NOTES AND COMMENTS

THE LEGAL REGIME OF WRECKS OF WARSHIPS AND OTHER STATE-OWNED SHIPS IN INTERNATIONAL LAW: THE 2015 RESOLUTION OF THE *INSTITUT DE DROIT INTERNATIONAL*

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Abstract

The status in international law of operational warships and other ships used only on governmental non-commercial service has been long established. In contrast, the status of such vessels after they have sunk has been, and remains, a matter of considerable uncertainty. The uncertainty arises in no small part from the absence of any provision in the 1982 UN Convention on the Law of the Sea relating to sunken State vessels or, indeed, to wrecks more generally. Over the last 30 years, technological advances have led to the discovery of many new wreck sites, fuelling international interest in the status of sunken State wrecks. At its Santiago Session in 2007, the Institut de droit international *established its 9th Scientific Commission to look into the matter. A Preliminary Report, drafted by the Commission's Rapporteur, Professor Natalino Ronzitti, was discussed at the Rhodes Session in 2011 and, after further deliberations, a Resolution entitled "The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law" was adopted by the Tallinn Session in August 2015. This contribution sets out the background to the work of the 9th Commission, outlines the substance of the Resolution, and offers some observations thereon.*

Keywords: *Institut de droit international*; sunken State vessels; warships; wrecks; sovereign immunity.

1. INTRODUCTION

On 29 August 2015, at its 77th Session held in Tallinn, Estonia, the *Institut de droit international* (IDI) adopted a Resolution on "The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law". The Resolution arose out of the work of the 9th Scientific Commission of the IDI, which produced

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a Preliminary Report on the topic for consideration at the Institute's 75th Session, in Rhodes, in 2011.[1]

The IDI's purpose is to promote the progress of international law through, among other things, clarifying and highlighting the characteristics of the law as it exists (*lex lata*), in order to encourage respect for that law, and opining on what the law ought to be (*de lege ferenda*).[2] One way that it does this is through the adoption, and promulgation, of resolutions of a "normative character".[3]

It is certainly the case that the international legal regime appertaining to the wrecks of warships and other State owned ships is in serious need of clarification, as well as progressive development. While the status in international law of *operational* warships and other ships operated on governmental non-commercial service has been long established, there has been considerable uncertainty over the status of those vessels once they are sunk. At the root of that uncertainty is political sensitivity. A number of international treaties are of relevance but their objectives are not always compatible and their application to sunken State vessels is piecemeal. There is also a considerable body of State practice but the exact bounds of customary law are hard to determine. The result is a legal regime that is deeply complex, fractured and misunderstood. For a range of reasons, not least the fact that advances in marine technology over the last 30 years have led to the discovery of numerous wrecks of all kinds, the need for greater certainty in this field is becoming ever more urgent.

2. Background

Articles 95 and 96 of the UN Convention on the Law of the Sea (UNCLOS)[4] enshrine the long-standing rule of international law that warships and other ships "owned or operated by a state and used only on government non-commercial service"[5] have "complete immunity from the jurisdiction of any state other than the flag state"[6] when sailing on the high seas. With limited provisos, this principle also extends to such vessels sailing in the exclusive economic zone (EEZ) and territorial sea of another State. The principle also applies to State aircraft and spacecraft. A notable omission, however, from the so-called "Constitution of the Oceans" is

[1] The Preliminary Report, prepared by the Rapporteur, Professor Natalino Ronzitti, and the plenary discussion on the topic that took place at the Rhodes Session were published in the *Annuaire de l'Institut de droit international*, Vol. 74, 2011, pp. 131-177. Preparatory works for the Tallinn Session, including an Addendum to the Report prepared by Professor Ronzitti, comments of IDI members, and the text of a Draft Resolution, are available on the IDI website.

[2] See at: <http://justitiaetpace.org/historique.php>. See also the IDI Statutes, Art. 1(2).

[3] See at: <http://justitiaetpace.org/historique.php>.

[4] 10 December 1982, entered into force 16 November 1994.

[5] UNCLOS, Art. 96.

[6] UNCLOS, Arts. 95 and 96.

any specific provision relating to the status of *sunken* State vessels[7] or, indeed, of wrecks more generally. As a result, there has been ongoing academic debate about whether or not the principle of sovereign immunity applies to a State vessel after it has sunk and, if it does, the basis for extending the principle to a vessel that no longer retains its essential function.[8] The issue is clouded by the fact that a separate but closely related question also arises concerning the *ownership* of a sunken State vessel and, in particular, the extent to which ownership rights are retained over the passage of time. However, using the premise of immunity, or the premise of ownership (or both), maritime States – including the United States (US), United Kingdom (UK), Russia, Japan, France, Germany, and Spain – assert that the recovery of sunken State vessels is subject to a different set of rules from those applying to private vessels and take the firm stance that such vessels cannot be interfered with without the express permission of the flag State.

In today's world, more than 30 years on since the adoption of UNCLOS, the question of the legal regime relating to wrecks and the recovery of material from wrecks is of increasing international interest and the legal status of sunken warships and other State vessels is an important facet of that regime and has significant ramifications. The increasing accessibility of the seabed, and of wrecks lying on the seabed, beyond coastal fringes has led to burgeoning interest in cultural and environmental aspects of wrecks and in such questions as: the treatment of wrecks where they are regarded as constituting cultural heritage; the treatment of human remains to be found on wreck sites and of the sites themselves where they are significant gravesites; the need to deal with wrecks that cause hazards of one kind or another (e.g. obstacles to navigation or to commercial development, or threats to the marine environment); and the relative rights of coastal States and flag States.

