwrecks in High Seas. The case of Odyssey", 3 *Law of the Sea Reports* (2012), 5-

J.N. Nodelman, "Admiralty Law, the Law of the Sea Convention and the Material Culture of Historical Shipwrecks", in 26 *Ocean Yearbook* (2012), 599-622.

J. A. Roach, R. W. Smith, *Excessive Maritime Claims*, 3rd ed., Leiden-Boston, 2012, 534-558.

S. Dromgoole, "Reflection on the Protection of the Major Maritime powers with Respect to the UNESCO Convention on the protection of the Underwater Cultural Heritage", *Marine Policy*, 2012, 1-8.

S. Dromgoole, *Underwater Cultural Heritage and International Law*, CUP, Cambridge, 2013.

V.-D. Degan, "The Legal Situation of the Wreck of the Ironclad 'Re d'Italia' Sunk in the 1866 Battle of Vis (Lissa), 51 *Comparative Maritime Law*, *Poredbeno Pomorsko Pravo* (2012), No. 166, 1-10.

J.J. B. Segarra "Above Us the Waves: Defending the Expansive Jurisdictional reach of American Admiralty Courts in Determining the Recovery Rights to Ancient or Historic Wrecks", in 43 *Journal of maritime Law & Commerce* (2012), 349-391.

J. Symonides et M. Symonides, "Droits de l'Etat du pavillon sur les épaves des navires de guerre et des autres navires d'Etat utilises à des fins non commerciales", *Revista europea de la navegacion maritima y aeronautica*, 2012, 1-18.

C. Symmons, "Recent Off-Shore Treasure-Seeking Incidents Relating to Wrecks in Irish Waters", 27 *International Journal of Marine and Coastal Law* (2012), 635-646.

M-Aznar, O. Varmer, The "Titanic" as Underwater Cultural Heritage: Challenge to its Legal International Protection, in 44 *Ocean Development and International law* (2013). 96-112.

V. Vadi, "War, Memory and Culture: The Uncertain Legal Status of Historic Sunken Warships", in 37 Tulane Maritime Journal (2013), 333-378.

E. Appendix: A Draft Structure for a Resolution on Sunken Warships and State Owned Vessels

The IX Commission recommended a draft structure of a Resolution to be adopted at a later stage. The draft should identify the issues to be the object of the Resolution. The term employed is sunken warships, being understood that it also addresses State owned vessels. The draft may be articulated as following:

Preamble

The preamble should identify the primary aim of the Resolution consisting in proposing rules of a topic almost unregulated under the perspective of conventional law. To this end the preamble should quote the sources on which the regulation should be based. The Resolution should stick on the customary international law and the existing practice and *opinio juris*.

As far as conventional law is concerned, the primary source should be UNCLOS and its applicable rules, which for their most parts are deemed to be declaratory of customary international law. The Resolution should integrate into existing law of the sea, whether or not it is considered declaratory of customary international law or mere conventional development, in particular Articles 303 and 149 of UNCLOS.

It is proposed that the preamble merely "takes note" of those conventions which are relevant but that have not reached a universal ratifications or that have been ratified by few States, even if they are not yet in force, such as the the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, the 2007 Nairobi International Convention on the Removal of Wrecks or the 2004 UN Convention on Jurisdictional Immunities of States and their Property

Immunity of Sunken Warships

The existing State practice is decisively endorsing the principle of immunity of sunken warships. This practice is supported by the *opinio juris* as reflected by a number of statements and also by the existing case-law, as proven by the recent affair on Odyssey. The Resolution should very clearly state the principle of sovereign immunity. The real problem is how this principle may be articulated when the ship is located on the seabed of the territorial waters, contiguous zone and the continental shelf of a foreign coastal State. The Resolution should contain a clause stating the principle of co-operation between the flag State and the coastal State. It may specify this principle according to the status of waters beneath the which the sunken warship lie. Any activity on the territorial waters requires the consent of the coastal State and conversely any activity by

the coastal State requires the consent of the flag State, unless a circumstance excluding wrongfulness may be invoked (for instance severe pollution or hazard to navigation). For the contiguous zone and the continental shelf the principle of consent by the coastal State should be attenuated and a clause like "should endeavor" may be proposed taking into account that wrecks on the continental shelf are not object of sovereign rights of the coastal State. For the contiguous zone reference should be paid to Article 303 Unclos in so far as a sunken warship falls under the category of objects of an archeological and historical nature.

State Succession

Warships are moveable property and their succession is regulated by the law in force for that kind of property. State succession to moveable property is dealt with by the 1983 UN Convention on State Succession un the Matter of Property, Archives and State Debts. However the Convention is hardly conceived as declaratory of customary international law and has been ratified by few States. The easiest examples are the ones on incorporation since the incorporating State succeeds to all rights and duties of the incorporated State. In case of dissolution of the successor State, one possibility it to attribute the property of the sunken warship to the coastal State in whose territorial waters or continental shelf the wreck lies. In case of transfer of territory the interpreter has to check whether the transfer agreement also encompasses part of the moveable property, including a number of ships. One could also envisage moveable property connected with the activity of the territory transferred, for instance sunken vessels which were employed for coast-guarding. The most difficult issues to solve are those relating to new States and to break-up of the predecessor State and connected with warships sunken before the critical date of State succession. Even in this case the territorial principle may be followed and thus the property and sovereign immunity may be attributed to the State in whose territorial waters or continental shelf the wreck lie. It is open to question how to regulate the case of a wreck lying on the sea-bed outside the national jurisdiction.

The 1983 Vienna Convention contains a specific rule in case of newly independent States affirming that the moveable property created with the contribution of the territory which has become independent should be transferred to the successor State in proportion with the contribution given by the dependent territory. The rule is progressive development of international law. However it may be compared with Article 149 UNCLOS which affirms that for the disposal and conservation of objects of an archeological or historical nature found in the Area the preferential rights of "region of cultural origin" need to be taken into account. The

Resolution should not identify the rules applicable in case of State succession. It should only refer to the pertinent rules of customary international law and to the conventional rules for those States which are parties to the Vienna Convention.

Armed Conflict at Sea

According to customary international law a captured warship becomes ipso facto property of the captor State without need of prize adjudication. Consequently warships which have been sunken during an engagement without being captured remain property of the flag State. This concept should properly reflected into the Resolution.

Sunken Warships as Public Property of the Flag State

Sunken warships remain property of the flag State, unless abandoned or because the title is lost for expiring the term of statutory limitations. Rules on abandonment and on statutory limitations should be determined according to the legal order of the flag State. Being public property of the flag State, a sunken warship cannot be subject to any measure of constraint.

The Status of the Cargo

In the *Mercedes* it was held that the cargo is interlinked with the wreck and it enjoys sovereign immunity together with the wreck. It was also held that sovereign immunity does not transform the portion of the cargo, which is private property, into public property.

Personal Property on Board of Sunken Warships

The above considerations also are valid for the personal property on board of the sunken warship, for instance the property of crew members. The legal order of the flag State will determine ownership and inheritance rights.

Salvage and the Law of finds

Sunken warships cannot be subject to the law of salvage since they enjoy sovereign immunity. Moreover, they are public property of the flag State and this is an additional reason for excluding salvage. The exclusion of salvage also covers the cargo on board including the personal property of the crew, since it is interlinked with the ship. Salvage may be authorized by the flag State and may be carried out by a commercial entepresises. If the ship is lying on the territorial waters or contiguous zone of a foreign State, the cooperation of the coastal State is also required.

Salvage may be carried out if the wreck has been abandoned by the flag State. In this case the law of finds may be applies for the wrecks as well for artifacts, provided that nobody can claim their property, for instance in application of statutes of limitations. Even in this case, the salvage should be carried out under the control of the coastal State, if the wrecks lies beneath its territorial waters or contiguous zone and the proper rules of marine archeology should be abided by.

Cultural Heritage

The notions of ownership and sovereign immunity are not in themselves contrary to the concept of cultural heritage. The law may impose to the sovereign an obligation to preserve the wreck. The law also may impose specific modalities, for instance if the wreck should be preserved in situ, properly recovered and displayed. The Resolution might set a date for determining when a wreck becomes cultural property. Article 149 UNCLOS does not set any date. However the Resolution may adopt the criterion of 100 years which is the critical date of the UNESCO Convention.

Regional co-operation

The Resolution should contain a clause fostering regional co-operation. It should be promoted by the bordering States, but also by other sea-users even though they are not belonging to the region.

Cemetery and War Graves

Every action on the wrecks should be carried out with due respect for the victims on board of the warship. The Resolution should encompass the principle of the due respect, which may be implemented through the establishment of the wreck as a war cemetery or other proper disposal for the victims and their burial if the wreck is recovered.

Hazard to Navigation and Protection of Marine Environment

The Nairobi Convention does not apply to warships, unless the flag State decides otherwise. Similarly the provisions on marine pollution and casualties do not in principle apply to warships. However we may conceive an action by the coastal State in case of hazard to navigation or severe marine pollution. As a rule the consent of the flag State should be searched for. If it not given or in case of impending danger, the coastal State should be entitled to remove the wreck. Its action should be justified as a circumstance precluding wrongfulness, under the rationale of force majeure or state of necessity

Settlement of disputes

UNCLOS foresees a system for disputes settlement. It is proposed that the Resolution does not identify the specific UNCLOS rules on the settlement of disputes. In particular the Resolution should not establish whether disputes concerning sunken warships fall under Section 2 of Chapter XV and whether Article 298(1), para. (b) applies on the premiss that any dispute on the recovering of sunken warships should be considered a dispute involving military activities. Rather it is preferable a generic reference to Article 33 of the UN Charter and to the pertinent conventions of international law.

F. Comments on the Addendum and on the Draft structure Resolution

Comments by Mr Degan

A mark of distinction of the best Resolutions that our Institute has adopted in its long history lays in distinguishing between rules of positive international law (*lex lata*) and our proposals *de lege ferenda* in order to improve and complete the actual rules in force. A Rapporteur does his best in offering the complete picture of the rules in force together with their *lacunae* and other imperfections, with the aim that the final text of the Resolution approved by the Institute proposes new rules which should complement the actual ones or even revise some of the existing. Still, some very good Resolutions from the past become obsolete by new codification conventions with a large participation of State parties, or even by some decisions of the ICJ that adopt dissimilar solutions.[15]

I tried to help you by some suggestions in your job with the aim to complement the picture of positive law. It was your right to neglect arguments exposed in my letter of 4 May 2012, but it is at your risk.

Instead of the above approach you did your best to prove that your proposals on sovereign immunity and on the ownership of former flag State over sunken warships are rules of positive law and then almost in all circumstances. In order to do that you ignored some important rules of positive law in force at the time of sinking. To the same end you interpreted some judgments by domestic courts lock, stock and barrel as customary law of general application. That in spite of the provision set out in Article 38(1)(d) of the Statute of the ICJ according to which judicial decisions together with doctrine are not more than "subsidiary

[15] An example of a very old Resolution that is still useful is that „*La compétence du juge international en équité*", adopted by the Institute on 3 September 1937.

means for the determination of rules of law". In the same light your grossly undermined the 2001 UNESCO Convention on UCH. You expect that the Resolution of our Institute proposes drafting new conventional law for warships which will not qualify them as submerged antiquities. That new convention should confirm the above proposal that you believe to represent the law already in force.

Hence you almost entirely ignored the right of booty in international armed conflicts. I wrote you that the immunity of warships is valid in time of peace and in armed conflicts between belligerents and neutral States. But because warships are a means or instrument of warfare (like combat aircraft, coastal artillery or torpedoes), it seems impossible to allege that they enjoy sovereign immunity in relations between belligerent parties so far as a conflict terminates by a peace treaty or otherwise. Still less that can be argued for wrecks of warships.

I found a definition of booty in maritime warfare by Charles Rousseau, which reads as follows:

> *"Les navires de guerre tombent au pouvoir de l'ennemi sans procédure de prise préalable, du seul fait de leur capture, au titre du butin, dont appropriation est licite au regard du droit international."*[16]

The capture means here a physical appropriation rather than formal notification to this end to the enemy flag State through diplomatic channels.

In case that a warship was sunken in a naval battle it cannot recover "sovereign immunity" of any State because it was deprived of it before sinking. For these situations there is not an explicit rule of positive international law. In my view such a wreck becomes the property of the State that was entitled to capture it when it was in floatable situation. However, as long as an armed conflict lasts it is not wise to expect that the belligerent captor physically seizes the wreck, or that it formally captures it by a note. Belligerent States have much more important business to do in wars. A normal situation would be that they regulate the ownership on shipwrecks by treaties of peace, but as I know it did not occur in practice.

The most often the State that has sunken an enemy warship does not have interest in recuperating its wreck in case that it is situated very far

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[16] *Cf.*, *Revue générale du droit international public 1981*, p. 409. Quoted according to – Jean Salmon (dir). : *Dictionnaire de droit international public*, Bruxelles 2001, pp 140-141.

from its coastal waters. For such a wreck, as being war grave of victims on board, much more interests has the former flag State, or more precisely speaking the State with verifiable historic link with the sunken ship.

For these situations you have a quite opposite view to mine: "According to customary international law a captured warship becomes ipso facto property of the captor State without the necessity of prize adjudication. Consequently warships which have been sunken during an engagement without being captures remain the property of the flag State…" Certainly your conclusion from the right statement in its first sentence does not consist in a rule of positive international law, and as such it is not fit for our Resolution even as a proposal *de lege ferenda*. That is for several reasons. Practically you excluded the captor State from any rights on the wreck. Capture as you understand it is not in use in practice. In case that it is, a passage of time should be discussed between the sinking of a ship and its "capture". Hence, you advocate throughout your report the ownership of the so-called "flag State" of a wreck almost in all circumstances, comparing it only with some rights of the coastal State in whose waters the wreck is situated.

You alleged in the Addendum to your Preliminary Report that my argument according to which the Italian ship *Re d'Italia* became the booty of war of the Austrian Empire as soon as it was sunk "cannot be shared as the precedents of *Alabama*, *Admiral Nakhimov* and *U-boat 895* prove the contrary". Let us analyze these three cases.

1. In the American Civil War (1861-1865) European Powers recognized the Southern Confederation of States as belligerent. The Confederation had its flag distinct from that of the US armed forces from the North. In 1864 the Confederate privateer *Alabama* was sunk by the *USS Kearsage* near the port of Cherbourg, but at that time still on the high seas. In modern time that location became the territorial sea of France. France was not a party of that war and the "flag State" of the wreck of *Alabama* vanished in 1865.

The United States was right to claim its ownership on the wreck ("which has never been transferred or abandoned"), because it was its battleship that sunk the *Alabama*, and also as the only successor of the Confederation. Nevertheless, it relinquished its claim to ownership. In 1989 it concluded an agreement with France respecting the location of the wreck in French territorial sea, and it seems in the line with the future 2001 UNESCO Convention on UCH. The agreement related to the protection of the wreck, granting France the right to establish a protection zone around it and for taking appropriate measures for its conservation.

This case is important for recognizing the rights of the coastal State in its territorial sea, and because it treated that wreck as an immovable object, and in fact as an underwater cultural heritage.

2. *The U-boat 895* was sunk in 1944 in the Malacca Strait very far from Germany. The High Court of Singapore held in 1980 that the submarine was still German property "since it was not captured by the enemy before sinking". It was probably the British or the US Navy that sunk that German submarine. In case that such a State did not have interest on it, the High Court was right to adjudicate the wreck to Germany as its former flag State. We shall discuss the argument put here in quotation marks within the next case.

3. Similar to the above you quoted the Japanese note that the Russian armed cruiser *Admiral Nakhimov* in the Russo-Japanese War of 1904-1905 "has been captured by Japanese Navy before it sunk". This should mean that the Japanese Navy first seized the cruiser evacuating its crew and documents, then captured it formally, and finally decided to sink it.

The data from Internet speak a different story.[17] On 27 May 1905, the first day of the Battle of Tsushima the *Admiral Nakhimov* was hit about thirty times, mainly by fire from Japanese armoured cruisers, and suffered 25 killed, and 51 injured, but retained her combat capabilities. Around 21.30 – 22.00 hours she was hit at the bow by a torpedo, fired by an unidentified ship. Despite the struggle of the crew, the ship was sinking and she was abandoned the next morning close to the island of Tsushima. The Japanese auxiliary cruiser *Sado Maru* rescued 523 of her crew, another 103 men escaped in boats and were captured later, and 18 men were lost. Captain Rodionov later claimed that the ship has been sunk by a floating naval mine rather than a torpedo.

Hence, the Japanese Navy could not capture the *Admiral Nakhimov* before its sinking. The opposite could not happen. In an opposite situation Russian Navy could "capture" all the Japanese ships before seizing and sinking them, and hence win that war.

In my view Japan is fully entitled to the wreck of *Admiral Nakhimov* because it sunk it in a regular war. In my view sinking of an enemy warship in such a conflict is as good as any formal act of capture, whatever this term means. My conclusion relates only to rules of warfare. Of course, each international and non-international armed conflict and sinking of surface ships and submarines are tragic events themselves.

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[17] *Cf.*, Russian armoured cruiser *Admiral Nakhimov* (https://en.vilkipedia.org/wiki/Russian_armoured cruiser_Admiral_Nakhimov (last visit 18.8.2013)).

