UNIVERSITY OF Southampton

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Wrecks, Threats, and Jewels at the bottom of the Sea: Potential conflict between the UNESCO Convention on the Protection of Underwater Cultural Heritage and the Nairobi Wreck Removal Convention

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by:

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Abstract

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When a polluting source is established to be a historic wreck the obligation of States to preserve the marine environment could contradict their duty to protect submerged objects of an archaeological and historical nature. This thesis will aim to examine the international conventions that govern the protection of underwater cultural heritage and the removal of potentially polluting and hazardous wrecks. It will endeavour to identify which norm would take precedence in a situation where a State has both the obligation to protect the marine environment and a duty to protect underwater cultural heritage. It will analyse State practice when faced with such a situation in order to identify the possibility of the emergence of a new rule of customary international law requiring States faced with an environmental threat from a wreck that is of historical or archaeological importance to eliminate the threat whilst at the same time protect and preserve the wreck *in situ* with minimal interference. Therefore, the examination will be centred on the question of the extent to which the application of the Nairobi Convention could be in conflict with the application of the UNESCO Convention, with the view of clarifying the legal grounds upon which a State can interfere with a historic wreck that is hazardous.

To this end, this research will identify the significance of the two conventions and why their creation was unavoidably determined by prior circumstances. It will provide an examination of the two conventions as well as an analysis of the relevant provisions of UNCLOS being the foundation of the international law of the sea. The examination will delve into and highlight possible conflicts that may arise between the conventions. Finally, the premise of this thesis, is to present the possible emergence of a new rule of customary international law. In doing so, the thesis contributes towards the clarification and further development of customary international law.

Contents

Research Thesis: Declaration of Authorship

Print name: Natalie Shirley

Title of thesis: **Wrecks, Threats and Jewels at the bottom of the Sea: Potential conflict between the UNESCO Convention on the Protection of Underwater Cultural Heritage and the Nairobi Wreck Removal Convention**

I declare that this thesis and the work presented in it is my own and has been generated by me as the result of my own original research.

I confirm that:

1. This work was done wholly or mainly while in candidature for a research degree at this University;
2. Where any part of this thesis has previously been submitted for a degree or any other qualification at this University or any other institution, this has been clearly stated;
3. Where I have consulted the published work of others, this is always clearly attributed;
4. Where I have quoted from the work of others, the source is always given. With the exception of such quotations, this thesis is entirely my own work;
5. I have acknowledged all main sources of help;
6. Where the thesis is based on work done by myself jointly with others, I have made clear exactly what was done by others and what I have contributed myself;
7. None of this work has been published before submission.

Signature: Natalie Shirley Date: 30 November 2022

Acknowledgments

'Don't be afraid. Be Focused. Be determined. Be Hopeful. Be empowered.'

Michelle Obama

Today, whilst completing the final touches of the most challenging project of my life, I remind myself of all the difficulties faced over the past couple of years and I am very grateful for the position that I find myself in today. There were times when I felt a little dispirited and the project ahead seemed overwhelming. I discovered an inner strength that I never thought I had, and I am in the process of accomplishing things that I once thought were unachievable. It has been a marathon rollercoaster of ups and downs; however, I will forever cherish the invaluable lessons learnt throughout this journey that will be of great benefit in my chosen career.

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Sincere thanks go to my friends for always supporting me and putting up with me throughout my academic years and for making my life as wonderful as it is.

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Key abbreviations

"ATL":	Actual Total Loss
"CLC":	International Convention on Civil Liability for Oil Pollution 1969
"CMI":	Comite Maritime International
"CTL":	Constructive Total Loss
"EEZ":	Exclusive Economic Zone
"GLA":	General Lighthouse Authorities
"GLF":	General Lighthouse Fund
"ICJ":	International Court of Justice
"ICOM":	International Council of Museums
"ICS":	1989 International Convention on Salvage
"IDI":	Institut de Droit International
"ILA":	International Law Association
"ILC":	International Law Commission
"IMO":	International Maritime Organization
"Intervention Convention":	International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969
"LLMC":	Convention on Limitation of Liability for Maritime Claims 1976
"MMO":	Marine Management Organisation
"MoD":	Ministry of Defence
"MoU":	Memorandum of Understanding
"Nairobi Convention":	Nairobi International Convention on the Removal of Wrecks 2007

“PACPOL”:	Pacific Ocean Pollution Prevention Programme
“P&I Club”:	Protection and Indemnity Club
“SDR”:	Special Drawing Right
“SSA”:	Sea Search Armada
“UCH”:	Underwater Cultural Heritage
“UK”:	United Kingdom
“UNCLOS”:	United Nations Convention on the Law of the Sea 1982
“UNESCO Convention”:	UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001
“UNESCO”:	United Nations Educational, Scientific and Cultural Organization
“US”:	United States of America
“USD”:	United States Dollar
“WWI”:	World War I
“WWII”:	World War II