While UNCLOS makes no specific mention of wrecks, it does include two provisions – Articles 149 and 303 – relating to "objects of an archaeological and historical nature" found at sea and designed to afford such objects with a degree of protection. Such objects may, of course, include wrecks; and it is the case that the wrecks of warships and other types of State vessel may have particular historical significance for one reason or another. However, even in the years immediately following the adoption of UNCLOS, Articles 149 and 303 were regarded as woefully inadequate as a framework for protection of heritage values. In light of this inadequacy, UNESCO promulgated its controversial Convention on the Protection of the Underwater Cultural Heritage.[9] This instrument is designed to create a comprehensive regime for "underwater cultural heritage", as defined by the Convention,

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[7] In the wake of the *Glomar Explorer* incident, informal proposals to include provision for the recovery of such vessels were tabled by the Soviet bloc but rejected: see Preliminary Report, *cit*. *supra* note 1, p. 146.

[8] For details, see Preliminary Report, *ibid*., pp. 142-143.

[9] 2 November 2001, entered into force 2 January 2009. As at 1 April 2016 it had 55 States Parties.

and it makes special provision for "State vessels and aircraft". It also makes some, albeit limited, provision with respect to the treatment of human remains and maritime gravesites. Another treaty of some significance is the Nairobi International Convention on the Removal of Wrecks, promulgated by the International Maritime Organisation.[10] This is designed to provide a scheme for intervention where wrecks pose a hazard, but its application is relatively limited: although it does have potential to apply in the territorial sea, it is designed to apply primarily in the EEZ; its application to wrecks that sank before its coming into force is doubtful;[11] and it generally excludes warships and other State vessels. A number of other treaties also have relevance to some degree, including the UN Convention on Jurisdictional Immunities of States and their Property,[12] and the Salvage Convention.[13]

A complicating factor is that the objectives of the conventional and other international legal regimes impacting on wrecks are sometimes far from compatible: most notably, the central archaeological principle underlying the 2001 UNESCO Convention – that underwater cultural heritage should be preserved *in situ* – is in direct conflict with the notion that troublesome wrecks should be "removed" and that commercially valuable property should be rescued from peril and returned to its owner (or, in the absence of an owner, to the "stream of commerce"). The fractured way in which international law in this field has developed has been aggravated by the special but uncertain status of State vessels. This means that the treaties dealing with salient matters have either excluded State vessels from their scope of application, or differentiate between State vessels and commercial vessels in ways that add complexity.

Over recent years, there has been a growing body of State practice on the part of the major maritime States with regard to sunken warships. Virtually all of that practice has been designed to reinforce the notion that interference with such wrecks, wherever they lie, is impermissible under international law without the express consent of the flag State. The political contentiousness of that notion, however, became manifest during the difficult negotiations leading up to the adoption of the 2001 UNESCO Convention. Tensions on this matter, and also on the question of the compatibility of the treaty with UNCLOS in relation to coastal State jurisdiction over the continental shelf, threatened to derail the whole process. Ultimately, a

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[10] 18 May 2007, entered into force 14 April 2015. As at 8 March 2016 it had 27 States Parties.

[11] On this point, see DROMGOOLE and FORREST, "The 2007 Nairobi Wreck Removal Convention and Hazardous Historic Shipwrecks", Lloyd's Maritime and Commercial Law Quarterly, 2011, pp. 92 ff., p. 94.

[12] 2 December 2004, not yet in force. As at 1 April 2016, 21 instruments of ratification, acceptance, approval, or accession had been deposited. Thirty are required for the Convention to enter into force.

[13] 28 April 1989, entered into force 14 July 1996. As at 8 March 2016 it had 69 States Parties. Like the 2007 Nairobi Convention, and many other maritime treaties, it generally excludes warships and other State vessels from its scope of application.

bloc of maritime States rejected the final text because of the way it dealt with these issues.[14] It is noteworthy, however, that several maritime States are now parties to the 2001 Convention, including Italy, Spain, Portugal, and France. The position of France is particularly significant: having initially abstained from voting for the Convention on grounds that included its treatment of sunken warships, France later changed its view after concluding that the Convention provided the only effective means of controlling commercial treasure hunting in its offshore waters.

3. Substance of the Resolution

The 2015 IDI Resolution comprises 15 substantive articles covering a panoply of issues to which sunken State vessels give rise. These are preceded by eight preambular clauses. The preamble makes it clear that the purpose of the Resolution is to "contribute to the clarification of international law" in this field and draws attention to the relevance of a number of treaties. The following comments are not intended to provide a comprehensive discussion and analysis of the Resolution, but rather to highlight some of its core features and make some observations thereon.

3.1. Definitions

Article 1 defines two key terms for the purposes of the Resolution. By doing so, it identifies the material scope of the Resolution. First of all, the article defines "wreck" as meaning "[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".[15] It then goes on to define "a sunken State ship" in the following terms:

> "[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".

These two definitions taken together make it clear that the provisions of the Resolution are intended to apply to any ship that has actually sunk, along with any object connected with the ship, in circumstances where the ship was owned by a

[14] Russia and Norway voted against the 2001 UNESCO Convention; France, Germany, the Netherlands, and the UK abstained. The US did not have a vote as it was not a member of UNESCO at the time, but it expressed serious reservations.

[15] Art. 1(1).

State and used at the time of sinking solely for governmental non-commercial purposes. These definitional criteria are generally consistent with definitions employed in relevant treaties.[16] In accordance with the restrictive theory of sovereign immunity, government-owned ships that were operating wholly or partly for commercial purposes are not encompassed. In light of the close relationship between the notion of immunity and the ownership of the State, the definition of a sunken State ship covers only those ships *owned* by a State and not those merely operated by a State, for example those under charter, or requisitioned in wartime.