In this framework it is interesting to know the story of sinking of the Argentine light cruiser *General Belgrano* by the Royal Navy submarine *Conqueror* on 2 May 1982, during the Falklands War. It was sunk on the high seas, but beyond the Total Exclusion Zone (T.E.Z.) of 200 miles around the Falkland or Malvinas Islands unilaterally proclaimed by Britain. She is the only ship ever to have been sunk during military operations by a nuclear powered submarine. As a consequence, 323 men lost their lives. Argentine and Chilean ships rescued 772 men. [18]

Because of the disproportionate number of victims and of the controversy over the facts that *Belgrano* was sunk out of the T.E.Z., the UK will probably never claim the ownership o9f the wreck of *Belgrano*. It would be the best that both parties find a peaceful solution of their long-lasting dispute on sovereignty over the Falkland Islands, and perhaps within it of the status of the wreck. Notwithstanding the short period of time passed, they can proclaim it as their joint underwater cultural heritage.

Allow me my dear *confrère* to present some additional remarks.

The *Odyssey* Final Judgment is interesting with its verdicts and motives. But in my view it cannot present *communis opinion juris* apt of creating or confirming rules of general customary international law. In case that the wreck in question is situated in internal waters or the territorial sea of the United States its verdict would probably be different. Therefore, it is not good to project its conclusions to wrecks in whatever waters they are situated.

Besides that, multiplication of statements of some former flag States that they have never abandoned or transferred title on a wreck should not be taken as proof of existence of a customary rule. Warship of these States did not enjoy the sovereign immunity; neither had they respected it in respect to enemy warships during the war in question. Legal fictions of this kind generate new legal fictions until the entire construction falls to absurdity.

Together with losing their sovereign immunity, wrecks at the bottom of the sea lose their feature of being ships and in case of warships the quality of organs of the flag State. For this reason unlike operative ships, they cannot be treated as movable property of a State. They are immovable objects at the bottom of the sea until the competent coastal

[18] See ARA *General Belgrano* (http://en.wilkipedia.org/wiki/ARA_General_Belgrano (last visit 18.8.2013)).

State or the former flag State decide physically to remove them or their parts. That can especially be the case with treasure found in a wreck.

With these features wrecks do not present the major problems of State succession. Unlike assets and debts of the predecessor State a shipwreck cannot be apportioned among all States in succession process.

Finally, in my view there is no reason for underrating the solutions adopted in the 2001 UNESCO Convention on the Protection of Underwater Cultural Heritage, or for proposing the conclusion of a new convention relating to special regime of sunken warships. The number of parties of the UNESCO Convention jumped between your Preliminary Report and its Addendum from 20 to 44. To your remark that it does not reflect customary law because major naval powers like the UK and US are not State parties, I can oppose my wish in favour of their ratification of it, and in addition that the US becomes also the party to the 1982 UN Law of the Sea Convention. Happily Italy is a party to both of them, and with Italy Croatia is too.

Comments by Lady Fox

Proposal as to Articles on State Immunity for the Draft Resolution discussed in the Addendum: Appendix 13.07.11

Introduction

I have read the Addendum of 2013 and the Preliminary Report of 2010 of Professor Ronzitti, and conclude that, with the account of the discussion at the 2011 Rhodes session of the Institut and the Appendix to the 2013 Addendum, the subject has been extensively examined from all aspects. In my Reply to the Preliminary Report I stated:

The recognition of such a plea of State immunity as a preliminary check on proceedings in the court of the Coastal State to recover or dispose of a sunken warship, regardless of the length of time since it sank, secures that any other State, international organisation or other person seeking to take measures of recovery or disposal will have first to notify and obtain the consent of the State of the sunken warship (para. 5).

The relevance of this approach is approved by the Special Rapporteur in the Preliminary Report and the Appendix to the Addendum where it is stated that both treaty and customary international law recognise that State immunity applies to warships owned or operated by a State, As I with regret will not be attending the Institut's 2013 Session in Tokyo, it seems that the most useful contribution which I can now make would be to set out some draft Articles on State immunity which might assist in the task of reducing the Special Rapporteur's excellent statements of the

present legal position to conclusions which the Ninth Committee may summarise for adoption by the Institut in a Resolution on submerged wrecks of ships owned or operated by a State.

Accordingly I set out below a brief note on some Draft Articles on State immunity which I have set out on a separate page.

1. *Definition*

In any Resolution setting out the international law with regard to sunken warships it will be necessary to include a definition of the ship or wreck of such a ship and to make clear that the flag State or State Owner (or in some circumstances, the State as operator) is entitled to plead State immunity in all circumstances ie wherever located and at whatever century or point in time the ship was sunk. In the preparation of the Resolution guidance as to the wording may be found in the definitions appearing in the 1926 Brussels Convention relating to the Immunity of State Owned Vessels, Article 3, the UN Law of the Sea 1982 Article 29 and the UN Convention of Jurisdictional Immunities of States and their Property 2004 (UNSCI)

Article 16. I have set them out at the end of this paper.

2. For State immunity purposes, such a definition in the Resolution should include

(i) a description of the ship as to the whole or part, and any cargo or other object connected with it which is to be treated as immune;

(ii) its condition which is to be confined to 'sunken' including a ship 'sunk during a naval engagement in armed conflict without being captured' (see Prelim Report) *Alabama, Admiral Nakhimov* and *U-boat 895 „pace* the "Re d'Italia" Appendix at p. 5); but excluding stranded vessels or those in process of sinking;

(iii) its location is to be identified as on the seabed, with the internal national waters of a State expressly excluded.

(iv) the State's connection with the ship is to be stated as 'owner -at the time it sank' entitling its claim to immunity.

As the Sp Rapporteur Ronzitti states in the preliminary report- A sunken vessel is by definition 'non-operated' - so the additional phrase the State as operator can be omitted, (but see below).

(v) its use is to be stated as solely 'at the time of sinking for governmental non-commercial services of the State.'

A ship satisfying the above definition is to be described throughout the Resolution as including 'the cargo'; or 'other object'-'connected with sunken State ship' unless expressly stated to the contrary.

3. The Definition Article might then set out other State ships which are to be treated as coming within the Resolution's definition of a 'State sunken ship'

Thus a State sunken ship within the above definition should include warships, or naval auxiliaries, and other vessels owned by a State and used at the time of sinking solely for government non-commercial purposes.

Cf see UNSCI Article 16.2's exclusion in paragraph 10 below

4. *State immunity*

The Addendum states the existing State practice decisively endorses the principle of immunity of sunken warships. As the International Court of Justice states in *Jurisdictional Immunities of States, Italy v Germany, Greece intervening* 2012 State immunity is a procedural plea going to jurisdiction, it would therefore seem best to place State immunity after the Article dealing with Definition under headings of *War grave* and *Jurisdiction* dealing with application of plea of State immunity to 'State sunken ships' as defined above.

5. *War grave*

As both the Prelim Report and Addendum require, this Article states that due respect is to be shown for all personnel in a State sunken ship at the time of sinking.

As stated above a ship solely operated but not being owned by a State shall not be treated as 'a State sunken ship'; save when at the time of sinking it was operated by naval or other forces under armed forces discipline of the State solely for governmental non-commercial purposes.

The burden of establishing such a State sunken ship as a war grave shall be on the flag State or State claiming ownership of the ship at the time of its sinking.

6. *Jurisdiction*

Given that the law of the sea under UNCLOS regulates the exercise of jurisdiction whether by the flag State, coastal State or other States by reference to particular zones it would seem necessary to provide the application of jurisdiction to State sunken ships enjoying State immunity separately with regard to two areas- the high seas and the territorial waters of the coastal State. It may be that a rule relating to a third zone,

the Continental Shelf and EEZ is required but in the absence of any significant difference regarding immunity I have included these zones in the High Seas provision.

7. *Within the High Seas Continental Shelf or EEZ of another State*

So far as the respect for State immunity on the High Seas and Continental Shelf, having regard to UNCLOS Articles 57 and 58's recognition of the immunity of State warships, a general principle of co-operation applies not only to the coastal State, and other States which or whose nationals have an interest in the identification, recovery and disposal of such a State sunken ship and its contents or objects connected with it but also to the flag State, and the State which was owner of the State sunken ship at the time of its sinking.

8. *Within the Territorial waters of a Coastal State*

Here I have sought to give proper force to the procedural bar to jurisdiction of State immunity but sought to stress the need for notice to the coastal State particularly where the Flag State or State owner envisages a positive exercise of jurisdiction or measures to recover its State submerged ship. In sub-Article (b) I have sought to strengthen the right after due notice of the coastal State to take action but also to allow that State to take immediate action in the event of severe environmental or pollution risk or hazard to navigation.

9. Given that State immunity in no way determines issues of substantive law I have sought in sub-Article (c) to assign to the Coastal State residual powers of jurisdiction to determine all substantive issues and also, in the absence of a plea of immunity , after service of notice on the flag State or State owner, to determine any application of a plea to State immunity and all other procedural issues.

10. *Relevant Articles in international Conventions*

The following definitions which feature in treaties relating to State immunity may be drawn on in the preparation of the Ninth Committee's Resolution.

The 1926 Brussels Convention relating to the Immunity of State Owned Vessels

Article 3 the Convention does not to apply to:

> 'warships, Government yachts, patrol vessels, hospital ships, auxiliary vessels, supply ships, and other craft owned or operated by the State, and used at the time a cause of action arises exclusively on Governmental and non-commercial service.' .

UN Law of the Sea 1982

Article 29 - Definition of warships

For the purposes of this Convention, "warship" means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

Article 95- Immunity of warships on the high seas

Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

Article 96 - Immunity of ships used only on government non-commercial service

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.

Article 303 - *Archaeological and historical objects found at sea*

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

2. In order to control traffic in such objects, the coastal State may, in applying Article 33, presume that their removal from the seabed in the zone referred to in that Article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that Article.

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

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

UN Convention of Jurisdictional Immunities of States and their Property 2004 (UNSCI)

Article 16 - Ships owned or operated by a State

1. Unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

2. Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the time being, only on government non-commercial service.

3. Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the carriage of cargo on board a ship owned or operated by that State if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes.

4. Paragraph 3 does not apply to any cargo carried on board the ships referred to in paragraph 2, nor does it apply to any cargo owned by a State and used or intended for use exclusively for government non-commercial purposes.

5. States may plead all measures of defense, prescription and limitation of liability which are available to private ships and cargoes and their owners.

6. If in a proceeding there arises a question relating to the government and non-commercial character of a ship owned or operated by a State or cargo owned by a State, a certificate signed by a diplomatic representative or other competent authority of that State and communicated to the court shall serve as evidence of the character of that ship or cargo.

Proposed Articles to cover State Immunity

Article 1 - Definition of State sunken ship

(a) For the purposes of this Resolution a State sunken ship is a ship located on the seabed outside the internal national waters of any State which at the time of sinking was owned by a State and used solely for governmental non-commercial services of that State.

The term 'State sunken ship' includes a ship under regular armed forces discipline sunk during a naval conflict without being captured, but excludes a stranded vessel or one in process of sinking.

(b) A State sunken ship includes the whole or part of, any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately.

(c) A State sunken ship includes warships, or naval auxiliaries, and other vessels owned by a State used at the time of sinking solely for government non-commercial service.

Article 2 - War Graves

(a) Due respect shall be observed by all States and their nationals with regard to any personnel in a State sunken ship present there at the time of its sinking.

Notwithstanding the State not being owner, this obligation shall also apply to a sunken ship which at the time of sinking was operated by a State by naval or other personnel under armed forces discipline of the State solely for governmental non-commercial purposes.

(b) The burden of proof of establishing the State sunken ship and the personnel therein as a war grave shall be on the flag State or State claiming ownership or the operation of the ship at the time of its sinking.

Article 3 - High Seas and Continental Shelf

When a State sunken ship is located on the seabed a general principle of respect for the immunity of the Flag State or State owner and cooperation with regard to such a State sunken ship shall be observed by all States and their nationals in respect of the identification, recovery and disposal of such a State sunken ship whether in whole or in part and/or any cargo or other object connected with such a ship.

Article 4 - Territorial Waters: Jurisdiction

(a) Where a State sunken ship is located on the seabed within the territorial waters of a State, the flag State or State owner shall notify in writing the coastal State that it claims State immunity in respect of such State submerged ship and further set out any measures as to the identification, recovery and disposal of such a ship, or any of its contents or objects connected with it or the exercise of any jurisdiction in that respect. Any such measures or exercise of jurisdiction shall be taken solely with the agreement of the flag State, State owner and the coastal State.

(b) Where a State sunken ship is located on the seabed of the territorial waters of a State, save where severe environmental or pollution risk or hazard to navigation requires immediate action by the coastal State, three months' notice in writing to the flag State or State owner shall be given by the coastal State of any act or exercise of jurisdiction as to the identification, recovery and disposal of all or part, or of any of its contents or objects connected with such State submerged ship. Any dispute as to the identity or entitlement of the flag State or State owner shall be determined by the coastal State.

(c) Where no written plea of State immunity has been received by the Coastal State within the expiry of three months from such notification in writing the Coastal State shall have jurisdiction to determine any question

as to the ownership of the sunken State ship, the measures as to the identification, recovery and disposal of such a ship, as to its preservation or disposal for the benefit of mankind, including any duty to protect it as an object of an archeological and historical nature found at sea and the determination of any other matter, procedural or substantive with regard to the said ship.

Comments by Mr Francioni

Much to my regret, I will not be able to participate in the IDI session in Tokyo. However I have read the revised report prepared by Professor Ronzitti and I wish to congratulate him for the thorough work he has done. While I remain committed to my continued participation in this exercise, I just wanted to make three points in view of the future drafting of a Resolution.

(1) The Rapporteur seems to embrace an across the board rule of immunity for wrecks of warships and government owned ships. His absolute deference to the state of the flag does not take adequate consideration of the recent development at the level of treaty law with regard to the general interest of the international community in the safeguarding of underwater cultural heritage. This interest finds its major manifestation in the 2001 UNESCO Convention, whose ratifications are rapidly growing in number. Granted, the UNESCO Convention is applicable only to object that have been underwater for at least 100 years. But experience shows that most of the wrecks targeted by exploration and retrieval projects belong to this category. Besides, the expanding commercial industry engaged in the exploration and retrieval of old wrecks, is interested in the valuable objects on board, which can have a significant market value as antiquities and historical objects, or for their intrinsic value, as in the case of gold and ancient coins. My view is that the rule of immunity should be balanced with other principles applicable in the context of underwater cultural heritage: the most important principle is that of preservation of the object in situ; another principle is that of transparency of the exploratory operations, so that the title holders and stake holders of a particular wreck are informed of the exploratory or retrieval operations. Finally, another important principle is that of cooperation, especially between the flag state and the costal state, whenever the wreck is located in coastal areas. All these principles are part and parcel of the 2001 UNESCO Convention and it is my opinion that these principles should be reflected in a Resolution of the IDI on the subject. I would like to add that at least in the area of cultural heritage immunity claimed by states to oppose restitution of cultural property by private actors has not been treated as absolute (See Rep. of Austria

v. Altman, Supr Ct US, 7 June 2004). Likewise, limits to sovereign immunity should be considered applicable also to underwater cultural heritage.

(2) The above observations open up an issue that is not dealt with in the Report: that is the issue of ownership title of objects found on board of wrecks. This, of course is an issue different from that the jurisdictional title over the ship. However much of the case law concerning underwater cultural objects concerns who is the owner of the valuable objects found in the wreck. The UNESCO Convention does not address this issue, because it was beyond UNESCO's competence to regulate private law aspect relating to underwater heritage. However, experience shows that in the area of cultural property, the international regulation of public law aspects is unavoidably followed by a uniform regulation of titles over such property. This happened with the 1970 UNESCO Convention on illicit traffic, which was later followed by the 1995 UNIDROIT Convention on the return of stolen and illegally exported cultural objects. It would be a remarkable contribution to the development of international law if our Commission were able to fill the present gap and develop criteria for the attribution/recognition of titles over cultural objects retrieved from underwater wrecks.

(3) Point 2) confirms my previous comments made on the earlier draft at the Rhodos Session, that the matter of the legal regime of wrecks should include regulation also of the issue of state succession in the property found on the wreck. This is a very relevant aspect of current litigations over who owns underwater cultural heritage as illustrated by the case "Nuestra Señora de las Mercedes cited in the Report.

Comments by Mr Hafner

1. I'm in agreement with the general structure of the future Resolution.

2. I would like to add only some information in the context of state succession after the First World War: According to Article 136 of the State Treaty of St. Germain of 1919 "all Austro-Hungarian warships, submarines included, [were] declared to be finally surrendered to the Principal Allied and Associated Powers." Moreover, under Article 141 "All arms, ammunition and other naval war material, including mines and torpedoes, which belonged to Austria-Hungary at the date of the signature of the Armistice of 3 November 1918, [were] declared to be finally surrendered to the Principal Allied and Associated Powers."

Although it could now be asked whether a wreck of a warship is still a warship in the sense of Article 136, Article 141 seems to clarify that even sunken warships were surrendered to the other Powers.

Nevertheless, in 1962, a sunken Austro-Hungarian submarine U-20 was rescued from the waters off the coast of Grado, northern Italy, (obviously in the Italian territorial sea). Its tower was brought to Austria and can be visited in the Museum of Military history in Vienna.

It seems that this case is very illustrative regarding the obligation of cooperation among the successor States and the general duty to protect objects of cultural nature (despite the fact that this submarine was destroyed only 96 years ago, namely in 1917).

In general, the question of State succession is very complicated so that only two alternatives seem practicable concerning its formulation in legal terms: either a very general clause referring to the law of State succession or a detailed and long regime.

3. The draft Articles prepared by Lady Fox regarding the immunity of wrecks of State ships are very helpful. I would only propose to apply the terminology as used in the UNESCO convention.

G. The Geneva Intersessional Meeting. Comments received before the Meeting

With a view of concluding the travaux of the IX Commission in Tallin, an intersessional meeting was convened in Geneva at the IHEID on 4-5 June 2015, thanks to the hospitality of our *confrère* Lucius Caflish. The Rapporteur circulated a draft of Resolution before the meeting and received a number of drafting proposals by Lady Fox and *confrères* Francioni, Hafner, Oxman, Simma and Wolfrum. *Confrère* Caminos endorsed the draft with the suggestions made by Simma and Wolfrum. Comments were made in writing by *confrère* Degan, who attended the Meeting, whilst *confrère* Yee, unable to attend, sent his contribution. The Rapporteur introduced the Draft Resolution he circulated with the comments received. He also illustrated a few element of the practice developed after the Tokyo Session, such as the condemnation of the Odyssey by the judge in Tampa to pay a substantial sum of money for "bad faith and abusive litigation" (Order of 25 September 2013: CASE NO. 8:07-cv-614-T-23MAP). Other elements are to be found in the plans for the recovery, in agreement with the British Government, of the Balkin HMS Victory sunk in 1744 during a storm in the Channel and for the salvage of the HMS Lord Clive (sunk in 1762, Rio de La Plata, Uruguay) and of the Graf Spee scuttled at the mouth of River Plate in December 1939. It is also relevant that the UNESCO Underwater Cultural Convention now counts 51 States parties (since the Tokyo Session Algeria, Bahrain, Guyana and Hungary have ratified the Convention). The celebration of centennial of World War I

started in 2014 and since that date onwards sunken ships fall under the reach of the 2001 Convention.

The Comments by Degan and Yee are reproduced below.

Comments by Mr Degan

This is to inform you that I will be present at the meeting of our Commission on 4 and 5 June in Geneva.

I read again the letters we exchanged, as well as your reports of 2011 and 2013. Here are the points in which we disagree. They should be discussed again if you believe that my agreement on your work is necessary.

1. Judgments of domestic courts form part of practice as an element of general customary rules. Some of them can be understood as confirmation of existing customary law if they interpret the general rules set out in codification conventions like the 1982 UN Law of the Sea Convention. However, because they are sometimes contradictory among themselves within one State, and because of distribution of powers in modern States, national courts cannot assume obligations in the name of their State that could be creative of new general customary law. Therefore their statements on law should be taken into account with great caution.

There is a misunderstanding at some writers about the meaning of *opinio juris* as one of two elements of existence of customary law. It does not consist in "*opinions*" of a State organ or of a judge about the rules of law. It is the *conviction* of a State through its organs that a social habit is according to international law obligatory or right, and that a contrary practice consists in violation of rules in question and can result in the international responsibility of the wrong-doing State.

2. The 2001 UNESCO Convention on the Underwater Cultural Heritage (UCH) got so far more than fourty parties. There is little chance if any that some of them subsequently renounce it. On the contrary, number of its ratifications will most certainly increase in future. If there is a chance for convocation of a diplomatic conference for its modification I do not believe that most of your proposed solution will be accepted at least by its present parties. This relates in particular to rules prohibiting the commercial exploitation of UCH (Article 2(7)), and on the distribution of competencies in Articles 7 to 12.

Although the Convention does not deal with public and private property rights on shipwrecks, the imperative rule for its parties prohibiting commercial exploitation makes that problem of property less important. By this it diminishes the importance of the question of

sovereign immunity of shipwrecks that became Underwater Cultural Heritage.

Nevertheless, like in the present unfortunate practice of the United States which did not accede to the 1982 UN Law of the Sea Convention, some non-parties to the 2001 UNESCO Convention will pick and choose on some of its provisions that are favourable to their interests as a proof of the customary law in force. They will not repudiate the Convention as a whole, but will allege that other rules are contractual provisions not binding third States. Therefore, it seems to be a futile task that our Institute adopts a Resolution calling for negotiations of a new convention according to which the wrecks of warships and of other State-owned ships operated on non-commercial service will not qualify as submerged antiquities, and to provide in it much stronger rights in favour of their former flag States.

3. If I understood the statements in your two reports well, wrecks of warships remain the property of the flag State wherever they are actually situated and notwithstanding the passage of time since their sinking, unless it expressly abandons its entitlement. This general allegation is not in perfect harmony with existing and former rules on warfare at seas. Your conclusion is correct in respect to sunken warships in time of peace as a result of errors in navigation caused by their own crew or in other cases of necessity. If such a wreck can be beached and repaired, it will preserve its sovereign immunity and the ownership by the flag State. There can be similar situations even in time of an armed conflict, but only in respect of warships and their wrecks in neutral ports and neutral seas, and *vice versa*.

However, in armed conflicts warships become tools of warfare between belligerents and they lose sovereign immunity of the flag State as such. The same relates to their wrecks. Your attitude was contradicted in the practice of belligerents only in the Adriatic Sea during World War II that I want to explain here.

Before that war the Royal Yugoslav Navy possessed a small fleet. Following the aggression of the Nazi Germany and Fascist Italy against Yugoslavia on 6 April 1941, in gross violation of the 1928 Kellogg-Briand Pact, Italy did not respect the sovereign immunity of the Yugoslav Royal Navy, neither the property of the Yugoslav State over its fleet. Italy captured the bulk of its units in the port of Kotor (Cattaro) on 25 April 1941. Since then they operated as units of *Regia Marina* under new names and the Italian flag.

As a result of ever-turning wheel of fortune, following Italy's capitulation in September 1943, the former *Kriegsmarine* of the German

Reich captured almost all warships under Italian flag in the Adriatic Sea, including ships that previously belonged to the Yugoslav Royal Navy. Since then and until the German capitulation in April 1945 these captured ships under German flag assured the German communications and supply of German troops on the Eastern coast of the Adriatic. The building of some of them was terminated in shipyards of Pula and Rijeka after the capitulation in 1943, and they never sailed under the Italian flag. Until the end of the war in Europe most of these ships were sunk by the vessels of the British Navy based in the Yugoslav island of Vis and by the Royal Air Force.

By the Treaty of Peace with Italy signed in Paris on 10 February 1947 Italy implicitly recognized the continuity of the Yugoslav State since its creation in 1918. By Article 74-B-1 of this Treaty Italy was ordered to pay the reparation to Yugoslavia in the amount of 125 million US dollars. It was not specified that in that lump sum was encompassed the value of all Yugoslav naval vessels that were captured by Italy and sunk by the Allied forces when they fought under the German flag.

This practice proves that the respect of sovereign immunity of naval ships between belligerents in armed conflicts is a fiction that does not correspond to the reality of warfare. The question of property rights over wrecks of these vessels cannot be resolved simply by denying the right of appropriation of these crafts by enemy before they were sunk. In this light a simple rule that the flag State of such a vessel that becomes a shipwreck on the bottom of the sea preserves the right of property on it in situations of armed conflicts cannot apply. The only reasonable solution for these problems seems to be Articles 7 to 12 of the UNESCO Convention.

Comments by Mr Yee

Note and Proposal on the Immunity of Wrecks of Warships and Other State-owned Ships

1. I benefitted tremendously from the reports of the Rapporteur and the comments from the members of the Commission as well as the discussions in Tokyo. Still I believe the issue of immunity of wrecks of warships and other State-owned ships is shrouded in some uncertainty. Here I offer some observations and a proposal on this issue, without dealing with other issues addressed in the draft Resolution circulated the other day by the Rapporteur.

2. In my view it is not completely clear that a State sunken ship would definitely enjoy immunity across the board in all maritime zones, if we carefully examine the provisions of the UNCLOS and take into consideration the interaction between what we have in the UNCLOS and

other species of the law such as *jus ad bellum* and international criminal law.

3. First of all, I note that there is no provision in the UNCLOS that specifically deals with the issue.

4. Secondly, even the UNCLOS uses different phrasing to describe immunity in different provisions. See arts. 42(5) ("sovereign immunity"); 95 ("complete immunity"); 96 ("complete immunity"); 178 ("immunity from legal process"); 179 ("immunity from search and any form of seizure"); 181 ("inviolable"); 182 (complicated formulations); 183 ("exemption from taxes and customs duties"); and 236 ("sovereign immunity"). Such differences militate in favor of the view that the UNCLOS knows different sizes and shapes of immunity: complete immunity, immunity from judicial proceedings, and inviolability in the sense of immunity from search and seizure. These different sizes and shapes may apply to a State sunken ship. Of course, beyond the UNCLOS the situation is more uncertain probably.

5. In this connection, I note that the idea of inviolability as a form of immunity is now fully accepted for experts on mission under the regime relating to those experts working for the United Nations and the specialized agencies, although such experts on mission may not be immune from judicial proceedings (as a narrower part of judicial process). I suppose there is no need to belabor this point.

6. Furthermore, what has been said in the Rapporteur's proposed Articles (e.g., Article 7) may not have sufficiently addressed the issue of inviolability.

7. Thirdly, it seems that a governmental ship being used in the waters under the sovereignty of a foreign coastal State in violation of the law prohibiting the use of force against the latter State at least would not enjoy complete immunity, because self-defense or self-help measures can be employed by the coastal State to stop the violation; it would be strange to give the ship complete immunity simply because, and as soon as, it had sunk and become a wreck. Such a view would place a wreck in a better position than a ship. While some may assert that self-defense and self-help, on the one hand, and immunity, on the other hand, are on different tracks of international law—if I may so characterize the relevant points in the judgments in *Arrest Warrant* and *Germany v. Italy* in the International Court of Justice, the result of successful self-defense or self-help can have the same practical result of removing the inviolability of the vessel. As far as inviolability is concerned, practice does not support such a

distinction between the two tracks.[19] Government planes that have flown into a foreign State in violation of the latter's sovereignty have not been granted inviolability, where sometimes a case for self-defence or even self-help need not be mounted as the planes have landed and are not moving; only police actions are in order. In any event, if indeed the rules were operating separately on such different tracks, a rule on immunity for the ship wreck should not prevent the continuation of the self-defense or self-help measures against the ship wreck after the ship has sunk, to the extent applicable. As to other aspects, the Court's judgment in *Germany v. Italy* is not without detractors and these issues can be left for the future.

8. Similarly, it seems clear these days that governmental crew aboard a ship would not enjoy immunity from prosecution for war crimes (and probably other international crimes) committed onboard the ship[20]; it would be difficult for one to accept that even though the ship was utilized as an instrument in the commission of these crimes, that ship itself still would enjoy immunity or even complete immunity, and that it would continue to enjoy immunity after it had sunk and become a wreck. Such a view would put the ship in a situation better than the crew members. If such a better position were to obtain during an armed conflict or in matters relating thereto, the narrow scope of the Court's decision in *Germany v. Italy* would militate in favor of a different rule in cases other than armed conflict situations.[21] The Court expressly said that "it is not called upon in the present proceedings to resolve the question whether there is in customary international law a 'tort exception' to State immunity applicable to *acta jure imperii* in general" and that "[t]he issue before the Court is confined to acts committed on the territory of the forum State by the armed forces of a foreign State, and other organs of State working in co-operation with those armed forces, in the course of conducting an armed conflict". If a broader inquiry were conducted, the result may well be different.

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[19] The special status of embassy premises may entitle them to special treatment, but that hinges on the special status. Since governmental ships are not so special as are embassy premises, they should not be given the same status.

[20] Cf., e.g., 1 Oppenheimer's International Law, 744-45; 1165-1174; Ingrid Delupis, Foreign Warships and Immunity for Espionage, 78 American JIL (1984), 53.

[21] Jurisdictional Immunities of the State (Germany/Italy: Greece intervening), Judgment, ICJ Reports 2012, 127, para. 65; cf. Diss. Op. Gaja, ibid., 317, para. 9. Cf. Sienho Yee, The Discretionary Function Exception Under the Foreign Sovereign Immunities Act: When in America, Do the Romans Do as the Romans Wish?, 93 Columbia Law Review (1993), 744-82.

9. In addition, the cases presented so far do not seem to have addressed many aspects of immunity in a focused manner. A careful reading of them will reveal that they do not really support complete immunity for a governmental sunken ship in all respects.

10. In light of the above considerations, particularly the uncertainties, I would propose that we not formulate a provision that would fix or freeze the immunity of a sunken ship in a static way once and for all. Rather, we should formulate a *general* rule that would cap the immunity of a State sunken ship to no greater than the quantum of immunity it enjoys immediately before sinking, allowing that quantum of immunity to mature in the fullness of time. One may note that to some extent the enjoyment of immunity by a certain type of ships may depend on their viability as such ships; once such a viability is lost, the immunity attaching to such a type is also lost (cf. UNCLOS, Art. 29). One may also note that the immunity that a wreck enjoys would not necessarily equal that enjoyed by the ship immediately before sinking. We need, and can only say, that the immunity that a wreck enjoys cannot be greater than that the ship enjoyed immediately before sinking.

11. Furthermore, we should also formulate some particular rules to reflect that the situations where no immunity is available, if we are reasonably certain of these situations.

12. In the light of the above considerations, a provision to the following effect is proposed (leaving language issues for the future):

Without prejudice to the applicability of other species of law, a State sunken vessel enjoys, while un-abandoned, immunity to no greater extent than the vessel has immediately before sinking, however:

(1) A State sunken vessel being used immediately before sinking in the waters under the sovereignty of a foreign coastal State as an instrument in committing a serious international crime or a violation of the prohibition against the use of force does not enjoy inviolability;

(2) Government cargo on board a State sunken vessel enjoys immunity to the same extent as the sunken vessel;

(3) Private cargo on board a State sunken vessel enjoys immunity to the same extent as the sunken vessel except from judicial proceedings.

The Geneva meeting was attended by MM. Caflisch, Degan, Francioni, Hafner, Kateka, Oxman, Thürer and was chaired by the Rapporteur after a brief introduction by Lucius Caflisch. After two days of discussion, the group was able to finalize a Resolution on the basis of

the draft prepared by the Rapporteur. It was decided to submit the Resolution to the Plenary in Tallin.

H. Text of the Draft Resolution adopted at Geneva Intersessional Meeting (5 June 2015)

Ninth Commission

The Legal Regime of Wrecks of Warships and Other State-owned Ships

in International Law

Rapporteur: Natalino Ronzitti

Resolution

The *Institute of International Law*,

Emphasizing the duty of co-operation for the preservation and protection of cultural heritage;

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982);

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970) and the Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995);

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007);

Taking note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004);

Bearing in mind the law of armed conflict at sea as well as the customary rules on succession of States;

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter;

Adopts the following Resolution:

Article 1

Definitions

For the purpose of this Resolution:

1. Wreck means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.

2. A sunken State ship means a warship, naval auxiliary, or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. Stranded ships or ships in process of sinking are not included in the definition.

3. A sunken State ship includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately.

Article 2

Duty of co-operation

1. A wreck of an archaeological and historical nature constitutes cultural heritage when it has been submerged for at least 100 years.

2. All States should co-operate to protect and preserve wrecks constituting cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.

3. All States are required to take the necessary measures for ensuring the protection of wrecks constituting cultural heritage.

4. States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties under this Resolution in a manner consistent with the rights and duties of other States.

Article 3

Immunity of sunken State ships

Without prejudice to the other provisions of this Resolution sunken State ships enjoy sovereign immunity.

Article 4

Sunken State ships as *property* of the flag State

Sunken State ships remain property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it in accordance with its laws.

Article 5

Status of the cargo

1. The cargo on board of sunken State ships enjoys sovereign immunity.
2. The cargo owned by the flag State remains property of that State.
3. Private cargo cannot be disturbed or removed without the consent of the flag State.

Article 6

Armed conflict at sea

Wrecks of captured State ships are property of the captor State.

Article 7

Sunken State ships in internal waters. Archipelagic waters, and the territorial sea

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8

Sunken State ships in the contiguous zone

In the exercise of its rights under Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9

Sunken State ships in the exclusive economic zone or on the continental shelf

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. The flag State should notify the coastal State in accordance with applicable treaties of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State in removing the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the rules and principles of international law regarding State succession.

Article 12

War Graves

Due respect shall be shown by all States and their nationals for the remains of any person in a sunken State ship who was on board at the time of its sinking. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of

the remains of deceased persons and their burial if the wreck is recovered. Interested States are encouraged to propose the establishment of war cemeteries for wrecks.

Article 13

Salvage

1. The salvage of sunken State ships is subject to the provisions of Articles 4 to 7 of this Resolution and to the applicable rules of international law.
2. Salvage should be carried out in accordance with this Resolution and appropriate archaeological practices.

Article 14

Cultural Heritage

1. States have the duty to protect wrecks referred to in Article 2, paragraph 1.
2. Where appropriate wrecks of the nature referred to in paragraph 1 should be preserved in situ.
3. Wrecks of the nature referred to in paragraph 1 not preserved in situ should be recovered in accordance with appropriate archaeological practices and properly displayed.
4. States shall take measures necessary to prevent and control commercial exploitation for trade or speculation of sunken State ships constituting cultural heritage that is incompatible with the duties set forth in Article 2 of this Resolution as well as in applicable treaties.