The inclusion of the cargo or other objects connected with the ship, regardless of the ownership of those objects, accords with general principles of international maritime law which tend to treat the components of a wreck as a single unit.[17] The significance of this point in the context of a sunken warship was shown in recent US litigation with respect to the Spanish frigate, the *Nuestra Señora de las Mercedes*.[18] While the ownership of the cargo of *specie* on board the vessel was the subject of dispute and remained undetermined, the US Court of Appeals confirmed the decision of the District Court that the cargo was effectively "cloaked" in the immunity of the vessel, given it was a Spanish warship, and as a consequence a salvage company was not entitled to recover the cargo without the express authorisation of Spain as the flag State.[19]

One notable aspect of the definitions set out in Article 1 of the Resolution is that they do not explicitly encompass sunken State *aircraft*. Given the many thousands of warplanes that have been lost at sea, especially during the First and Second World Wars, this seems surprising.[20] However, the principles enshrined in the Resolution presumably would apply by analogy to aircraft (and spacecraft).[21]

3.2. Cultural Heritage

The Resolution gives due prominence to the fact that, in today's world, the question of sunken State vessels is inextricably entwined with the question of the

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[16] See UNCLOS, Art. 32; 1989 Salvage Convention, Art. 4(1); 2001 UNESCO Convention, Art. 1(8); 2007 Nairobi Wreck Removal Convention, Art. 4(2).

[17] See, e.g., 2007 Nairobi Convention, Art. 1(4); 2001 UNESCO Convention, Art. 1(1)(a)(ii).

[18] *Odyssey Marine Exploration, Inc., v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (MD Fla. Dec. 22, 2009); *aff'd*, 657 F.3d 1159 (11th Cir. (Fla.) 21 September 2011); *cert. denied*, 132 S. Ct. 2379 (US 14 May 2010). The *Mercedes* was lost in battle in 1804 off the coast of Portugal and discovered by the American shipwreck recovery company, Odyssey Marine Exploration, in 2007.

[19] See DROMGOOLE, *Underwater Cultural Heritage and International Law*, Cambridge, 2013, pp. 151-152.

[20] Cf. the definition used in the 2001 UNESCO Convention, Art. 1(8).

[21] See, e.g., Preliminary Report, *cit*. *supra* note 1, p. 135.

protection of cultural heritage. A substantial proportion of the global stock of underwater cultural heritage comprises sunken State craft of one sort or another and the Resolution emphasises the importance of the need to protect the heritage value of such craft by choosing to deal with this matter in its first substantive article and also in its first preambular clause.

Article 2, headed "Cultural heritage", draws (implicitly rather than explicitly) on the provisions in UNCLOS relating to "objects of an archaeological and historical nature", as well as the provisions of the 2001 UNESCO Convention, and attempts to distil some of their essence. Article 2(1) provides: "A wreck of an archaeological and historical nature is part of cultural heritage when it has been submerged for at least 100 years". The words "of an archaeological and historical nature" derive from Articles 149 and 303 UNCLOS. It is questionable, however, whether they add anything in the context of Article 2(1) of the Resolution since, presumably, the provision is intended to indicate that *any* wreck (as defined by the Resolution) is part of cultural heritage provided it has been submerged for at least 100 years. The 100 year "cut-off" employed here to define when a wreck qualifies as cultural heritage derives from the 2001 UNESCO Convention.

Article 2(1) of the Resolution appears to assume that 100 years should now be taken as the accepted time limit for application of the UNCLOS provisions, as well as the more detailed protective framework in the 2001 Convention.[22] However, while the regime in the 2001 Convention does not cover younger material, this does not mean that the international community does not regard younger material as having potential cultural value warranting protective measures. While it is not entirely clear, it is likely to have been pragmatic reasons – including the need to draw a clear distinction between material to which the law of salvage applies and material to which the regulatory framework in the 2001 Convention applies – that led the negotiators of the 2001 Convention to adopt a temporal criterion of 100 years to determine the scope of application of the treaty regime. As the 2001 Convention to all intents and purposes excludes the application of salvage law, it was politically expedient to avoid treading on too many toes within the commercial salvage industry.[23] However, there is little doubt that the term "objects of an archaeological and historical nature" employed by Articles 149 and 303 of UNCLOS is widely interpreted in State practice as covering objects *younger* than 100 years.[24] The international agreement to protect the site of the *Titanic* is a prominent example of State practice that supports this view. This agreement was negotiated by the US, France, Canada, and the UK more than a decade before the centenary of the liner's

[22] See Preliminary Report, *ibid*., pp. 136 and 166.

[23] 2001 UNESCO Convention, Art. 4. By contrast, Art. 303(3) UNCLOS specifically preserves the law of salvage.

[24] For a detailed discussion of the issue, and examples of State practice, see DROMGOOLE, *cit*. *supra* note 19, pp. 73-76, esp. p. 75.

sinking.[25] The reference in its preamble to Article 303 of UNCLOS indicates that the negotiating parties regarded the agreement as an implementation of the duty to cooperate to protect objects of an archaeological and historical nature set out in paragraph (1) of that article. In the UK, in 2001 seven vessels of the German High Seas Fleet, scuttled at Scapa Flow in 1919, were afforded protected status under heritage legislation,[26] well before the centenary of their sinking, and in other parts of the world wrecks from the Second World War have been singled out for protection on grounds of their historical significance, including the USS *Arizona*, listed on the US National Register of Historic Places, and the Japanese submarine *I-124*, the very first vessel to be declared as "historic" under the Australian Historic Shipwrecks Act 1976. There is a risk that the wording of Article 2(1) of the Resolution could lead to a widespread assumption that material underwater for less than 100 years does not fall within the scope of Articles 303 and 149 UNCLOS. In the view of the present author, such a development would be a serious setback for the cause of cultural heritage protection in the marine sphere.

Article 303(1) UNCLOS requires States to protect objects of an archaeological and historical nature found at sea and to cooperate for that purpose. That duty, reiterated in the 2001 UNESCO Convention,[27] is reflected in Article 2(2) of the Resolution. This provides: "All States are required to take the necessary measures to ensure the protection of wrecks which are part of cultural heritage". The first preambular clause also emphasises the fact that States are under a duty to cooperate for the preservation and protection of cultural heritage. The IDI therefore appears to be confirming that Article 303(1) UNCLOS has evolved into a rule of customary international law.