Article 15

Hazard to navigation and protection of the marine environment

1. The flag State shall remove wrecks constituting a hazard to navigation or a source or threat of marine pollution.
2. In case of imminent danger, the coastal State may take the measures necessary to eliminate or mitigate the danger.

Article 16

Settlement of disputes

Disputes concerning wrecks of sunken State ships shall be settled in accordance with Articles 2, paragraph 3, and 33 of the Charter of the United Nations and the applicable dispute settlement provisions of treaties in force between the States concerned.

I. Subsequent Comments

After the adoption of the Dr by the Group in Geneva the Rapporteur received a number of drafting change proposals by *confrère* Lowe on the content of the Resolution. He also expressed a critical remarks. Critical remarks were also made by *confrère* Degan. Both are reproduced below.

Comments by Mr Lowe

My thanks to Natalino for all of the effort that he has put in to it. I have indicated some questions, and some minor drafting points, in Track Changes. I must confess, however, that I am not entirely convinced that this is the best way that we can make a useful contribution to the topic. Given the existence of the other conventions, I think that we really need to spell out the lacunae that we think the Resolution would fill, and the thinking behind the approach adopted. And I am concerned that we may have overlooked some of the practical constraints arising from the conduct of salvage and archaeological operations. I wonder if there is not a case for pausing our work and trying to engage in detail with one of the other professional groups concerned – such as the marine archaeologists – to see what changes (if any) in the international legal framework are necessary to accommodate the conduct of their work according to their own best practices and professional standards.

I very much regret that I have had to change my plan to participate in the Tallinn meeting – particularly as I am working in South America during your Geneva meeting. I hope that we can find the right approach, by which we can make an original and useful contribution in this topic.

Comments by Mr Degan

To my regret I am not able to support the last text of the draft Resolution that the majority of members of our Ninth Commission adopted at the end of our meeting in Geneva. With your improvements in progress most of the text in the last version became admissible to me. Nevertheless, I have strong objections on Articles 3 and 4 and in the light of their impact also on its Article 6. I shall resume here some of my arguments that I addressed to you in my previous letters.

Article 3 reads as follows: "*Without prejudice to the other provisions of this Resolution sunken State ships enjoy sovereign immunity*". This provision is applicable on wrecks of warships sunken in time of peace either by errors in navigation of its crew or errors in their construction, but without external involvements. It can be claimed that if a ship in innocent passage through the foreign territorial sea suffers an accident its

wreck continues to enjoy sovereign immunity of its flag State and it remains in its property. The same is in the high seas.

In time of an armed conflict which was regular at the time of sinking, warships of all belligerents as being actors of their hostilities, lose their sovereign immunity. They were produced and are maintained as a means of warfare. If such a ship was sunken by the enemy belligerent its wreck cannot enjoy sovereign immunity of the flag State because it is not operational and as such is not anymore a State organ. Claiming its sovereign immunity is not more than a legal fiction. Therefore, important are here circumstances of sinking.

I suggested you in my previous letters not to ignore the rules on war booty in armed conflicts at the seas. There are few provisions in codification conventions, but there is a uniform, consistent and established practice relating to it, which is followed by *communis opinion juris*.[22]

I also stressed from the practice of WW II some cases of subsequent capture of warships by several States and sinking them by the third belligerent. Our Commission adopted the new Article 6 that "*Wrecks of captured State ships are property of the captor State*". Unfortunately, that simple rule cannot encompass all situations that can occur during protracted hostilities. In the 19th century the ramming of enemy ironclads meant at the same time their capture and the loss of property over the wrecks by the original flag State. Perhaps the same analysis cannot be appropriate in situations of later developments in methods of naval warfare. A warship can now be sunken in an enemy minefield. A big battleship can be torpedoed by a small naval craft, and especially by submarines. In World War II many warships were sunk by air raids from enemy aircraft careers or from land. Now they can be a target of long range missiles from enemy ships, submarines or from land. The right of booty is hardly applicable in all these situations, but it is not entirely excluded.

An inductive approach to this practice has preference over deduction of some would-be legal rules from our pre-established aims. The cases of sinking of battleships are not so frequent in practice of warfare and a plenty of data of sinking and of surrounding circumstances can be found on Internet.[23]

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[22] See for instance Rule 49 in the ICRC's *Customary International Law*, Volume I, Cambridge University Press, pp. 173-175.

[23] Having in view that practice of captures and changes of the flag State until the sinking of a ship by a third belligerent, I suggested a general reservation in the preamble

Article 4 reads as follows: "*Sunken State ships remain property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it in accordance with its laws*". Respecting the rules of positive international law on the booty of war a quite opposite provision should be more appropriate. It should be the belligerent State that has sunken an enemy warship which is free to abandon its title on the wreck.

However, in both above cases this Article provides a rule that cannot be corroborated by any previous State practice, and still less by *communis opinio juris*. It is a piece of legislation that is not appropriate to Resolutions of our Institute. Our company has no legislative tasks that what ensues from Article 2 of its Statutes concerning its purpose. It cannot all the way through its Resolutions modify rules of general customary international law that most of States consider to be the law in force. Hence, a clear distinction between *lex lata* and *lex ferenda* in order to promote the progress of international law is always welcomed. Contrary to it, Articles 3, 4 and 6 are coached in our draft Resolution in the form of legal rules already in force.

Especially a Resolution of our Institute cannot as such modify or amend rights and obligations of parties to treaties in force. Even if a Resolution succeeds to initiate a new diplomatic conference on its modifications, the amended text, if it enters into force, will not apply on relations between a party of the original text alone and parties of two texts (Article 30-(4)-(b) of the 1969 Vienna Convention). Suppose that the 2001 UNESCO Convention on Underwater Cultural Heritage will be amended in future and that one of its parties adopts the modified text and another refuses to do so. Its Article 7 on protection of Underwater cultural heritage in internal waters, archipelagic waters and territorial sea will continue to govern their relations in its original form.

Having in view very contradictory and unstable practice of States over the capture of warships and the entitlement on their wrecks, one should not ignore a conclusion by famous Greek philosopher Aristotle from the 3rd century BC: "…that all law is universal but about some things it is not possible to make a universal statement which shall be correct… for the

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of our draft Resolution that its rules do not apply on wrecks of warships sunken in time of recognized armed conflicts. The text adopted as the ultimate paragraph in its preamble has lost that objective.

error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start."[24]

The advantage of the 2001 UNESCO Convention is exactly in this that it puts aside questions of property rights and sovereign immunity over all wrecks that constitute the Underwater cultural heritage. It proclaims the principle that this heritage of the mankind should not be commercially exploited. That became a legal obligation of the growing number of its States parties. Instead of questions of ownership and of non-existent sovereign immunity over the wrecks, the Convention has established the jurisdiction of States in protection of this heritage. This does not entirely exclude claims on their property before internal jurisdictions of coastal States. However, Article 7 of that Convention strongly discourages such claims by a former flag State in internal waters, archipelagic waters and the territorial sea of another State. In other parts of the sea such claims have more chances to succeed. In the Area they are in opposition to no coastal State, but the problem is of 4000 meters or more of the depth of the submerged sea-bed.

I wanted by an amendment on War Graves in Article 12 suggest a new balance of interests of the coastal State and the former flag States and other interested parties. It was adopted, but it does not cure the implication of Articles that have been agreed to.

Finally, I want shortly to comment the adopted solution in proposed Article 5 that the cargo on board of sunken State ships enjoys sovereign immunity and that it remains the property of the flag State. In case that a sunken State ship becomes Underwater cultural heritage, the cargo on its board, as being its accessory, comes under the protection of rules and principles set out in the 2001 UNESCO Convention. This is confirmed by its definition in Article 1(1)(ii). Hence, Article 5 of our Draft Resolution is inapplicable in relations between parties to this Convention which is a *lex specialis* in respect to rules of more general character.

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[24] *Cf., The Nicomachean Ethics* of ARISTOTLE, translated and introduced by Sir David Ross, Oxford University Press 1959, Book V, 1137b, para 10, (p. 133).

II. DELIBERATIONS DE L'INSTITUT

Troisième séance plénière Mardi 25 août 2015 (matin)

La séance est ouverte à 11 h 40 sous la présidence de M. *Müllerson*.

The *President* invited Mr Ronzitti, Rapporteur of the 9th Commission, to present his Report.

The *Rapporteur* thanked the President and announced that he would try to be brief. He recalled that the Draft Resolution prepared by the Commission had been distributed. He pointed out that even if the working language was English, a French translation had been prepared, thanks to the work of the Secretariat. He recalled that the subject had been introduced to the Members of the 9th Commission at the Naples Session. A Preliminary Report had been circulated in Rhodes, along with a questionnaire. In Tokyo, an addendum and a draft structure for a Resolution had been presented. The Commission met again in Geneva and prepared the Draft Resolution which was now before the plenary.

The Rapporteur drew the attention of the Members to the main problems with wrecks of warships and other State-owned ships highlighted in the Draft Resolution, which pertained to sovereign immunity and the protection of underwater cultural heritage. The Draft Resolution contained 16 articles and a preamble. The Rapporteur illustrated its main contents just recalled, and referred to the principal conventions related to the subject-matter under study, as well as rules of customary law. The Rapporteur presented the general point of the Draft Resolution in order to clarify what would otherwise have stayed under the clouds, given that the main conventions on the subject included reservations regarding warships and State-owned ships. Definitions were set out in Articles 1 and 2. Some provisions, such as Articles 7 to 10, revealed the tension between the coastal State and the flag State. He noted that the establishment of war cemeteries on wrecks (Article 12) was a sensitive point, and that the question of salvage was controversial compared to the obligation to protect cultural heritage. Propositions had been made about wrecks which were a hazard to navigation, or could damage the marine environment. He provided the example of the Pacific Ocean, which contains many wrecks dating back to the Second World War. The Draft Resolution also included a dispute settlement provision.

The Rapporteur then wanted to present and illustrate briefly the Articles of the Draft Resolution. He noted that Article 1 contained a definition of

wrecks, including objects that were on board of the ship, which was an important clarification. In the second paragraph, he highlighted that the Commission had referred to the Geneva Convention. He added that paragraph 3 included in the definition of a sunken State ship any cargo or object connected with the ship, regardless of the identity of its owner.

The Rapporteur pointed out that Article 2 recalled that a wreck of an archaeological and historical nature constituted cultural heritage when it had been sunken for at least 100 years, according to the definition enshrined in the *UNESCO Convention on Underwater Cultural Heritage*. He underscored that paragraph 2 was a provision about hazards or pollution such wrecks could cause, whereas paragraph 4 dealt with cooperation of States bordering an enclosed or semi-enclosed sea, which was also important.

Next, the Rapporteur stressed the significance of Articles 3 and 4. He observed that Article 3 was about immunity of sunken State ships. Article 4, for its part, showed the tension between the coastal State and the flag State, given that the sunken State ships remained property of the latter. The Rapporteur noted that this principle appeared very clear, and applied also in connection with cargo, as set out in Article 5, paragraph 2. As a recent judgment confirmed, he reminded the plenary that cargo also enjoys sovereign immunity (paragraph 1). In paragraph 3, it was recalled that private cargo cannot be removed without the consent of its owner, that is to say the flag State. The Rapporteur showed that relating to armed conflict at sea, as set out in Article 6, wrecks became the property of the captor State, without any necessity of prize adjudication.

He then presented a number of delicate provisions taking into account the location of wrecks, and clearing the problem of jurisdiction, by reference to the UNCLOS and the UNESCO Convention (Articles 7 to 10). He noted that the exclusive right of the coastal State remains in internal waters, archipelagic waters and the territorial sea, without prejudice to Article 3 of the Draft Resolution about sovereign immunity of the flag State (Article 7). He added that in the contiguous zone, the coastal State may regulate the removal of the wreck (Article 8). As for the exclusive economic zone and the continental shelf, he observed that the coastal State enjoys sovereign rights, and the flag State should consequently notify it whether activities are carried out on the wreck. He further stated that Article 10 stuck to the provisions of Article 149 of the UNCLOS, which specify that wrecks were under the exclusive jurisdiction of the flag State. The Rapporteur highlighted that anyhow, States should pay attention to wrecks as fact of the cultural heritage. He mentioned that, in Article 11, the Commission had preferred not to quote any conventions

on succession of States given their low level of ratifications, and to simply refer to customary law.

Recalling Article 12 on War graves, and more precisely the respect due to the remains of any persons in a wreck who were on board at the time of sinking, the Rapporteur indicated that these provisions echoed the first Protocol of the Geneva Conventions of 1949.

He added, about Article 13, that there were different views about salvage and the way to protect cultural heritage. Attention should have been paid to the fact that wrecks remain in any case property of the flag State. The Rapporteur indicated that paragraph 2 provided that salvage should be carried out in accordance with archaeological heritage.

He pointed out that Article 14, as a special provision about cultural heritage, set out that wrecks of an archaeological and historical nature should be preserved *in situ*. The Rapporteur mentioned that if this was not possible, such a wreck should be exposed as a museum. He emphasised that the important thing was States' duty to prevent or control commercial exploitation of this kind of sunken State ship (Paragraph 4).

The Rapporteur, presenting Article 15, showed that the 2007 *Nairobi International Convention on the Removal of Wrecks* did not regulate wrecks of warships, unless the flag State would take it into account. Here, removing the wreck constituting a hazard to navigation or a source or threat of pollution appeared as a duty of flag State. He underlined that the coastal State may also have to take measures, in case of imminent danger.

Finally, the Rapporteur called attention to Article 16, a short provision about the settlement of disputes making reference to the UN Charter.

The Rapporteur thanked again the members of the 9th Commission who contributed to this work.

The *President* thanked the Rapporteur for his very informative recall, and opened the floor to the discussion.

Mr *Bogdan* expressed his congratulations for this interesting and well-done Draft Resolution. As a private international law specialist, he expressed particular appreciation for Article 4, which indeed takes into account a private international law problem. It reminded him of the situation of a flag State selling a wreck to a private company, that is to say a private contract situation. The Rapporteur specified that the provision mentioned that this transfer had to be done in accordance with that State's laws. Mr Bogdan expressed the thought that this principle was a good solution, but did not appear self-evident. To his mind, it was not necessary to take position about it in the Draft Resolution, and the

provision should have stopped before the reference to the flag State's laws.

Mr *Wolfrum* opined that the Draft Resolution appeared as fulfilled and should not be left for further discussion. He thought that Members should adopt it as soon as possible.

M. *Ranjeva* souhaite quant à lui attirer l'attention sur les problèmes rencontrés par les Etats devenus cimetières d'épaves de navires de guerre et d'Etats, tels que Madagascar. L'adoption d'un tel instrument aiderait très certainement, de son point de vue, les autorités étatiques à mettre en place la législation interne appropriée pour y répondre. Il tient également à faire deux remarques. Le projet de résolution ne mentionne nullement la pratique de pillage institutionnalisée des épaves, menée par des associations de malfaiteurs dont les stratégies s'articulent autour des conventions existantes. Il considère que ce problème d'actualité devrait être pris en compte. Il relève en outre qu'aux termes de l'article 3, les navires d'Etat coulés bénéficient de l'immunité de juridiction. S'il en comprend le principe, il s'interroge sur ses limites, notamment temporelles, et se demande s'il n'y aurait pas place pour une prescription.

M. *Torres Bernárdez* remercie le Rapporteur et l'ensemble de la 9ème Commission pour leur travail. Il indique qu'il suit de près les développements relatifs à cette matière, et pense que le projet est en état d'être renvoyé en comité de rédaction. Il estime qu'il n'est aucunement question ici de droit contractuel, mais uniquement de droit international public. L'article 14, paragraphe 4, lui apparait à ce propos intéressant, en ce qu'il met en lumière l'importance d'éviter l'exploitation commerciale du patrimoine culturel. Il est en accord avec la définition donnée à l'article 2 des épaves appartenant audit patrimoine culturel. Son Etat y ayant un intérêt évident, il accueille chaleureusement les dispositions qui rappellent la propriété de l'Etat du pavillon sur les épaves. Dans l'ensemble, il apparaît donc très en faveur de ce projet de résolution et de son adoption lors de cette session.

Mr *Kazazi* thanked the Rapporteur for his achievement, but required a clarification on the scope of the Draft Resolution. He wondered why it had been limited to warships and State ships, and not extended to commercial ships, which could also cause hazards. He then remarked that if the Draft Resolution emphasised cultural heritage, the protection of the environment was no less important and should have been highlighted as well. He observed that wrecks could indeed cause huge damages to the ecosystem. He finally expressed doubts about the need for a provision on dispute settlement in such a Resolution.

Mr *Treves* recalled that he was not a member of the 9th Commission, but had recently read what appeared to him as a solid piece of work, and thanked the Rapporteur for it. He remarked that the Draft Resolution was in conformity with the general principles of the law of the sea. But moreover, Articles 7 to 9 were a good contribution to make these rules more concrete. He nevertheless raised the same objection against Article 16 on dispute settlement as Mr Kazazi, noting that this text was a Resolution of the Institute and not a treaty. He suggested that the existing conventions on this matter should refer to the provisions on dispute settlement contained in UNCLOS.

The *President* invited the Rapporteur to provide a short response to the questions raised in the plenary.

The *Rapporteur* expressed his gratitude for the comments received and indicated his intention to address them one-by-one. He thanked Mr Bogdan for his useful intervention. In response to Mr Ranjeva, he indicated that salvage was not abolished but to be conducted in conformity with the protection of cultural heritage. He referred to Article 14, paragraph 4, of the Draft Resolution, pointed out by Mr Torres Bernárdez, which clearly provides that States should enact rules in order to prevent pillage or commercial exploitation of sunken ships. Taking into account all relevant provisions, he underscored that historical and cultural property was protected and salvage was limited. Whilst salvage could not be prevented, he reiterated that it should be conducted in conformity with the prescriptions of the Draft Resolution.

The Rapporteur addressed Article 3 of the Draft Resolution, which purported to protect the immunity of jurisdiction. He clarified that there was legislation that clearly governed the question of whether this immunity was absolute or relative. He recalled that under international law, there was no rule of prescription: in principle, the passage of time was not a rule that removed immunity. He confirmed that recent jurisprudence involving wrecks of warships dating back to the 18th century had confirmed this tendency, adding that this question also depended on the law of flag States.

The Rapporteur then addressed the issue raised by Mr Kazazi on the scope of the Draft Resolution. He remarked that commercial ships were not included within the purview of that instrument because the Commission was tasked with regulating sunken warships, which was a controversial subject. He stated that the *Nairobi Convention* regulates sunken commercial ships, whilst excluding sunken warships. Similarly, he called attention to the fact that the 1989 *International Convention on Salvage* excludes warships from its purview.

The Rapporteur reiterated that several provisions pertained to cultural heritage. He added that Article 15 of the Draft Resolution laid down responsibilities for both the flag State and the coastal State in respect of the protection of the marine environment. Responding to Messrs Kazazi and Treves, he shared their understanding that Article 16 constituted a short provision on dispute settlement, the inclusion of which had been debated within the Commission. He indicated that he would discuss its fate with the other members of the Commission, and took the view that it could be eliminated.

Otherwise, the Rapporteur agreed that the Commission could adopt the suggestion put forward by Mr Treves and indicated that there was a need to draft provisions on dispute settlement modes. He observed that this was a policy choice that would have to be discussed within the Commission.

The *President* thanked the Rapporteur for his concise answers. He gave the floor to Mrs Arsanjani.

Mrs *Arsanjani* thanked the Rapporteur and Commission for their complete and well-rounded Report. She indicated that she had no quarrel with the Draft Resolution. She interrogated the Rapporteur on the meaning of the terms "sovereign immunity" in Articles 3 and 5 of the Draft Resolution. In particular, she queried whether they pertained to jurisdiction or whether they also extended to inviolability, inferring that the current formulation could engender an ambiguous meaning. She further called into question the utility of having a provision on dispute settlement in a resolution of the *Institut*.

Le *Président* remercie les membres de leur participation.

La séance est levée à 12 h 30.

Septième séance plénière Vendredi 28 août (après-midi)

La séance est ouverte à 14 h 05 sous la présidence de M. *Müllerson*.

The *President* gave the floor to the Rapporteur to present the revised draft Resolution.

DRAFT RESOLUTION REVISED 1

The *Institute of International Law*,

Emphasising the duty of co-operation for the preservation and protection of cultural heritage,

Conscious of the duty to protect and preserve the marine environment,

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982),

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970) and the Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995),

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007),

Taking note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004),

Bearing in mind the law of armed conflict at sea as well as the customary rules on the succession of States,

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter,

Adopts the following Resolution:

Article 1

Definitions

For the purpose of this Resolution:

1. Wreck means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.

2. A sunken State ship means a warship, naval auxiliary, or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. Stranded ships or ships in process of sinking are not included in the definition.

3. A sunken State ship includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately.

Article 2

Duty of co-operation

1. A wreck of an archaeological and historical nature constitutes cultural heritage when it has been submerged for at least 100 years.

2. All States should co-operate to protect and preserve wrecks constituting cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.

3. All States are required to take the necessary measures for ensuring the protection of wrecks constituting cultural heritage.

4. States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties under this Resolution in a manner consistent with the rights and duties of other States.

Article 3

Immunity of sunken State ships

Without prejudice to the other provisions of this Resolution, sunken State ships enjoy immunity from the jurisdiction of any State other than the flag State.

Article 4

Sunken State ships as property of the flag State

Sunken State ships remain property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

Article 5

Status of the cargo

1. The cargo on board sunken State ships enjoys sovereign immunity.
2. The cargo owned by the flag State remains property of that State.
3. Private cargo cannot be disturbed or removed without the consent of the flag State.

Article 6

Armed conflict at sea

Wrecks of captured State ships are property of the captor State.

Article 7

Sunken State ships in internal waters, archipelagic waters and the territorial sea

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8

Sunken State ships in the contiguous zone

In the exercise of its rights under Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9

Sunken State ships in the exclusive economic zone or on the continental shelf

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. The flag State should notify the coastal State in accordance with applicable treaties of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State in removing the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the rules and principles of international law regarding State succession.

Article 12

War graves

Due respect shall be shown by all States and their nationals for the remains of any person in a sunken State ship who was on board at the time of its sinking. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial if the wreck is recovered. Interested States are encouraged to propose the establishment of war cemeteries for wrecks.

Article 13

Salvage

The salvage of sunken State ships is subject to the provisions of this Resolution, the applicable rules of international law and appropriate archaeological practices.

Article 14

Cultural heritage

1. States have the duty to protect wrecks referred to in Article 2, paragraph 1.

2. Where appropriate wrecks of the nature referred to in paragraph 1 should be preserved in situ.

3. Wrecks of the nature referred to in paragraph 1 not preserved in situ should be recovered in accordance with appropriate archaeological practices and properly displayed.

4. States shall take measures necessary to prevent or control commercial exploitation for trade or speculation of sunken State ships constituting cultural heritage that is incompatible with the duties set forth in Article 2 of this Resolution as well as in applicable treaties.

Article 15

Hazard to navigation and protection of the marine environment

1. Subject to Article 7 of this Resolution, the flag State shall remove wrecks constituting a hazard to navigation or a source or threat of marine pollution.

2. In case of imminent danger, the coastal State may take the measures necessary to eliminate or mitigate the danger.

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PROJET DE RESOLUTION REVISE 1

L'*Institut de droit international*,

Soulignant le devoir de coopération pour la préservation et la protection du patrimoine culturel ;

Conscient du devoir de protéger et de préserver l'environnement marin ;

Guidé par les règles de droit international coutumier inscrites dans la Convention des Nations Unies sur le droit de la mer (1982) ;

Rappelant la Convention pour la protection du patrimoine culturel subaquatique (2001) aussi bien que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970) et la Convention d' UNIDROIT sur les biens culturels volés ou illicitement exportés (1995) ;

Prenant note de la Convention internationale de Nairobi sur l'enlèvement des épaves (2007) ;

Prenant note de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens (2004) ;

Considérant le droit des conflits armés en mer aussi bien que les règles coutumières sur la succession d'Etats ;

Conscient des incertitudes qui continuent d'entourer la question des épaves des navires de guerre et désirant contribuer à la clarification du droit international en cette matière ;

Adopte la résolution suivante :

Article 1

Définitions

Aux termes de cette résolution :

1. « Épave » signifie un navire d'État coulé qui n'est plus opérationnel, ou une partie quelconque de celui-ci, y compris tout objet qui est ou a été à bord de ce navire.

2. « Navire d'État » coulé signifie un navire de guerre, un navire auxiliaire ou tout autre navire appartenant à un État et exclusivement utilisé à des fins gouvernementales non commerciales au moment du naufrage. Les navires échoués ou en train de couler ne sont pas inclus dans la définition.

3. Un navire d'Etat coulé comprend tout ou partie de la cargaison ou tout autre objet rattaché à ce navire, que la cargaison appartienne à l'Etat ou à une personne privée.

Article 2

Devoir de coopération

1. Une épave de nature archéologique ou historique fait partie du patrimoine culturel dès lors qu'elle est submergée depuis au moins 100 ans.

2. Tous les Etats devraient coopérer pour protéger et préserver les épaves faisant partie du patrimoine culturel, pour enlever les épaves qui posent un risque pour la navigation, et pour assurer que les épaves ne causent ou ne menacent de causer la pollution de l'environnement marin.

3. Tous les Etats prennent les mesures nécessaires pour assurer la protection des épaves faisant partie du patrimoine culturel.

4. Les Etats riverains d'une mer fermée ou semi-fermée devraient coopérer dans l'exécution de leurs obligations aux termes de cette résolution, conformément aux droits et obligations des autres Etats.

Article 3

Immunité des navires coulés

Sous réserve des autres dispositions de cette résolution, les navires d'Etat coulés jouissent de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

Article 4

Navires d'Etat coulés en tant que propriété de l'Etat du pavillon

Les navires d'Etat coulés restent la propriété de l'Etat du pavillon sauf si cet Etat a clairement déclaré abandonner cette épave ou y renoncer ou transférer son titre de propriété sur elle.

Article 5

Statut de la cargaison

1. La cargaison à bord de navires coulés jouit de l'immunité de juridiction.

2. La cargaison appartenant à l'Etat du pavillon reste la propriété de cet Etat.

3. Les cargaisons privées ne peuvent être déplacées ou enlevées sans le consentement de l'Etat du pavillon.

Article 6

Conflit armé en mer

Les épaves de navires d'Etat capturés sont la propriété de l'Etat capteur.

Article 7

Navires d'Etat coulés dans les eaux intérieures, les eaux archipélagiques ou la mer territoriale

Dans l'exercice de sa souveraineté, l'Etat côtier a le droit exclusif de réglementer les activités sur les épaves dans les eaux intérieures, les eaux archipélagiques et la mer territoriale sous réserve de l'article 3 de cette résolution.

Article 8

Navires d'Etat coulés dans la zone contiguë

Dans l'exercice de ses droits conformément à l'article 303 de la Convention des Nations Unies sur le droit de la mer, l'Etat côtier peut réglementer l'enlèvement des navires d'Etat coulés dans sa zone contiguë.

Article 9

Navires d'Etat coulés dans la zone économique exclusive ou sur le plateau continental

Toute activité de l'Etat du pavillon entreprise sur un navire coulé dans la zone économique exclusive ou sur le plateau continental d'un autre Etat devrait être conduite en tenant dûment compte des droits souverains et de la juridiction de l'Etat côtier. L'Etat du pavillon devrait notifier à l'Etat côtier, conformément aux traités applicables, toute activité qu'il entend entreprendre sur l'épave. L'Etat côtier a le droit d'enlever une épave entravant l'exercice de ses droits souverains si l'Etat du pavillon ne prend

aucune mesure après avoir été requis de coopérer avec l'Etat côtier pour enlever l'épave.

Article 10

Navires d'Etat coulés dans la Zone

Sous réserve de l'article 149 de la Convention des Nations Unies sur le droit de la mer, les épaves de navires d'Etat coulés dans la Zone sont soumises à la juridiction exclusive de l'Etat du pavillon.

Article 11

Succession d'Etats

Les dispositions de cette résolution sont sans préjudice des règles et principes du droit international concernant la succession d'Etats.

Article 12

Tombes de guerre

Tous les Etats et leurs nationaux respectent comme il se doit les dépouilles, se trouvant sur un navire d'Etat coulé, de toute personne qui était à bord au moment du naufrage. Cette obligation peut être accomplie en transformant l'épave en cimetière de guerre ou en accordant aux dépouilles un traitement adéquat et des funérailles si l'épave est récupérée.

Les Etats intéressés sont encouragés à proposer l'établissement de cimetières de guerre sur les épaves.

Article 13

Récupération

La récupération des navires d'Etats coulés est régie par les dispositions de la présente résolution, les règles applicables du droit international et les pratiques archéologiques appropriées.

Article 14

Patrimoine culturel

1. Les Etats doivent protéger les épaves visées à l'article 2, paragraphe 1.

2. Dans la mesure de ce qui est approprié, les épaves visées au paragraphe 1 devraient être préservées *in situ*.

3. Les épaves visées au paragraphe 1 non préservées *in situ* devraient être récupérées en suivant les pratiques archéologiques appropriées et exposées de manière convenable.

4. Les Etats prennent les mesures nécessaires pour empêcher ou contrôler l'exploitation commerciale ou spéculative des navires d'Etat coulés constituant un patrimoine culturel, incompatible avec les obligations posées à l'article 2 de cette résolution ainsi que par les traités applicables.

Annuaire de l'Institut de droit international - Séssion de Tallinn - Volume 76
Yearbook of Institute of International Law - Tallinn Session - Volume 76

Article 15

Risques à la navigation et protection de l'environnement marin

1. Sans préjudice de l'article 7 de cette résolution, l'Etat du pavillon enlève les épaves constituant un risque pour la navigation ou une source ou une menace de pollution marine.

2. En cas de danger imminent, l'Etat côtier peut prendre les mesures nécessaires pour éliminer ou limiter le danger.

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The *Rapporteur* reported that the Commission had met and produced a revised draft Resolution that took into account lively exchanges in the plenary. The major amendment was the deletion of Article 16 on the settlement of international disputes, which was considered unnecessary. The other amendments were minor and concerned the drafting. The preamble had been amended following the suggestion that it contain a new provision on the duty to protect and preserve the marine environment, in parallel with Article 15. Article 3, concerning the immunity of sunken State ships, was adapted to follow the more precise language of Article 95 of UNCLOS. Article 4 omitted the last three words on the regulatory transfer of title, which were thought unnecessary. Article 13, concerning salvage, had been consolidated and simplified. Article 15, relating to the duty of the flag State to remove wrecks, was now expressly "subject to Article 7" on the exclusive jurisdiction of the coastal State in respect of its territorial sea and archipelagic waters. Two further amendments, relating to Articles 5 and 6, were proposed in writing by Mr Kohen.

The *President* opened the discussion on the revised draft Resolution and invited Mr Kohen to present his amendments to the plenary.

Mr *Abi-Saab* found that the word "enjoy" in Article 3 was inapposite, being that things do not "enjoy" rights but rather are subject to the rights enjoyed by natural and legal persons. He suggested that the word "enjoy" be replaced with "are subject to".

M. *Kohen* félicite le Rapporteur pour son projet de résolution sur un sujet délicat. Il considère que le sujet traité par la résolution soulève d'importantes questions de droit intertemporel qui devraient être prises en considération.

M. Kohen propose d'ajouter à l'article 5 un paragraphe disposant que « Cargo owned by other States remains property of other States ». M. Kohen considère que l'article 6 pose également des difficultés. Il propose d'ajouter à cette disposition une référence à la conformité de la capture au droit international afin d'éviter, si elle ne l'est pas, que l'Etat

capteur devienne propriétaire de l'épave même quand il a agi de manière illicite. Il propose d'ajouter « insofar as the capture occurred in accordance with international law ».

Suggestion 1 présentée par M. Kohen

Article 5:

Add a new paragraph between 2 and 4 as follows:

"Cargo owned by other States remains property of other States"

Article 6:

Wrecks of captured State ships are property of the captor State.

Add:

"insofar as the capture occurred in accordance with international law"

***

Article 5:

Ajouter un nouveau paragraphe entre les paragraphes 2 et 4 se lisant comme suit:

« La cargaison appartenant à d'autres Etats reste la propriété de ces Etats »."

Article 6:

Les épaves de navires d'Etat capturés sont la propriété de l'Etat capteur.

Ajouter :

"dans la mesure où la capture a eu lieu conformément au droit international.".

***

Enfin, M. Kohen exprime sa grande satisfaction de voir le projet de résolution intégrer une disposition sur la succession d'Etats.

Mrs *Arsanjani,* recalling her earlier point concerning the phrase "sovereign immunity" and noting that this phrase had been replaced in Article 3 with the term "immunity from jurisdiction", suggested that a corresponding amendment be made to Article 5, paragraph 1.

Dame *Rosalyn Higgins* suggested the addition, at the end of Article 1, paragraph 2, of the words "nor are decommissioned oil platforms", noting that oil platforms are subject to a separate legal regime.

Mr *Symeonides* requested clarification concerning the provisions on wrecks constituting cultural heritage, namely Article 2 and 14, enquiring as to the rationale for the period of 100 years mentioned in Article 2, paragraph 1. He further questioned whether the other parts of the draft

Resolution applied to wrecks constituting cultural heritage, or whether these were covered by a completely different regime such as the UNESCO Convention.

Mr *Lee* shared the concern expressed by Mr Kohen, in that some consideration should be given to reflect the current situation in the preservation of vested rights. To this end, adding the phrase "in conformity with international law" as a prerequisite would be of some assistance.

Mr *Oxman* noted for the Drafting Committee a consequential amendment in Article 5 further to the new paragraph 3 proposed by Mr Kohen. It would follow from this that the word "Private" was not necessary in what would be paragraph 4. This was purely consequential and did not affect the underlying principles.

M. *Ranjeva* remercie M. Kohen pour sa proposition d'amendement sur l'article 6 mais s'inquiète de la référence à la conformité au droit international de la capture, qui soulève des questions de droit intertemporel. La référence est source d'ambiguïté en ce qu'elle ne permet pas de déterminer si le droit applicable est celui en vigueur à la date où le navire a coulé, ou à la date de la capture de l'épave. Il s'inquiète également de la difficulté d'opérer une distinction entre navires corsaires et navires de la course royale. M. Ranjeva suggère de rechercher une formule de l'article 6 permettant de lever ces ambiguïtés.