The provisions of Article 2(3)-(5) of the Resolution draw attention to three of the cardinal principles of the 2001 Convention: that preservation *in situ* should be the first option to be considered in the management of material falling within the Convention's application;[28] that, where recovery is permitted, that recovery should be undertaken in accordance with internationally accepted archaeological standards and practices;[29] and that commercial exploitation and "pillage" is prohibited.[30]

The 2001 UNESCO Convention is undoubtedly a politically controversial instrument. However, it should not be thought that the controversy extends to its fundamental principles. A vital component of the Convention is its Annex. This reiterates and expounds upon the cardinal principles and contains Rules enshrining

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[25] 2000 Agreement Concerning the Shipwrecked Vessel RMS *Titanic*.

[26] The wrecks were scheduled under the Ancient Monuments and Archaeological Areas Act 1979.

[27] See 2001 Convention, Art. 2(2) and (3).

[28] 2001 UNESCO Convention, Art. 2(5).

[29] See the Rules set out in the Annex to the 2001 Convention, which according to Article 33 are an integral part of the Convention itself.

[30] 2001 UNESCO Convention, Art. 2(7). See also Rule 2 of the Annex, which elucidates on the meaning of commercial exploitation.

benchmark standards for deliberate interference with underwater cultural heritage. Significantly, despite the lack of consensus on the text of the Convention itself, none of the States participating in the final vote on the Convention objected to the content of the Annex and, in fact, it was widely praised at the end of the negotiations, including in the statements by maritime States outlining their reservations about specific technical aspects of the text.[31] In the 16 years since the adoption of the Convention, it could be argued that the Annex has gained the status of "soft law". The UK Government, for example, though not currently minded to ratify the 2001 Convention, has adopted the principles set out in the Annex as "best practice" with respect to the management of historical and archaeological sites[32] and, in official guidance, explicitly states that it applies the Annex as best practice to "historic" British military wrecks.[33] It is worth observing that these wrecks are not defined by the 100-year temporal criterion in the 2001 Convention, but instead simply as wrecks that "are valuable to this and future generations because of their heritage interest".[34]

3.3. Legal Status of Sunken State Ships

Five articles of the Resolution address the legal status of sunken State ships in terms of the two related questions of immunity and ownership. These are Articles 3-6 and 11. Arguably, the most valuable provision in the entire Resolution is Article 3. This provides: "Without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State".

As demonstrated all too well during the UNESCO negotiations, uncertainty as to the status of sunken State vessels presents a serious impediment to creating an effective international legal framework to cater for such wrecks. Unfortunately, while Article 16 of the UN Convention on Jurisdictional Immunities of States and Their Property confirms the immunity from jurisdiction of a foreign State of operational warships and other vessels owned or operated by a State and used only on government non-commercial purposes, it does not plug the gap left by UNCLOS by explicitly addressing the question of the immunity of such vessels after they have sunk. By indicating that the eminent jurists of the IDI consider that there is suffi-

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[31] See, e.g., statements by France, Norway, Russia, UK, and US, reprinted in CAMARDA and SCOVAZZI (eds.), *The Protection of the Underwater Cultural Heritage: Legal Aspects*, Milano, 2002, pp. 426-434.

[32] Hansard, House of Commons, Written Answers for 24 January 2005, Col. 46W.

[33] Department for Culture Media and Sport/Ministry of Defence, "Protection and Management of Historic Military Wrecks Outside UK Territorial Waters: Guidance on How Existing Policies and Legislation Apply to Historic Military Wreck Sites", April 2014, para. 1.

[34] *Ibid*. The guidance goes on to say that the significance of the wrecks "can be defined in terms of their archaeological, artistic, and/or historic interest".

cient consistent State practice, motivated by a sense of legal obligation, to amount to customary international law with respect to the immunity of sunken State ships,[35] the categorical statement in Article 3 of the Resolution should be extremely helpful in putting to rest doubts on the matter.

Exactly what immunity entails in the context of a sunken State vessel depends on the precise circumstances pertaining to the wreck. The saving clause at the start of Article 3 is a reference, *inter alia*, to provisions in the Resolution relating to the circumstances where a sunken State wreck is located in waters within the jurisdiction of a State other than the flag State. The relevant articles – Articles 7, 8 and 9 – are discussed in section 3.4 below.

Article 4 of the Resolution states: "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".[36] The principle enshrined in this article goes hand-in-hand with the principle set out in Article 3. The fact that a chattel sinks to the bottom of the sea does not mean that the owner loses its property rights. Instead, generally speaking, for the owner to lose its rights it must be shown that it has either transferred those rights or abandoned them. In the case of abandonment, physical abandonment is not sufficient; there must also be a positive *intention* on the part of the owner to relinquish its property rights. In the case of private ownership rights, it may be possible to infer such intention from the circumstances. However, in the case of sunken State vessels, the maritime powers have taken the firm position that *express* relinquishment is required.[37] Article 4 confirms that there is sufficient State practice on the matter to support a rule of customary law.[38] Again, this is very helpful.

Article 4 needs to be read alongside Article 5. This addresses the legal status of cargo. It makes it clear that cargo owned by the flag State remains the property of that State,[39] that cargo owned by *other* States remains the property of those States,[40] and that the sinking of the ship has no effect on property rights relating to cargo.[41] While the Resolution does not explicitly address the question of the persistence of ownership rights after sinking in cargo belonging to *private* owners or, indeed,

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[35] For reviews of State practice in this regard, see Preliminary Report, *cit. supra* note 1, pp. 145-151; and DROMGOOLE, *cit. supra* note 19, pp. 139-152.

[36] Emphasis added.

[37] See, e.g., the formal statements to this effect in the US Federal Register, Vol. 69, No. 24, 5 February 2004. See also the terms of the US Sunken Military Craft Act of 2004. This position was affirmed by the Fourth Circuit Court of Appeals in 2000 in the landmark *Sea Hunt* case, which related to the question of whether Spain had abandoned its ownership rights in two galleons *Juno* and *La Galga* (221 F.3d 634 (4th Cir. 2000)).