M. *Torres Bernárdez* considère que le droit applicable est celui en vigueur à la date à laquelle l'événement se produit.

M. *Caflisch* soutient les deux propositions d'amendement présentées par M. Kohen sur les articles 5 et 6 et suggère deux modifications rédactionnelles. L'amendement à l'article 5 devrait être rédigé de la manière suivante « Cargo owned by other States remains the property of thoses States ». Il propose de remplacer « insofar » par « if » dans la proposition d'amendement à l'article 6.

The *Rapporteur* responded to the comments in numerical order of the Articles concerned. He accepted the proposal by Dame Rosalyn Higgins with respect to Article 1, paragraph 2, the proposal by Mr Abi-Saab concerning the word "enjoy" in Article 3, and the suggestion by Mrs Arsanjani in respect of the term "sovereign immunity" in Article 5. Concerning the amendment to Article 5 proposed by Mr Kohen, the Rapporteur emphasised that account had to be taken of the ownership of other States. It was possible to have cargo belonging to several States. He was willing to accept the new paragraph with the consequential amendment proposed by Mr Oxman. Turning to Article 6, the Rapporteur noted that the question of inter-temporal law was somewhat delicate, as

illustrated for example by developments in the law concerning privateering, and the draft Resolution was guided by the principle *tempus regit actum*. He considered that the amendment proposed by Mr Kohen with the language proposed by Mr Caflisch could resolve the issue of inter-temporal law raised by Mr Torres Bernárdez. The Rapporteur agreed with the proposed introduction of a requirement that capture be "in accordance with international law". Concerning the questions on wrecks constituting cultural heritage raised by Mr Symeonides, the Rapporteur noted that a cut-off date of 100 years was selected in the interests of legal certainty, and would apply on a rolling basis.

Mme *Bastid-Burdeau* propose, à l'article 5, paragraphe 3, de remplacer « les cargaisons privées » par « les autres cargaisons ».

Mrs *Infante Caffi* noted that Article 2, paragraph 1, set forth the declaration that wrecks constitute cultural heritage after 100 years, and enquired as to the legal consequences of this declaration, in terms of the scope of the duties of States following the change in the nature of a wreck.

Mr *Oxman* clarified that his earlier comment on Article 5, paragraph 3, was based on the assumption that Mrs Bastid-Burdeau was not necessarily opposed to the amendment presented by Mr Kohen. Mr Oxman understood that there was agreement in substance on the point made by Mrs Bastid-Burdeau, and the question was purely one of drafting.

Mr *Tomuschat* requested that the Rapporteur explain how the quality of flag State was inherited by one State from another, and according to which rules such quality would be assigned. Mr Tomuschat referred to the historic example of the Austro-Hungarian Empire, the break-up of which had led to the creation of a number of different States.

Mr *Struycken* suggested that the end of Article 5, paragraph 2, be amended so as to read "remains property according to the rules of conflict of laws of the flag State".

M. *Caflisch* attire l'attention des membres sur le fait que « cargo owned by other States » est différent de « other cargo » qui peut inclure une cargaison appartenant à un particulier. Il propose de retenir la proposition d'amendement présentée par M. Kohen sans modification.

Le *Secrétaire général* souligne que les formules retenues aux articles 3 et 5 selon lesquelles les navires d'Etat coulés jouissent de l'immunité sont impropres dans la mesure où seul l'Etat jouit de l'immunité.

The *Rapporteur* responded first to the question posed by

Mrs Infante Caffi, and noted that the duties of States in respect of cultural heritage were set forth in Article 14. Turning to the question from Mr Tomuschat, the Rapporteur explained that the applicable regime was that of State succession. Hence for example, the flag State of a ship of the former Austro-Hungarian Empire would be determined in accordance with the rules on State succession, according to the fleet of the ship concerned. The division of a fleet was regulated by customary rules of international law. Concerning Article 5, the Rapporteur considered that the most problematic issue was the addition proposed by Mr Kohen. The discussion concerning Article 6 was resolved in his opinion by reference to the law in force, which in turn depended on the principle *tempus regit actum.*

Mr *Bogdan* referred to the discussion on Article 5, paragraph 3 and proposed a provision to the effect that "ownership of other cargo remains unaffected but it cannot be disturbed or removed without the consent of the flag State". He considered that such amendment would remove the need to refer to conflict of laws rules.

Mme *Bastid-Burdeau* admet la pertinence de l'observation du Secrétaire général. Elle s'interroge sur l'absence de référence à l'immunité d'exécution.

The *Rapporteur* referred to the case of the *Nuestra Señora de las Mercedes,* detailed in his Report at page 288 and following, in which the Supreme Court of the United States upheld the ruling that the sunken vessel and its cargo remained subject to the sovereign immunity of Spain. In such a case, the question of immunity was exclusively for the flag State to decide. The Rapporteur did not consider it necessary to refer to immunity from execution. This had been discussed previously and was considered to be in keeping with UNCLOS and with the 2004 UN Convention on Jurisdictional Immunities of States and their Property.

Mr *Lee* considered that a provision on dispute settlement would be advisable. In this regard he suggested including the former Article 16, which had been deleted, with the reversal of the order so as to refer first to the applicable provisions of the treaties in force between the States concerned before referring to Article 2, paragraph 3, and Article 33 of the UN Charter. Mr Lee considered that the Commission might go further and draft more specific rules on the settlement of disputes.

The *Rapporteur* recalled that several Members in the earlier discussion had called for the omission of a provision on dispute settlement.

Mr *Wolfrum* endorsed the text as it stood with the amendments suggested by Mr Kohen and Mr Caflisch. It was not possible in his view

to return to a simple provision on dispute resolution. Mr Wolfrum recalled that UNCLOS contained a highly elaborate dispute settlement mechanism. Moreover the *Institut* was concerned not with a draft convention but with a set of guidelines on substantive rules. In this regard a dispute resolution provision was unnecessary and risked weakening the existing mechanism established by UNCLOS.

The *President* thanked the Members for their comments and noted that the Rapporteur would shortly be invited to present an amended draft based on comments, following which the plenary would vote on the draft Resolution as amended.

M. *Kohen* estime que l'arrêt « Nuestra Señora de las Mercedes » cité par le Rapporteur ne reflète pas correctement l'état du droit international. Quoi qu'il en soi, les amendements qu'il a proposés tels que modifiés en suivant les propositions de M. Caflisch devraient aider à résoudre certains des problèmes soulevés par les membres.

DRAFT RESOLUTION REVISED 2

The *Institute of International Law*,

Emphasising the duty of co-operation for the preservation and protection of cultural heritage,

Conscious of the duty to protect and preserve the marine environment,

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982),

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970) and the Unidroit Convention on Stolen or Illegally Exported Cultural Objects (1995),

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007),

Taking note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004),

Bearing in mind the law of armed conflict at sea as well as the customary rules on the succession of States,

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter,

Adopts the following Resolution:

Article 1
Definitions

For the purpose of this Resolution:

1. Wreck means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.

2. A sunken State ship means a warship, naval auxiliary, or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. This definition does not include stranded ships, ships in the process of sinking, or oil platforms.

3. A sunken State ship includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately.

Article 2
Duty of co-operation

1. A wreck of an archaeological and historical nature constitutes cultural heritage when it has been submerged for at least 100 years.

2. All States should co-operate to protect and preserve wrecks constituting cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.

3. All States are required to take the necessary measures for ensuring the protection of wrecks constituting cultural heritage.

4. States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties under this Resolution in a manner consistent with the rights and duties of other States.

Article 3
Immunity of sunken State ships

Without prejudice to the other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.

Article 4
Sunken State ships as property of the flag State

Sunken State ships remain property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

Article 5

Status of the cargo

1. Cargo on board sunken State ships is immune from the jurisdiction of any State other than the flag State.

2. Cargo owned by the flag State remains the property of that State.

3 Cargo owned by other States remains the property of those States.

4. Cargo cannot be disturbed or removed without the consent of the flag State.

Article 6

Armed conflict at sea

Wrecks of captured State ships are the property of the captor State if the capture occurred in accordance with the applicable rules of international law.

Article 7

Sunken State ships in internal waters, archipelagic waters and the territorial sea

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8

Sunken State ships in the contiguous zone

In the exercise of its rights under Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9

Sunken State ships in the exclusive economic zone or on the continental shelf

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. The flag State should notify the coastal State in accordance with applicable treaties of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State in removing the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the rules and principles of international law regarding State succession.

Article 12

War graves

Due respect shall be shown by all States and their nationals for the remains of any person in a sunken State ship who was on board at the time of its sinking. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial if the wreck is recovered. Interested States are encouraged to propose the establishment of war cemeteries for wrecks.

Article 13

Salvage

The salvage of sunken State ships is subject to the provisions of this Resolution, the applicable rules of international law and appropriate archaeological practices.

Article 14

Cultural heritage

1. States have the duty to protect wrecks referred to in Article 2, paragraph 1.

2. Where appropriate wrecks of the nature referred to in paragraph 1 should be preserved in situ.

3. Wrecks of the nature referred to in paragraph 1 not preserved in situ should be recovered in accordance with appropriate archaeological practices and properly displayed.

4. States shall take measures necessary to prevent or control commercial exploitation for trade or speculation of sunken State ships constituting cultural heritage that is incompatible with the duties set forth in Article 2 of this Resolution as well as in applicable treaties.

Article 15

Hazard to navigation and protection of the marine environment

1. Subject to Article 7 of this Resolution, the flag State shall remove wrecks constituting a hazard to navigation or a source or threat of marine pollution.

2. In case of imminent danger, the coastal State may take the measures necessary to eliminate or mitigate the danger.

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PROJET DE RESOLUTION REVISE 2

L'*Institut de droit international*,

Soulignant le devoir de coopération pour la préservation et la protection du patrimoine culturel ;

Conscient du devoir de protéger et de préserver l'environnement marin ;

Guidé par les règles de droit international coutumier inscrites dans la Convention des Nations Unies sur le droit de la mer (1982) ;

Rappelant la Convention pour la protection du patrimoine culturel subaquatique (2001) aussi bien que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970) et la Convention d' UNIDROIT sur les biens culturels volés ou illicitement exportés (1995) ;

Prenant note de la Convention internationale de Nairobi sur l'enlèvement des épaves (2007) ;

Prenant note de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens (2004) ;

Considérant le droit des conflits armés en mer aussi bien que les règles coutumières sur la succession d'Etats ;

Conscient des incertitudes qui continuent d'entourer la question des épaves des navires de guerre et désirant contribuer à la clarification du droit international en cette matière ;

Adopte la résolution suivante :

Article 1

Définitions

Aux termes de cette résolution :

1. « Épave » signifie un navire d'État coulé qui n'est plus opérationnel, ou une partie quelconque de celui-ci, y compris tout objet qui est ou a été à bord de ce navire.

2. « Navire d'État » coulé signifie un navire de guerre, un navire auxiliaire ou tout autre navire appartenant à un État et exclusivement utilisé à des fins gouvernementales non commerciales au moment du naufrage. Cette définition n'inclut pas les navires échoués ou en train de couler les plateformes pétrolières.

3. Un navire d'Etat coulé comprend tout ou partie de la cargaison ou tout autre objet rattaché à ce navire, que la cargaison appartienne à l'Etat ou à une personne privée.

Article 2

Devoir de coopération

1. Une épave de nature archéologique ou historique fait partie du patrimoine culturel dès lors qu'elle est submergée depuis au moins 100 ans.

2. Tous les Etats devraient coopérer pour protéger et préserver les épaves faisant partie du patrimoine culturel, pour enlever les épaves qui posent un risque pour la navigation, et pour assurer que les épaves ne causent ou ne menacent de causer la pollution de l'environnement marin.

3. Tous les Etats prennent les mesures nécessaires pour assurer la protection des épaves faisant partie du patrimoine culturel.

4. Les Etats riverains d'une mer fermée ou semi-fermée devraient coopérer dans l'exécution de leurs obligations aux termes de cette résolution, conformément aux droits et obligations des autres Etats.

Article 3

Immunité des navires coulés

Sous réserve des autres dispositions de cette résolution, les navires d'Etat coulés jouissent de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

Article 4

Navires d'Etat coulés en tant que propriété de l'Etat du pavillon

Les navires d'Etat coulés restent la propriété de l'Etat du pavillon sauf si cet Etat a clairement déclaré abandonner cette épave ou y renoncer ou transférer son titre de propriété sur elle.

Article 5

Statut de la cargaison

1. La cargaison à bord de navires coulés jouit de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

2. La cargaison appartenant à l'Etat du pavillon reste la propriété de cet Etat.

3. Les cargaisons appartenant à d'autres Etats demeurent la propriété de ces Etats.

4. Les cargaisons ne peuvent être déplacées ou enlevées sans le consentement de l'Etat du pavillon.

Article 6

Conflit armé en mer

Les épaves de navires d'Etat capturés sont la propriété de l'Etat capteur si la capture a eu lieu conformément aux règles applicables du droit international.

Article 7

Navires d'Etat coulés dans les eaux intérieures, les eaux archipélagiques ou la mer territoriale

Dans l'exercice de sa souveraineté, l'Etat côtier a le droit exclusif de réglementer les activités sur les épaves dans les eaux intérieures, les eaux archipélagiques et la mer territoriale sous réserve de l'article 3 de cette résolution.

Article 8

Navires d'Etat coulés dans la zone contiguë

Dans l'exercice de ses droits conformément à l'article 303 de la Convention des Nations Unies sur le droit de la mer, l'Etat côtier peut réglementer l'enlèvement des navires d'Etat coulés dans sa zone contiguë.

Article 9

Navires d'Etat coulés dans la zone économique exclusive ou sur le plateau continental

Toute activité de l'Etat du pavillon entreprise sur un navire coulé dans la zone économique exclusive ou sur le plateau continental d'un autre Etat devrait être conduite en tenant dûment compte des droits souverains et de la juridiction de l'Etat côtier. L'Etat du pavillon devrait notifier à l'Etat côtier, conformément aux traités applicables, toute activité qu'il entend entreprendre sur l'épave. L'Etat côtier a le droit d'enlever une épave entravant l'exercice de ses droits souverains si l'Etat du pavillon ne prend aucune mesure après avoir été requis de coopérer avec l'Etat côtier pour enlever l'épave.

Article 10

Navires d'Etat coulés dans la Zone

Sous réserve de l'article 149 de la Convention des Nations Unies sur le droit de la mer, les épaves de navires d'Etat coulés dans la Zone sont soumises à la juridiction exclusive de l'Etat du pavillon.

Article 11

Succession d'Etats

Les dispositions de cette résolution sont sans préjudice des règles et principes du droit international concernant la succession d'Etats.

Article 12

Tombes de guerre

Tous les Etats et leurs nationaux respectent comme il se doit les dépouilles, se trouvant sur un navire d'Etat coulé, de toute personne qui était à bord au moment du naufrage. Cette obligation peut être accomplie en transformant l'épave en cimetière de guerre ou en accordant aux dépouilles un traitement adéquat et des funérailles si l'épave est récupérée.

Les Etats intéressés sont encouragés à proposer l'établissement de cimetières de guerre sur les épaves.

Article 13

Récupération

La récupération des navires d'Etats coulés est régie par les dispositions de la présente résolution, les règles applicables du droit international et les pratiques archéologiques appropriées.

Article 14

Patrimoine culturel

1. Les Etats doivent protéger les épaves visées à l'article 2, paragraphe 1.

2. Dans la mesure de ce qui est approprié, les épaves visées au paragraphe 1 devraient être préservées *in situ*.

3. Les épaves visées au paragraphe 1 non préservées *in situ* devraient être récupérées en suivant les pratiques archéologiques appropriées et exposées de manière convenable.

4. Les Etats prennent les mesures nécessaires pour empêcher ou contrôler l'exploitation commerciale ou spéculative des navires d'Etat coulés constituant un patrimoine culturel, incompatible avec les obligations posées à l'article 2 de cette résolution ainsi que par les traités applicables.

Article 15

Risques à la navigation et protection de l'environnement marin

Sans préjudice de l'article 7 de cette résolution, l'Etat du pavillon enlève les épaves constituant un risque pour la navigation ou une source ou une menace de pollution marine.

En cas de danger imminent, l'Etat côtier peut prendre les mesures nécessaires pour éliminer ou limiter le danger.

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The *President* invited the Rapporteur to indicate the amendments made to the draft Resolution.

The *Rapporteur* outlined the amendments. Article 1, paragraph 2 took into account the separate regime applying to oil platforms. Article 3 no longer made use of the word "enjoy". Article 5 adopted terminology consistent with Article 3 and was amended in line with the proposal by Mr Kohen, with a simplified paragraph 3. Article 6 was also amended as proposed by Mr Kohen. No further changes had been made.

Mme *Bastid-Burdeau* propose de modifier l'article 3 en remplaçant « les navires jouissent » par « les navires sont couverts ».

Le *Rapporteur* rappelle que la formule utilisée est identique à celle des articles 95 et 96 de la Convention des Nations Unies sur le droit de la mer.

M. *Torres Bernárdez* propose de modifier le paragraphe 2 de l'article 1 en ajoutant « ou » avant « les plateformes pétrolières ».