[38] Arguably, the degree of *consistency* in the practice on this question is in fact greater than that in respect of the question of immunity: see DROMGOOLE, *cit. supra* note 19, at p. 153.

[39] Art. 5(2).

[40] Art. 5(3).

[41] Art. 5(4).

in the personal possessions of crew and other individuals on board, such property must surely be treated *pari passu*. Article 5 also confirms that the principle set out in Article 3 that immunity continues after sinking applies not just to the vessel and its fixtures and fittings, but also the cargo (and, again, presumably other objects on board), regardless of in whom the ownership is vested, and that the consent of the flag State is required before it is disturbed or removed.[42] This is all consonant with the notion applied in the *Mercedes* case that the cargo and ship are to be treated as a single unit and that the cargo and other items on board are thus, in effect, "cloaked" in the ship's immunity even where their ownership is vested in someone other than the flag State.

Articles 6 and 11 address two quite specific issues that may affect the ownership of a sunken State ship. Article 6 reiterates the well-established principle that "[w]recks of captured State ships are the property of the captor State if the capture occurred in accordance with the applicable rules of international law".[43] Article 11 highlights the fact that the principles and rules of international law regarding State succession have the potential to impact upon the question of ownership; in light of this, the provisions of the Resolution must be taken to be without prejudice to those principles and rules.[44]

One question the Resolution does not explicitly clarify is the theoretical basis for immunity persisting after a warship or other State vessel has sunk. While there has been much academic rumination on this issue, it is not of mere academic interest. In particular, it would be very helpful if the question of whether immunity is *predicated* on the ownership of the flag State could be conclusively answered. The definition of "[a] sunken State ship" set out in Article 1(2) of the Resolution means that this question is neatly side-stepped because the Resolution does not encompass ships *operated*, but not owned, by a State. The fact that this is the case may be an indication that such vessels, once sunk, should *not* be regarded as subject to immunity.[45] In other words, that immunity *is* predicated on ownership. If that is the case, other questions then arise: does a wreck's immunity continue for as long as

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[42] Art. 5(4).

[43] See Preliminary Report, *cit*. *supra* note 1, pp. 151-152 and 173, where reference is made to the famous *Admiral Nakhimov* incident involving the capture of a Russian warship by the Japanese navy during the Japanese-Russian war of 1904-1905. In the case of the capture of warships and auxiliary ships (as opposed to merchant ships) there is no need for prior prize adjudication before property is transferred to the capturing State. The property is transferred immediately upon capture. Presumably the same is also the case in the event of the surrender of a vessel before sinking. An interesting question is whether the deliberate scuttling of a vessel to avoid its capture by the enemy amounts to abandonment of title. An abandonment of the vessel does not necessarily amount to an abandonment of the property interest.

[44] Interestingly, the question of State succession arose, but was not determined, in the case of the *Mercedes* with respect to the dispute between Spain and Peru as the ownership of the *specie* on the wreck.

[45] At least some of the maritime States, including France, Germany, and the UK, claim immunity for such vessels: see DROMGOOLE, *cit*. *supra* note 19, pp. 138 and 146.

the wreck remains in the ownership of the flag State? And is immunity lost if a State sells a wreck, for example for scrap? The answer to this latter question is probably yes. Interestingly, the point arose quite recently in a case involving the wreck of a British warship. It was unclear whether the UK Government could prohibit interference with the site on the grounds of immunity given that there was some evidence that the wreck may have been sold to scrap merchants many years previously.

3.4. Zonal Provisions

Articles 7-10 of the Resolution address some of the implications of the geographical location of a sunken State ship with reference to the maritime zone in which it is situated. Articles 7-9 deal with the thorny question of the rights of the coastal State in circumstances where the sunken State ship of one State is located in a maritime space within the national jurisdiction of another. Article 10 addresses the situation where a sunken State ship is located in the international seabed Area.

When the wreck of a sunken State vessel of one State is found in the territorial sea of another State, or in other maritime spaces under coastal State sovereignty, a direct tension arises between the sovereignty of the coastal State and the notion that the wreck is immune from the jurisdiction of any State other than the flag State. It is in this context that political sensitivities are at their most acute.[46] Article 7 of the Resolution provides: "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".

The saving clause in Article 7, together with that in Article 3, create a circularity that reflects the fact that a delicate balancing act needs to be struck between the rights and jurisdiction of the coastal State and those of the flag State. At least on the face of it, there appears to be an irreconcilable conflict between two apparently exclusive jurisdictional rights. While disinclined to admit it, flag States ultimately do appear to concede that the coastal State has the right to control access to the site of a sunken State wreck.[47] Difficult questions then arise regarding the extent to which the flag State has a right to be advised, or consulted, in advance of any interference and, even more crucially, to *prohibit* interference. This is reflected in the wording of Article 7 of the 2001 UNESCO Convention. Paragraph 1 of that article provides that, in the exercise of their sovereignty, States Parties have the exclusive right to regulate and authorise activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea. Paragraph 3 of the same article provides that States Parties should inform the flag State Party of the discovery of an identifiable State vessel or aircraft in their territorial sea or archipelagic waters. Aspects of this provision that proved

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[46] See *ibid*., at p. 139 ff.