M. *Mahiou* soutient cette proposition.

Mrs *Arsanjani* questioned whether Article 6 was framed so as to provide for the situation where the cargo of a captured ship was the property of a third State, such as for example property stolen from a neutral State. Mrs Arsanjani did not find the text sufficiently clear as to the consequences if the property of a third State was involved.

The *Rapporteur* clarified that Article 6 reflected the principle that a capture was void when not in accordance with international law. The property of neutral parties was a question of the law of the flag State. According to the law of the sea, the cargo of a captured ship could be confiscated. For this purpose, in the context of warships, the ship and its cargo were interlinked.

Mr *Bogdan* presented the example of a jewellery sent from the United Kingdom to the United States by Royal Mail during the second World War, on a ship which sank and became salvage. He questioned how such sinking and salvage could affect ownership of the goods. An *a contrario* reading of the draft Resolution could result in the ownership rights being disregarded and the confiscation of the package, should the flag State consent. It would be useful in those circumstances to point out that private property remained the property of the sender.

The *Rapporteur* considered such a situation to be covered by Article 5, paragraph 4. This question fell under the law of the flag State. As was held in the case of the *Nuestra Señora de las Mercedes*, a sunken warship was subject to the immunity enjoyed by the flag State, hence

questions of property were to be regulated by the law of the flag State.

Mr *Tomka*, commenting with interest as a national of a landlocked State, noted that the concern raised by Mr Bogdan appeared to be that Article 5 did not cover a situation where cargo was the property of a non-State entity. Mr Tomka suggested that this concern might be addressed if paragraph 3 were broadened so as to refer to cargo "owned by others" rather than "owned by other States".

The *Rapporteur* considered that the issue was sufficiently addressed by Article 5, paragraph 4, since cargo would fall under the jurisdiction of the flag State event if owned by any other entity.

Mr *Tomuschat* supported the suggestions made by Mr Bogdan and Mr Tomka. Article 5, paragraphs 2 and 3, concerned cargo owned by other States. In his opinion, it was important to state the principle that property rights were not affected by the fact of sinking.

M. *Kohen* s'inquiète de la formulation du paragraphe 4 de l'article 5 qui, amputée de la référence au caractère privé de la cargaison, permet à l'Etat du pavillon de s'opposer à ce que l'Etat propriétaire de la cargaison récupère celle-ci.

M. *Mahiou* suggère de lever les diverses ambiguïtés rencontrées à la lecture de l'article 5 en remplaçant « les cargaisons » par « toute autre cargaison ».

The *Rapporteur* found that questions of ownership of cargo were governed in the first instance by Article 3, which provided for the exclusive jurisdiction of the flag State in respect of a sunken State ship. In such cases the status of the ship and its cargo were interlinked. This principle was upheld in the *Nuestra Señora de las Mercedes* case, where Peru sought to intervene on the grounds that part of the cargo of the ship consisted of coins minted in that part of the historic Spanish Empire. The Supreme Court of the United States ruled that the sovereign immunity of the flag State applied to any cargo the ship was carrying when it sank. Hence, the question of Peruvian ownership of the coins fell within the jurisdiction of Spain. This principle was reflected in Article 3.

Mr *Wolfrum* proposed that Article 5, paragraph 4 commence with the proviso, "The sinking of a ship has no effect on the property rights concerning the cargo on board, however …" and hoped that this might reconcile the differing views presented.

Mr *Symeonides* concurred with the amendment proposed by Mr Wolfrum and considered that this succinctly addressed what was presently paragraphs 2 and 3, so that these latter were no longer necessary.

Mr *Abi-Saab* agreed that the amendment proposed by Mr Wolfrum rendered paragraphs 2 and 3 redundant.

The *Rapporteur* welcomed the amendment proposed by Mr Wolfrum but considered that it remained necessary to state the principles set forth in paragraphs 2 and 3 of Article 5.

The *President* recalled the procedure for the vote article by article.

Le Président appelle à voter sur l'article 1.

Le Président annonce le résultat du vote à main levée sur l'article 1 : 47 voix pour, 0 voix contre, 0 abstention.

Le Président appelle à voter sur l'article 2.

Le Président annonce le résultat du vote à main levée sur l'article 2 : 47 voix pour, 0 voix contre, 0 abstention.

Le Président appelle à voter sur l'article 3.

M. *Pocar* relève que le titre français de l'article 3 doit être harmonisé avec le titre anglais de la disposition et devrait se lire « immunité des navires d'Etat coulés ».

Le *Rapporteur* accepte la proposition.

Le *Président* annonce le résultat du vote à main levée sur l'article 3 : 49 voix pour, 0 voix contre, 1 abstention.

Le Président appelle à voter sur l'article 4.

Le Président annonce le résultat du vote à main levée sur l'article 4 : 49 voix pour, 0 voix contre, 0 abstention.

Mr *Kohen* proposed that Article 5 be voted upon paragraph by paragraph.

The *President* accepted the proposal.

Mr *Tomka* agreed with the amendment proposed by Mr Symeonides and regretted that this had not been adopted by the Rapporteur.

The *Rapporteur* emphasised that in his view, paragraphs 2 and 3 were not redundant but were important statements of the principles forming the foundations of Articles 6 through 10.

Le *Président* appelle à voter sur le paragraphe 1 de l'article 5.

Le Président annonce les résultats du vote à main levée sur le paragraphe 1 de l'article 5 : 44 voix pour, 2 voix contre, 2 abstentions.

Le Président appelle à voter sur le paragraphe 2 de l'article 5.

Le Président annonce les résultats du vote à main levée sur le paragraphe 2 de l'article 5 : 42 voix pour, 2 voix contre, 3 abstentions.

Le Président appelle à voter sur le paragraphe 3 de l'article 5.

Le Président annonce les résultats du vote à main levée sur le paragraphe 3 de l'article 5 : 42 voix pour, 3 voix contre, 3 abstentions.

Le Président appelle à voter sur paragraphe 4 de l'article 5.

Le Président annonce les résultats du vote à main levée sur le paragraphe 4 de l'article 5 : 43 voix pour, 3 voix contre, 2 abstentions.

Le Président appelle à voter sur l'article 6.

Le Président annonce les résultats du vote à main levée sur l'article 6 : 48 voix pour, 0 voix contre, 1 abstention.

Le Président appelle à voter sur l'article 7.

Le Président annonce les résultats du vote à main levée sur l'article 7 : 49 voix pour, 0 voix contre, 1 abstention.

Mr *Reisman* noted that he had voted in favour of Article 7, but was puzzled that regulatory jurisdiction was assigned to the coastal State whereas in Article 3 substantive jurisdiction was assigned to the flag State.

The *Rapporteur* recalled that this was an instance of concurrent jurisdiction. The exclusive regulatory jurisdiction of the coastal State was without prejudice to the jurisdiction of the flag State. This was expressly provided in Article 7.

Mr *Gaja* found it perplexing that Article 7 was "without prejudice" to Article 3 which in turn was "without prejudice" to other provisions of the draft Resolution.

The *Rapporteur* considered that such language was necessary to reflect the concurrent jurisdiction of two States. The situation of the flag State and that of the coastal State each had to be qualified with reference to the other.

Le *Président* appelle à voter sur l'article 8.

Le Président annonce les résultats du vote à main levée sur l'article 8 : 48 voix pour, 0 abstention, 0 abstention.

Le Président appelle à voter sur l'article 9.

Le Président annonce les résultats du vote à main levée sur l'article 9 : 47 voix pour, 0 voix contre, 0 abstention.

Le Président appelle à voter sur l'article 10.

Le Président annonce les résultats du vote à main levée sur l'article 10 : 45 voix pour, 0 voix contre, 2 abstentions.

Le Président appelle à voter sur l'article 11.

Le Président annonce les résultats du vote à main levée sur l'article 11 : 48 voix pour, 0 voix contre, 0 abstention.

Le Président appelle à voter sur l'article 12.

Le Président annonce les résultats du vote à main levée sur l'article 12 : 49 voix pour, 0 voix contre, 2 abstentions.

Mr *Tomka,* without touching on the substance of Article 12, found that the qualification "who was on board at the time of sinking" was unnecessary, as was the phrase "and their nationals". In his view, these qualifications detracted undesirably from the protection and respect that should be afforded to all individuals.

Le *Président* appelle à voter sur l'article 13.

Le Président annonce le résultat du vote à main levée sur l'article 13 : 49 voix pour, 0 voix contre, 1 abstention.

Le Président appelle à voter sur l'article 14.

Mme *Bastid-Burdeau* estime impropre la traduction française de « should be recovered in accordance with appropriate archaeological practices and properly displayed » en « devraient être récupérées en suivant les pratiques archéologiques appropriées et exposées de manière convenable » au paragraphe 3 de l'article 14.

M. *Caflisch* se prononce en faveur de la traduction initiale de la disposition qui porte sur l'exposition au public des objets récupérés sur l'épave.

Le *Président* annonce le résultat du vote à main levée sur l'article 14 : 45 voix pour, 1 voix contre, 1 abstention.

Mr *Symeonides* referred to his earlier question concerning the relationship between Article 14 and the other provisions of the draft Resolution. It was not clear from the text whether wrecks constituting cultural heritage were subject to the other provisions of the draft Resolution, such as in questions relating to the immunity and property rights of the flag State. As an epistemological example, one could imagine the case of a ship from the ancient region of Phoenicia, sunken in the Mediterranean, in relation to which the flag State could be one of a number of modern States, including Lebanon, Israel, Syria, and Palestine among others. Mr Symeonides questioned whether such issues were intended to be resolved by reference to the other provisions of the draft Resolution.

The *Rapporteur* recalled that the draft Resolution was intended to strike a balance between upholding on the one hand the protection of underwater cultural heritage, as enshrined in the 2001 UNESCO Convention, and on the other, protecting he rights guaranteed by the Council of Europe, insofar as historic shipwrecks could present hazards for the safety of the environment, of navigation and of the right to health

or life. Articles 2 and 14 were intended to augment the draft Resolution, and the other provisions of the draft Resolution, such as the exclusive jurisdiction of the flag State, applied. In this respect, the Rapporteur did not consider that there was any *lacuna* in the draft.

Le *Président* appelle à voter sur l'article 15.

Le Président annonce les résultats du vote à main levée sur l'article 15 : 49 voix pour, 0 voix contre, 0 abstention.

The President proposed to vote on the Preamble as a whole.

Le Président annonce les résultats du vote à main levée sur le préambule : 48 voix pour, 0 voix contre, 0 abstention.

Le Président appelle à voter sur l'ensemble de la résolution.

Le Président annonce le résultat du vote à main levée sur l'ensemble de la résolution : 43 voix pour, 0 voix contre, 2 abstentions.

The President declared the voting concluded and offered his congratulations to the Rapporteur for the successful adoption of the Resolution.

The *Rapporteur* expressed his profuse thanks to all Members, and in particular to the 9th Commission, for their support in the extensive work which had gone into the Resolution.

La séance est levée à 17 h 50.

Huitième séance plénière Samedi 29 août 2015 (après-midi)

La séance est ouverte à 14 h 15 sous la présidence de M. *Müllerson*.

The *President* announced that the text of the draft Resolution proposed by the 9th Commission was available in English and French and that therefore the roll call would take place immediately.

RESOLUTION

The *Institute of International Law*,

Emphasising the duty of co-operation for the preservation and protection of cultural heritage,

Conscious of the duty to protect and preserve the marine environment,

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982),

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property

(1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995),

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007),

Taking also note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004),

Bearing in mind the law of armed conflict at sea as well as the customary rules on the succession of States,

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter,

Adopts the following Resolution:

Article 1
Definitions

For the purposes of this Resolution:

1. "Wreck" means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.

2. "A sunken State ship" means a warship, naval auxiliary or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. It includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately. This definition does not include stranded ships, ships in the process of sinking, or oil platforms.

Article 2
Cultural heritage

1. A wreck of an archaeological and historical nature is part of cultural heritage when it has been submerged for at least 100 years.

2. All States are required to take the necessary measures to ensure the protection of wrecks which are part of cultural heritage.

3. Where appropriate, wrecks of the nature referred to in paragraph 1 should be preserved *in situ*.

4. Wrecks of the nature referred to in paragraph 1 not preserved *in situ* should be recovered in accordance with appropriate archaeological practices and properly displayed.

5. States shall take the measures necessary to prevent or control commercial exploitation or pillage of sunken State ships, which are part

of cultural heritage, that are incompatible with the duties set out in this Article as well as in applicable treaties.

Article 3

Immunity of sunken State ships

Without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.

Article 4

Sunken State ships as property of the flag State

Sunken State ships remain the property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

Article 5

Status of the cargo

1. Cargo on board sunken State ships is immune from the jurisdiction of any State other than the flag State.

2. Cargo owned by the flag State remains the property of that State.

3 Cargo owned by other States remains the property of those States.

4. The sinking of a ship has no effect on property rights concerning cargo on board. However, cargo may not be disturbed or removed without the consent of the flag State.

Article 6

Armed conflict at sea

Wrecks of captured State ships are the property of the captor State if the capture occurred in accordance with the applicable rules of international law.

Article 7

Sunken State ships in internal waters, archipelagic waters and the territorial sea

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8

Sunken State ships in the contiguous zone

In accordance with Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9

Sunken State ships in the exclusive economic zone or on the continental shelf

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. In accordance with applicable treaties, the flag State should notify the coastal State of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State for the removal of the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the principles and rules of international law regarding succession of States.

Article 12

War graves

Due respect shall be shown for the remains of any person in a sunken State ship. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial when the wreck is recovered. States concerned should provide for the establishment of war cemeteries for wrecks.

Article 13

Salvage

The salvage of sunken State ships is subject to the applicable rules of international law, the provisions of this Resolution, and appropriate archaeological practices.

Article 14

Hazard to navigation and protection of the marine environment

1. Subject to Article 7 of this Resolution, the flag State shall remove wrecks constituting a hazard to navigation or a source of, or threat to, marine pollution.

2. The coastal State may take the measures necessary to eliminate or mitigate an imminent danger.

Article 15

Duty of co-operation

1. All States should co-operate to protect and preserve wrecks which are part of cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.

2. In particular, States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties set out in this Resolution in a manner consistent with the rights and duties of other States.

***

RESOLUTION

L'Institut de droit international,

Soulignant le devoir de coopération pour la préservation et la protection du patrimoine culturel ;

Conscient du devoir de protéger et de préserver l'environnement marin ;

Guidé par les règles de droit international coutumier inscrites dans la Convention des Nations Unies sur le droit de la mer (1982) ;

Rappelant la Convention pour la protection du patrimoine culturel subaquatique (2001) aussi bien que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970) et la Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (1995) ;

Prenant acte de la Convention internationale de Nairobi sur l'enlèvement des épaves (2007) ;

Prenant également acte de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens (2004) ;

Eu égard au droit des conflits armés en mer aussi bien que les règles coutumières sur la succession d'Etats ;

Conscient des incertitudes qui continuent d'entourer la question des épaves des navires de guerre et désirant contribuer à la clarification du droit international en cette matière ;

Adopte la résolution suivante :

Article 1
Définitions

Aux termes de cette résolution :

1. « Épave » signifie un navire d'État coulé qui n'est plus opérationnel, ou une partie quelconque de celui-ci, y compris tout objet qui est ou a été à bord de ce navire.

2. « Navire d'État coulé » signifie un navire de guerre, un navire auxiliaire ou tout autre navire appartenant à un État et exclusivement utilisé à des fins gouvernementales non commerciales au moment du naufrage. Un navire d'Etat coulé comprend tout ou partie de la cargaison ou tout autre objet rattaché à ce navire, que la cargaison appartienne à l'Etat ou à une personne privée. Cette définition n'inclut pas les navires échoués ou en train de couler ni les plateformes pétrolières.

Article 2
Patrimoine culturel

1. Une épave de nature archéologique ou historique fait partie du patrimoine culturel dès lors qu'elle est submergée depuis au moins 100 ans.

2. Tous les Etats prennent les mesures nécessaires pour assurer la protection des épaves faisant partie du patrimoine culturel.

3. Dans la mesure de ce qui est approprié, les épaves visées au paragraphe 1 devraient être préservées in situ.

4. Les épaves visées au paragraphe 1 non préservées in situ devraient être récupérées en suivant les pratiques archéologiques appropriées et exposées de manière convenable.

5. Les Etats prennent les mesures nécessaires pour empêcher ou contrôler l'exploitation commerciale ou le pillage des navires d'Etat coulés qui font partie du patrimoine culturel, qui sont incompatibles avec les obligations posées au présent article ainsi que dans les traités applicables.

Article 3
Immunité des navires d'Etat coulés

Sous réserve des autres dispositions de cette résolution, les navires d'Etat coulés bénéficient de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

Article 4

Navires d'Etat coulés en tant que propriété de l'Etat du pavillon

Les navires d'Etat coulés restent la propriété de l'Etat du pavillon sauf si cet Etat a clairement déclaré abandonner cette épave ou y renoncer ou transférer son titre de propriété sur elle.

Article 5

Statut de la cargaison

1. La cargaison à bord de navires coulés jouit de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

2. La cargaison appartenant à l'Etat du pavillon reste la propriété de cet Etat.

3. La cargaison appartenant à d'autres Etats demeure la propriété de ces Etats.

4. Le naufrage d'un navire n'affecte pas les droits de propriété relatifs à la cargaison. Toutefois, la cargaison ne peut faire l'objet d'atteinte ou d'enlèvement sans le consentement de l'Etat du pavillon.