[47] See, e.g., ROACH and SMITH, *United States Responses to Excessive Maritime Claims*, The Hague, 3rd ed., 2012, p. 546.

contentious during the negotiations were the use of the hortatory word "should" rather than "shall" and the rather curious exclusion of explicit reference to internal waters in paragraph 3. This exclusion, it was felt, "creates a negative implication that flag states have no rights at all over their vessels in [internal waters]".[48]

Article 8 of the Resolution provides: "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". The reference here to Article 303 UNCLOS is one of only two references to specific treaty provisions in the Resolution. The paragraph of Article 303 which is relevant is paragraph 2. Through the device of a legal fiction, this affords the coastal State the authority to regulate the removal of objects of an archaeological and historical nature found in the contiguous zone. In light of this provision, the position with respect to sunken State vessels located in this zone, *assuming* they qualify as an object of an archaeological and historical nature, will not be so very different from that in relation to the territorial sea. Again, maritime States appear to accept that, ultimately, the coastal State does have the right to control access.[49]

Article 9 of the Resolution addresses the situation where a sunken State ship is located in the EEZ or on the continental shelf of a State other than the flag State. It can be broken down into three parts. The first sentence of Article 9 provides: "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". This provision reflects the principle enshrined in Article 58(3) UNCLOS that a foreign State must have "due regard" to the rights and duties of the coastal State in its EEZ when exercising its own rights in that maritime space. The first sentence of Article 9 of the Resolution suggests that this principle should apply to circumstances where the flag State undertakes activities on its own wreck, or authorises such activities. In so far as a wreck located on the *outer* continental shelf beyond 200 nautical miles is concerned, i.e. where there is no overlying EEZ, the legal basis for application of the "due regard" principle in the circumstances envisaged in Article 9 is, it must be said, less apparent.[50] In light of this, it may be that Article 9 is intended to address only the situation of a wreck lying *within* 200 nautical miles.

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[48] BLUMBERG, "International Protection of Underwater Cultural Heritage", in NORDQUIST et al. (eds.), *Recent Developments in the Law of the Sea and China*, The Hague, 2006, p. 506, footnote 22. The concerns about Article 7 were not allayed by the terms of Art. 2(8) of the 2001 Convention which suggest that nothing in the treaty modifies: "the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft".

[49] ROACH and SMITH, *cit. supra* note 47. Article 8 of the 2001 UNESCO Convention makes provision for the contiguous zone based on Art. 303(2) UNCLOS. Unlike its provision for the other maritime zones, it does not include any specific reference to sunken State vessels.

[50] No equivalent of the "due regard" principle in Art. 58(3) UNCLOS is to be found in Part VI of the treaty, which sets out the regime for the continental shelf. Indeed, according to

The second sentence of Article 9 provides: "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". At first sight, it has to be said that this sentence is rather perplexing. Some relevant treaties, for example the 2001 UNESCO Convention and the 2007 Nairobi Wreck Removal Convention, provide for notification in the *opposite* direction, in other words that in certain circumstances the coastal State must notify the flag State of activities it intends to carry out, or sanction.[51] However, the Preliminary Report indicates that a number of other treaties and instruments dealing with marine environmental matters and human rights are in contemplation here,[52] and that, from these, it is possible to construe a duty of information on the part of the flag State in circumstances where its activity on a wreck represents a threat to the environment or to human life, directly or indirectly.[53]

The third and final sentence of Article 9 provides: "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". This sentence appears to have in contemplation circumstances where a wreck poses a hazard in broad terms, in other words where its presence prejudices the legitimate interests of the coastal State. For example, it may pose an obstacle to activities relating to the economic exploration and exploitation of the zone, such as the installation of an oil platform or a wind turbine. In such circumstances, the IDI appears to construe (again primarily from relevant treaty texts) that the flag State is obliged to take measures to remove the hazard; if it does not do so, the coastal State then has the right to deal with the threat.[54]

The final zonal provision in the Resolution is Article 10. This provides: "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 10 includes the second reference in the Resolution to a specific treaty provision, in this case Article 149 UNCLOS. This provides for objects of an archaeological and historical nature located in the international seabed Area, i.e. on

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Art. 78(2) of that Part, "the exercise of the rights of the coastal State over the continental shelf must not infringe or result in any unjustifiable interference with navigation and other rights and freedoms of other States as provided for in this Convention". There is therefore a presumption that, in the event of a conflict between the activity of a flag State on its sunken wreck (which would amount to an exercise of high seas freedoms) and the exercise of the rights of the coastal State over the continental shelf, the flag State's interests would prevail.

[51] See 2001 UNESCO Convention, Arts. 10(3) and 10(7), which go beyond notification to consultation and agreement (although, controversially, not in every instance). See also 2007 Nairobi Wreck Removal Convention, Art. 9 (1)-(6)(b) and (c). The latter treaty does not apply to State vessels unless the flag State decides otherwise.

[52] Preliminary Report, *cit*. *supra* note 1, pp. 163-165.

[53] *Ibid*., pp. 164-165.

[54] *Ibid.*, p. 164. In practice what is required is removal of the threat, rather than necessarily removal of the wreck itself. The question of hazardous wrecks is dealt with more generally in Art. 14, on which see *infra* section 3.7.

the seabed beyond the limits of national jurisdiction.[55] Article 149 is a notoriously unhelpful provision as it essentially sets out an aspiration with respect to the treatment of such objects without giving any indication as to how that aspiration can or should be fulfilled. Article 10 of the Resolution makes it clear that, in so far as a sunken State ship qualifies as an object of an archaeological and historical nature, the flag State must take cognizance of Article 149 in determining the fate of the wreck site and of any material recovered from the site. It is worth noting that the provisions of the 2001 UNESCO Convention that relate to the Area, Articles 11 and 12, provide that States Parties have a responsibility to protect underwater cultural heritage in conformity with Article 149 UNCLOS,[56] and specify that "[n]o State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State".[57] In the Area, at least, there is no doubt about the "exclusivity" of the jurisdiction of the flag State.

3.5. War Graves

With the possible exception of security concerns relating to sensitive information that may be gleaned from a wreck site (which generally are likely to arise only in relation to recent casualties), for flag States a matter that is accorded the highest priority when the wreck of a warship or other State vessel is under consideration is the question of whether lives were lost when the vessel met its fate and, if so, whether there are – or may be – human remains still present at the site. As a result, there is a wealth of State practice indicating a general acceptance that human remains found on State wrecks should be treated with appropriate respect and that sites that represent substantial gravesites should be treated as places of sanctity. The exact bounds of this practice are hard to gauge, however, although it does seem to extend beyond the confines of lives lost in direct wartime combat. With the exception of international agreements relating to specific wreck sites, the 2001 UNESCO Convention is the only treaty that makes direct reference to human remains and gravesites found at sea. It provides that "States Parties shall ensure that proper respect is given to all human remains located in maritime waters",[58] and that "[a]ctivities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites".[59] Equal treatment is therefore ac-

[55] UNCLOS, Art. 1(1)(1).
[56] 2001 UNESCO Convention, Art. 11(1).
[57] 2001 UNESCO Convention, Art. 12(7).
[58] 2001 UNESCO Convention, Art. 2(9).
[59] 2001 UNESCO Convention, Annex, Rule 5. Archaeologists are used to dealing with sites containing human remains, both on land and at sea, and have well-developed codes of practice in this respect, for example the Vermillion Accord on Human Remains, adopted at the World Archaeology Congress, 1989 Inter-Congress.

corded to human remains and maritime gravesites, civil and military, and whatever the circumstances of the loss.[60]

Article 12 of the Resolution, headed "War graves", provides:

> "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".

Despite the heading of Article 12 and the content of the second two sentences, the first sentence appears to be confirmation that there is a customary rule of international law that appropriate respect must be shown for human remains present in any sunken State ship, whatever the context of its loss. This accords with two key domestic legislative instruments, the US Sunken Military Craft Act of 2004 and the UK Protection of Military Remains Act 1986, both of which afford protection to sites where military personnel lost their lives whether or not in the context of war. The second sentence indicates that the duty to show due respect may be implemented by the establishment of a wreck as a "war cemetery" and the third sentence exhorts States to establish such cemeteries. Where there has been mass loss of life through the sinking of a State vessel, in all likelihood this will have occurred in the course of a war and many mass maritime gravesites are, indeed, *de facto* war graves. Presumably what is envisaged is legal protection of specific sites. Domestic legislation, such as that referred to above, is a mechanism that can be used to effect such protection. However, depending on the maritime zone in which a wreck is situated, an international agreement may be required to ensure that controls on interference are enforceable. Interestingly, the two most notable international agreements creating maritime memorials relate to civil vessels lost in peacetime: the *Titanic*[61] and the passenger ferry M/S *Estonia*.[62]

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[60] The question of whether or not military gravesites should be accorded a special status was the subject of lively debate. A proposal for specific reference to military maritime graves was rejected: see GARABELLO, "Sunken Warships in the Mediterranean: Reflections on Some Relevant Examples in State Practice Relating to the Mediterranean Sea", in SCOVAZZI (ed.), *La Protezione del Patrimonio Culturale Sottomarino nel Mare Mediterraneo*, Milano, 2004, p. 171 ff., p. 187.

[61] See *supra* note 25 and related text.

[62] 1995 Agreement between the Republic of Estonia, the Republic of Finland, and the Kingdom of Sweden Regarding the M/S *Estonia* (with additional Protocol of 1996 allowing for accession of other parties).

3.6. Salvage

Article 13 of the Resolution provides: "The salvage of sunken State ships is subject to the applicable rules of international law, the provisions of this Resolution, and appropriate archaeological practices". It must be assumed that the reference here to "salvage" means the recovery of material from wrecks. The prevailing international salvage law regime is to be found in the 1989 International Salvage Convention but this does not apply to warships or other non-commercial State vessels unless the flag State "opts-in".[63] There is some debate, too, as to its application in any circumstances to *sunken* vessels.[64] The applicable rules of international law referred to are therefore presumably principally the rules of immunity, which mean that recovery of material from a State wreck is prohibited without the express authorisation of the flag State, and – to the extent that the material qualifies – the rules designed to protect cultural value laid down in Articles 149 and 303 UNCLOS and in the 2001 UNESCO Convention. The reference to "appropriate archaeological practices" is a helpful reminder that many sunken State wrecks *will* be regarded as historical and archaeological sites and that any interference with such sites must take account of internationally accepted archaeological standards, now enshrined in the Annex to the 2001 Convention.

3.7. Hazardous Sunken State Ships

Many sunken State vessels present a hazard of one sort or another. They may constitute an obstacle to shipping or to marine development activities such as the laying of a new pipeline; they may contain unexploded ordnance that constitutes a threat to human life; and they may pose a pollution risk if they have oil or other noxious materials on board. The issue of hazardous wrecks is addressed by the 2007 Nairobi Wreck Removal Convention. This allows a coastal State to remove, or have removed, a wreck that poses a hazard to the environment, to navigation or to the broader economic interests of the State. Designed to apply primarily in the EEZ, the 2007 Convention clarifies the powers of intervention of coastal States with regard to pollution hazards and also extends existing powers to cover navigation hazards. Like the Salvage Convention and other treaties relating to marine pollution and maritime casualties, it does not apply to warships or other non-commercial State vessels unless the flag State decides otherwise.[65]

Article 14 of the Resolution addresses the situation of a State wreck posing a hazard. To some degree it echoes the third sentence of Article 9. However, unlike Article 9, it applies to all maritime zones, not just the EEZ. It provides: "1. Subject to

[63] 1989 Salvage Convention, Art. 4(1).
[64] See DROMGOOLE, *cit*. *supra* note 19, p. 178.
[65] 2007 Nairobi Convention, Art. 4(2).

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".