Article 6

Conflit armé en mer

Les épaves de navires d'Etat capturés sont la propriété de l'Etat capteur si la capture a eu lieu conformément aux règles applicables du droit international.

Article 7

Navires d'Etat coulés dans les eaux intérieures, les eaux archipélagiques ou la mer territoriale

Dans l'exercice de sa souveraineté, l'Etat côtier a le droit exclusif de réglementer les activités sur les épaves dans ses eaux intérieures, ses eaux archipélagiques et sa mer territoriale sous réserve de l'article 3 de cette résolution.

Article 8

Navires d'Etat coulés dans la zone contiguë

Conformément à l'article 303 de la Convention des Nations Unies sur le droit de la mer, l'Etat côtier peut réglementer l'enlèvement des navires d'Etat coulés dans sa zone contiguë.

Article 9

Navires d'Etat coulés dans la zone économique exclusive ou sur le plateau continental

Toute activité de l'Etat du pavillon entreprise sur un navire coulé se trouvant dans la zone économique exclusive ou sur le plateau continental d'un autre Etat devrait être conduite en tenant dûment compte des droits

souverains et de la juridiction de l'Etat côtier. Conformément aux traités applicables, l'Etat du pavillon devrait notifier à l'Etat côtier toute activité qu'il entend entreprendre sur l'épave. L'Etat côtier a le droit d'enlever une épave entravant l'exercice de ses droits souverains si l'Etat du pavillon ne prend aucune mesure après avoir été requis de coopérer avec l'Etat côtier pour enlever l'épave.

Article 10

Navires d'Etat coulés dans la Zone

Sous réserve de l'article 149 de la Convention des Nations Unies sur le droit de la mer, les épaves de navires d'Etat coulés dans la Zone sont soumises à la juridiction exclusive de l'Etat du pavillon.

Article 11

Succession d'Etats

Les dispositions de cette résolution sont sans préjudice des principes et règles du droit international concernant la succession d'Etats.

Article 12

Tombes de guerre

Les dépouilles, se trouvant sur un navire d'Etat coulé, doivent être respectées comme il se doit. Cette obligation peut être accomplie en faisant de l'épave en cimetière de guerre ou en accordant aux dépouilles un traitement adéquat et des funérailles si l'épave est récupérée. Les Etats intéressés devraient veiller à l'établissement de cimetières de guerre sur les épaves.

Article 13

Récupération

La récupération des navires d'Etats coulés est régie par les règles applicables du droit international, les dispositions de la présente résolution et les pratiques archéologiques appropriées.

Article 14

Risques à la navigation et protection de l'environnement marin

1. Sans préjudice de l'article 7 de cette résolution, l'Etat du pavillon enlève les épaves constituant un risque pour la navigation ou une source ou une menace de pollution marine.

2. L'Etat côtier peut prendre les mesures nécessaires pour éliminer ou limiter un danger imminent.

Article 15

Devoir de coopération

1. Tous les Etats devraient coopérer pour protéger et préserver les épaves faisant partie du patrimoine culturel, pour enlever les épaves qui posent

un risque pour la navigation, et pour assurer que les épaves ne causent ou ne menacent de causer la pollution de l'environnement marin.

2. En particulier les Etats riverains d'une mer fermée ou semi-fermée devraient coopérer dans l'exécution de leurs obligations aux termes de cette résolution, conformément aux droits et obligations des autres Etats.

* * *

Le *Secrétaire général* procède au vote de l'ensemble de la résolution par appel nominal, tout en rappelant que, lorsque les membres sont appelés, ils doivent répondre avec un « oui », un « non » ou une abstention.

Le résultat du vote est le suivant :

Pour : M. Abi-Saab, Mme Arsanjani, M. Audit, Mme Bastid-Burdeau, MM. Broms, Bucher, Caflisch, Cançado Trindade, Collins, Conforti, Dinstein, El-Kosheri, Gaja, Mme Gaudemet-Tallon, M. Giardina, Dame Rosalyn Higgins, Mme Infante Caffi, MM. Jayme, Kazazi, Keith, Kohen, Lee, Müllerson, Orrego Vicuña, Ranjeva, Rao, Reisman, Ronzitti, Rozakis, Rudolf, Schrijver, Tomuschat, Torres Bernárdez, Treves, Verhoeven, Vinuesa, Wolfrum, Bogdan, Mme Borrás, M. Buergenthal, Mme Damrosch, MM. d'Argent, Greenwood, Iwasawa, Murase, Nolte, Oxman, Mme Pinto, MM. Sicilianos, Symeonides, Tomka.

Contre: aucun

Abstention : aucune

La résolution est adoptée par 51 voix pour, aucune voix contre et aucune abstention.

The *President* congratulated the 9th Commission on the second Resolution adopted in Tallinn.

Mr *Lee* expressed his regret that Article 16 was deleted form the final text of the Resolution; although he understood the different concerns and interests at stake, he considered that it was a duty of the *Institut* to encourage States to settle disputes peacefully.

La séance est levée à 14 h30.

III. RESOLUTION

NINTH COMMISSION

The Legal Regime of Wrecks of Warships and
Other State-owned Ships in International Law

Rapporteur : M. Ronzitti

RESOLUTION

The *Institute of International Law*,

Emphasising the duty of co-operation for the preservation and protection of cultural heritage,

Conscious of the duty to protect and preserve the marine environment,

Guided by the rules of customary international law enshrined in the United Nations Convention on the Law of the Sea (1982),

Recalling the Convention on the Protection of Underwater Cultural Heritage (2001) as well as the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970) and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995),

Taking note of the Nairobi International Convention on the Removal of Wrecks (2007),

Taking also note of the United Nations Convention on Jurisdictional Immunities of States and their Property (2004),

Bearing in mind the law of armed conflict at sea as well as the customary rules on the succession of States,

Being aware of the uncertainties that continue to surround the question of wrecks of warships and desiring to contribute to the clarification of international law concerning this matter,

Adopts the following Resolution:

Article 1

Definitions

For the purposes of this Resolution:

1. "Wreck" means a sunken State ship which is no longer operational, or any part thereof, including any sunken object that is or has been on board such ship.

2. "A sunken State ship" means a warship, naval auxiliary or other ship owned by a State and used at the time of sinking solely for governmental non-commercial purposes. It includes all or part of any cargo or other object connected with such a ship regardless of whether such cargo or object is owned by the State or privately. This definition does not include stranded ships, ships in the process of sinking, or oil platforms.

Article 2

Cultural heritage

1. A wreck of an archaeological and historical nature is part of cultural heritage when it has been submerged for at least 100 years.

2. All States are required to take the necessary measures to ensure the protection of wrecks which are part of cultural heritage.

3. Where appropriate, wrecks of the nature referred to in paragraph 1 should be preserved *in situ*.

4. Wrecks of the nature referred to in paragraph 1 not preserved *in situ* should be recovered in accordance with appropriate archaeological practices and properly displayed.

5. States shall take the measures necessary to prevent or control commercial exploitation or pillage of sunken State ships, which are part of cultural heritage, that are incompatible with the duties set out in this Article as well as in applicable treaties.

Article 3

Immunity of sunken State ships

Without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.

Article 4

Sunken State ships as property of the flag State

Sunken State ships remain the property of the flag State, unless the flag State has clearly stated that it has abandoned the wreck or relinquished or transferred title to it.

Article 5

Status of the cargo

1. Cargo on board sunken State ships is immune from the jurisdiction of any State other than the flag State.

2. Cargo owned by the flag State remains the property of that State.

3 Cargo owned by other States remains the property of those States.

4. The sinking of a ship has no effect on property rights concerning cargo on board. However, cargo may not be disturbed or removed without the consent of the flag State.

Article 6

Armed conflict at sea

Wrecks of captured State ships are the property of the captor State if the capture occurred in accordance with the applicable rules of international law.

Article 7

Sunken State ships in internal waters, archipelagic waters and the territorial sea

The coastal State, in the exercise of its sovereignty, has the exclusive right to regulate activities on wrecks in its internal waters, archipelagic waters, and territorial sea without prejudice to Article 3 of this Resolution.

Article 8

Sunken State ships in the contiguous zone

In accordance with Article 303 of the United Nations Convention on the Law of the Sea, the coastal State may regulate the removal of sunken State ships from its contiguous zone.

Article 9

Sunken State ships in the exclusive economic zone or on the continental shelf

Any activity of the flag State on a sunken ship in the exclusive economic zone or on the continental shelf of a foreign State should be carried out with due regard to the sovereign rights and jurisdiction of the coastal State. In accordance with applicable treaties, the flag State should notify the coastal State of any activity on the wreck which it intends to carry out. The coastal State has the right to remove a wreck interfering with the exercise of its sovereign rights if the flag State does not take any action after having been requested to co-operate with the coastal State for the removal of the wreck.

Article 10

Sunken State ships in the Area

Without prejudice to Article 149 of the United Nations Convention on the Law of the Sea, wrecks of sunken State ships in the Area are under the exclusive jurisdiction of the flag State.

Article 11

Succession of States

The provisions of this Resolution are without prejudice to the principles and rules of international law regarding succession of States.

Article 12

War graves

Due respect shall be shown for the remains of any person in a sunken State ship. This obligation may be implemented through the establishment of the wreck as a war cemetery or other proper treatment of the remains of deceased persons and their burial when the wreck is recovered. States concerned should provide for the establishment of war cemeteries for wrecks.

Article 13

Salvage

The salvage of sunken State ships is subject to the applicable rules of international law, the provisions of this Resolution, and appropriate archaeological practices.

Article 14

Hazard to navigation and protection of the marine environment

1. Subject to Article 7 of this Resolution, the flag State shall remove wrecks constituting a hazard to navigation or a source of, or threat to, marine pollution.

2. The coastal State may take the measures necessary to eliminate or mitigate an imminent danger.

Article 15

Duty of co-operation

1. All States should co-operate to protect and preserve wrecks which are part of cultural heritage, to remove wrecks which are a hazard to navigation, and to ensure that wrecks do not cause or threaten pollution of the marine environment.

2. In particular, States bordering an enclosed or semi-enclosed sea should co-operate in the performance of their duties set out in this Resolution in a manner consistent with the rights and duties of other States.

* * *

NEUVIEME COMMISSION

Le régime juridique des épaves des navires de guerre et des épaves des autres navires d'Etat en droit international

Rapporteur **:** M. Ronzitti

RESOLUTION

L'*Institut de droit international*,

Soulignant le devoir de coopération pour la préservation et la protection du patrimoine culturel ;

Conscient du devoir de protéger et de préserver l'environnement marin ;

Guidé par les règles de droit international coutumier inscrites dans la Convention des Nations Unies sur le droit de la mer (1982) ;

Rappelant la Convention pour la protection du patrimoine culturel subaquatique (2001) aussi bien que la Convention concernant les mesures à prendre pour interdire et empêcher l'importation, l'exportation et le transfert de propriété illicites des biens culturels (1970) et la Convention d'UNIDROIT sur les biens culturels volés ou illicitement exportés (1995) ;

Prenant acte de la Convention internationale de Nairobi sur l'enlèvement des épaves (2007) ;

Prenant également acte de la Convention des Nations Unies sur les immunités juridictionnelles des Etats et de leurs biens (2004) ;

Eu égard au droit des conflits armés en mer aussi bien que les règles coutumières sur la succession d'Etats ;

Conscient des incertitudes qui continuent d'entourer la question des épaves des navires de guerre et désirant contribuer à la clarification du droit international en cette matière ;

Adopte la résolution suivante :

Article 1

Définitions

Aux termes de cette résolution :

1. « Épave » signifie un navire d'État coulé qui n'est plus opérationnel, ou une partie quelconque de celui-ci, y compris tout objet qui est ou a été à bord de ce navire.

2. « Navire d'État coulé » signifie un navire de guerre, un navire auxiliaire ou tout autre navire appartenant à un État et exclusivement utilisé à des fins gouvernementales non commerciales au moment du naufrage. Un navire d'Etat coulé comprend tout ou partie de la cargaison

ou tout autre objet rattaché à ce navire, que la cargaison appartienne à l'Etat ou à une personne privée. Cette définition n'inclut pas les navires échoués ou en train de couler ni les plateformes pétrolières.

Article 2

Patrimoine culturel

1. Une épave de nature archéologique ou historique fait partie du patrimoine culturel dès lors qu'elle est submergée depuis au moins 100 ans.

2. Tous les Etats prennent les mesures nécessaires pour assurer la protection des épaves faisant partie du patrimoine culturel.

3. Dans la mesure de ce qui est approprié, les épaves visées au paragraphe 1 devraient être préservées *in situ*.

4. Les épaves visées au paragraphe 1 non préservées *in situ* devraient être récupérées en suivant les pratiques archéologiques appropriées et exposées de manière convenable.

5. Les Etats prennent les mesures nécessaires pour empêcher ou contrôler l'exploitation commerciale ou le pillage des navires d'Etat coulés qui font partie du patrimoine culturel, qui sont incompatibles avec les obligations posées au présent article ainsi que dans les traités applicables.

Article 3

Immunité des navires d'Etat coulés

Sous réserve des autres dispositions de cette résolution, les navires d'Etat coulés bénéficient de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

Article 4

Navires d'Etat coulés en tant que propriété de l'Etat du pavillon

Les navires d'Etat coulés restent la propriété de l'Etat du pavillon sauf si cet Etat a clairement déclaré abandonner cette épave ou y renoncer ou transférer son titre de propriété sur elle.

Article 5

Statut de la cargaison

1. La cargaison à bord de navires coulés jouit de l'immunité de juridiction vis-à-vis de tout Etat autre que l'Etat du pavillon.

2. La cargaison appartenant à l'Etat du pavillon reste la propriété de cet Etat.

3. La cargaison appartenant à d'autres Etats demeure la propriété de ces Etats.

4. Le naufrage d'un navire n'affecte pas les droits de propriété relatifs à la cargaison. Toutefois, la cargaison ne peut faire l'objet d'atteinte ou d'enlèvement sans le consentement de l'Etat du pavillon.

Article 6

Conflit armé en mer

Les épaves de navires d'Etat capturés sont la propriété de l'Etat capteur si la capture a eu lieu conformément aux règles applicables du droit international.

Article 7

Navires d'Etat coulés dans les eaux intérieures, les eaux archipélagiques ou la mer territoriale

Dans l'exercice de sa souveraineté, l'Etat côtier a le droit exclusif de réglementer les activités sur les épaves dans ses eaux intérieures, ses eaux archipélagiques et sa mer territoriale sous réserve de l'article 3 de cette résolution.

Article 8

Navires d'Etat coulés dans la zone contiguë

Conformément à l'article 303 de la Convention des Nations Unies sur le droit de la mer, l'Etat côtier peut réglementer l'enlèvement des navires d'Etat coulés dans sa zone contiguë.

Article 9

Navires d'Etat coulés dans la zone économique exclusive ou sur le plateau continental

Toute activité de l'Etat du pavillon entreprise sur un navire coulé se trouvant dans la zone économique exclusive ou sur le plateau continental d'un autre Etat devrait être conduite en tenant dûment compte des droits souverains et de la juridiction de l'Etat côtier. Conformément aux traités applicables, l'Etat du pavillon devrait notifier à l'Etat côtier toute activité qu'il entend entreprendre sur l'épave. L'Etat côtier a le droit d'enlever une épave entravant l'exercice de ses droits souverains si l'Etat du pavillon ne prend aucune mesure après avoir été requis de coopérer avec l'Etat côtier pour enlever l'épave.

Article 10

Navires d'Etat coulés dans la Zone

Sous réserve de l'article 149 de la Convention des Nations Unies sur le droit de la mer, les épaves de navires d'Etat coulés dans la Zone sont soumises à la juridiction exclusive de l'Etat du pavillon.

Article 11

Succession d'Etats

Les dispositions de cette résolution sont sans préjudice des principes et règles du droit international concernant la succession d'Etats.

Article 12

Tombes de guerre

Les dépouilles, se trouvant sur un navire d'Etat coulé, doivent être respectées comme il se doit. Cette obligation peut être accomplie en faisant de l'épave en cimetière de guerre ou en accordant aux dépouilles un traitement adéquat et des funérailles si l'épave est récupérée. Les Etats intéressés devraient veiller à l'établissement de cimetières de guerre sur les épaves.

Article 13

Récupération

La récupération des navires d'Etats coulés est régie par les règles applicables du droit international, les dispositions de la présente résolution et les pratiques archéologiques appropriées.

Article 14

Risques à la navigation et protection de l'environnement marin

1. Sans préjudice de l'article 7 de cette résolution, l'Etat du pavillon enlève les épaves constituant un risque pour la navigation ou une source ou une menace de pollution marine.

2. L'Etat côtier peut prendre les mesures nécessaires pour éliminer ou limiter un danger imminent.

Article 15

Devoir de coopération

1. Tous les Etats devraient coopérer pour protéger et préserver les épaves faisant partie du patrimoine culturel, pour enlever les épaves qui posent un risque pour la navigation, et pour assurer que les épaves ne causent ou ne menacent de causer la pollution de l'environnement marin.

2. En particulier les Etats riverains d'une mer fermée ou semi-fermée devraient coopérer dans l'exécution de leurs obligations aux termes de cette résolution, conformément aux droits et obligations des autres Etats.