Paragraph 1 indicates that, in the view of the IDI, it is possible to construe – once again primarily from relevant treaty law – a duty on flag States to remove sunken State wrecks that pose a hazard with respect to navigation, or are a source of marine pollution or threaten to become so. Presumably, the duty extends by analogy to other hazards too. The Nairobi Convention, for example, defines hazard quite widely to include "any condition or threat […] that may reasonably be expected to result in major harmful consequences to the marine environment, or damage to the coastline or related interests of one or more States", the key restriction being that "major harmful consequences" must be expected if the threat is not dealt with.[66] The reference to the notion of removal in paragraph 1 should probably be interpreted in line with the definition of "removal" in the Nairobi Convention, which makes it clear that what must be removed is the hazard and, depending on the circumstances, action short of removal of the wreck may suffice.[67] The fact that the duty on flag States is subject to Article 7 suggests that the flag State may be under a procedural obligation to consult with the coastal State and perhaps even obtain its consent before taking action with respect to a wreck posing a hazard in the territorial sea or other maritime space under coastal State sovereignty. Given that it is in the coastal State's interests that the hazard is dealt with, it seems unlikely that the coastal State would preclude the flag State from taking action, although it might well have a view about the nature of the action to be taken.

In practice, in any waters over which a coastal State has national jurisdiction, including the EEZ, in all likelihood the coastal State will be the party that generally initiates action by requesting that the flag State intervene to deal with a wreck posing a hazard. Despite the immunity of wrecks falling within the scope of the Resolution, Article 14(2) indicates that where a wreck in such waters poses an "imminent danger", the coastal State should itself be able to take the necessary measures to eliminate or mitigate the danger and to do so *without* the consent of the flag State. For example, this might be necessary if the flag State is tardy in taking action itself. The Preliminary Report cites the doctrine of necessity to support coastal State intervention in these sorts of circumstances.[68] Drawing on the Nairobi Convention, it seems likely that the measures should only be taken where "immediate action" is required; they should be "proportionate to the hazard"; should "not go beyond what is reasonably necessary", and should not "unnecessarily interfere with the rights and interests" of the flag State.[69]

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[66] 2007 Nairobi Convention, Art. 1(5).

[67] See Art. 1(7) of the Nairobi Convention, which defines removal as meaning "any form of prevention, mitigation or elimination of the hazard created by a wreck".

[68] Preliminary Report, *cit*. *supra* note 1, p. 164.

[69] Nairobi Convention, Arts. 2(2)-(3) and 9(8).

Article 14 and the related provisions in Article 9 are important in showing that, although relevant treaties tend to exempt State vessels from their scope of application, the flag State is not *legibus solutus* but instead should abide by the treaty principles as far as it is reasonable and practicable to do so.[70]

3.8. Duty of Cooperation

The final provision of the Resolution, Article 15 provides:

> "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. 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".

From the discussion above, it is clear that certain issues relating to sunken State wrecks can only be satisfactorily addressed if there is cooperation between the flag State and an affected coastal State, such cooperation entailing at the least the sharing of information, consultation, and the seeking and giving of consent. Given the uncertainties that exist concerning the precise respective rights and jurisdiction of flag States and coastal States in maritime zones within national jurisdiction, Article 15(1) may well be designed, at least in part, to exhort States to cooperate with one another in the circumstances outlined *whatever* the precise legal niceties may be.

In practice cooperative action may take many forms and may also extend beyond the immediate coastal State and the flag State. Article 15(2) is evidently designed to encourage cooperation on a regional basis. In the context of cultural heritage protection, regional cooperation is often necessary in order to tackle deliberate unwarranted interference with shipwrecks.[71] In the context of potentially hazardous wrecks, the impact of any potential incident, for example an oil spill, clearly may be felt by the whole region.

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[70] See Preliminary Report, *cit*. *supra* note 1, at p. 162.

[71] The 2001 UNESCO Convention explicitly encourages States Parties to enter into regional agreements that are in conformity with the Convention, envisaging that they may be utilised in order to afford "better" protection than that provided by the Convention itself (Art. 6(1)). There have been discussions with respect to a potential regional agreement to protect underwater cultural heritage in the Mediterranean Sea: see GARABELLO, *cit*. *supra* note 60, pp. 197-199.

4. Concluding Remarks

The IDI's initiative on sunken State vessels is extremely timely. The centenary period of the First World War has focused the attention of the international community on the fate of the vast number of sunken wrecks and other material remains associated with the war and highlighted the practical relevance and importance of many of the issues and questions discussed above. The Resolution, and the report that preceded it, contribute significantly to the crucial task of teasing out and clarifying international law in this field.

While some consideration was given to the possibility that the Resolution could call for an international treaty to deal with the subject, in the end it holds back from doing so. Given the surfeit of treaties in the field already and the complexities of their interaction with each other and with customary international law, this is probably wise. Among other things, it is far from clear which international organisation would be prepared to sponsor a treaty that cuts across so many different issues and the difficulties encountered by the UNESCO initiative, focusing as it did on just one of those issues, makes it clear that the negotiation of a new treaty would be a hugely formidable task.

Inevitably, the IDI Resolution leaves lots of unanswered questions. For example, is there, and should there be, a distinction in the legal status of sunken warships lost in war and those lost in other circumstances? What, if any, legal distinctions are to be drawn between sunken warships and other State-owned ships engaged, at the time of sinking, on non-commercial service? For the purposes of the Resolution, these two categories are assimilated, but are they necessarily assimilated for all purposes? What is the status of the wrecks of ships operated, but not owned, by a State and in use on non-commercial service when they sank and what duties are incumbent on both the operating State and the flag State in those circumstances? In what circumstances, if at all, should the flag State be held responsible for damage caused by wrecks? What *exactly* are the respective rights and jurisdiction of the coastal State and the flag State when a State wreck is located in waters within national jurisdiction, especially within the limit of the territorial sea? Further questions arise in relation to wrecks more generally. Does the flag State retain jurisdiction after a civil ship has sunk?[72] How should a wreck that is hazardous *and* of historical value be managed?[73]

It is to be hoped that the work of the IDI will be taken up and built upon by another international body. As Natalino Ronzitti pointed out in the Addendum to his Preliminary Report, the topic of wrecks has been on the long-term work programme of the International Law Commission since 2001. The time may now be ripe for this item to be activated.

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[72] See Preliminary Report, *cit. supra* note 1, p. 149.

[73] The 2001 UNESCO Convention makes no provision in this regard.