Chapter 1. Introduction

The primary objective of the shipping industry is to secure the safe passage of vessels, thereby enabling the transportation of passengers and cargo to be conducted in the most efficient and economical way possible. Shipping is responsible for transporting 90 per cent of the world's trade, thus the safety of the approximately 52,000 vessels that are trading globally is of paramount importance.[1] With the advent of modern technology the chances of a maritime incident have been greatly reduced, however, often unusual circumstances such as adverse weather conditions or human error can result in a major maritime disaster.[2] As stated in a report published by Allianz, it is estimated that human error accounts for between 75% to 96% of all maritime casualties.[3] Fatigue, lack of technical capabilities, deficient maintenance, poor communication skills and inadequate knowledge of the latest systems on board are all examples of human error that may contribute towards an incident.[4] Accidents that occur due to such errors may include grounding, mechanical failure, fire, explosion and collision. Examples of high-profile casualties that have captured the

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[1] Allianz Global Corporate & Specialty 'Safety and Shipping Review 2018 – An annual review of trends and developments in shipping losses and safety', 2018 https://www.agcs.allianz.com/assets/PDFs/Reports/AGCS_Safety_Shipping_Review_2018.pdf (accessed 20 January 2022)

[2] Allianz Global Corporate & Specialty, 'Safety and Shipping 1912-2012 from Titanic to Costa Concordia: An insurer's perspective from Allianz Global Corporate & Specialty', 2012 http://www.agcs.allianz.com/assets/PDFs/Reports/AGCS_safety_and_shipping_report.pdf (accessed 20 January 2022); Shipping losses have decreased significantly from 1 ship per 100 each year in 1912 to 1 ship per 670 per year in 2009.

[3] Ibid 6.

[4] James Herbert, 'The Challenges and Implications of Removing Shipwrecks in the 21st Century', *Lloyd's,* 2013 https://assets.lloyds.com/assets/pdf-risk-reports-wreck-report-final-version/1/pdf-risk-reports-Wreck-Report-Final-version.PDF (accessed 20 September 2022) 17.

world's attention include the capsizing of the *Costa Concordia* in 2012, the sinking of the *Titanic* in 1912 and more recently the grounding of the *Ever Given* in 2021.[5]

Further to these major incidents that capture the media's attention, it has been estimated that there are approximately 1,000 serious incidents each year.[6] Over the years, there has been an increased emphasis on safety which has helped reduce the number of total losses significantly.[7] This has been achieved by more stringent implementation of new and existing regulations, advances in technology, improved ship designs and an enhanced emphasis on risk management.[8] Therefore the majority of these 1,000 serious incidents are successfully towed to safety or refloated,

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[5] In 2012 the *Costa Concordia* grounded off the coast of Italy carrying 4200 passengers and crew. The cruise liner hit rocks which resulted in the ship being holed and subsequently capsizing in shallow waters. It tragically took the lives of 32 passengers and crew and the life of one salvage operator and is considered the most expensive casualty to date. See Trisha Thomas and Nicole Winfield, 'Costa Concordia is gone, but horror lingers 10 years later' (*ABC News*, 13 January 2022) <https://abcnews.go.com/Lifestyle/wireStory/italy-marks-10-years-deadly-costa-concordia-shipwreck-82239294> (accessed 14 February 2022). The *Titanic*, one of the most well known maritime disasters, sank in 1912 following a collision with an iceberg whilst on her maiden voyage to the United States taking the lives of 1500 passengers and crew. See Mary S. Timpany, 'Ownership Rights in the Titanic', 73 *Case Western Reserve Law Review* 1, (1986) 73. More recently, in March 2021, the *Ever Given* has been in the media spotlight following her grounding whilst traversing the Suez Canal. The Suez Canal was blocked for 6 days which resulted in widespread delays, it has been estimated that it affected US$ 9.6bn of goods each day or approximately 12% of total world trade. Arguably this case highlights the importance of seaborne transport as the ensuing disruption sent shockwaves through the global supply chains. See Allianz Global Corporate & Specialty 'Safety and Shipping Review 2021 – An annual review of trends and developments in shipping losses and safety' 2021 https://www.agcs.allianz.com/content/dam/onemarketing/agcs/agcs/reports/AGCS-Safety-Shipping-Review-2021.pdf (accessed 06 February 2022) 30.

[6] An incident may be considered serious when a vessel suffers severe structural damage or mechanical failure sufficient to typically render the vessel unseaworthy and which may result in constructive total loss of the vessel or require extensive repairs. Further, any damage that causes a vessel to require the assistance of a salvor or where human fatalities have occurred may also be classed as a serious incident. See Herbert (n 4) 5, 40.

[7] Total losses are defined as actual total losses or constructive total losses recorded for vessels over 100 gross tons (GT). See *Allianz Global Corporate & Specialty 2021* (n 5) 56.

[8] Ibid 4.

repaired, and subsequently returned to sea.[9] However, even though there has been a significant decrease in the number of total losses, as evidenced in *Figure 1* below, a total of 876 incidents resulted in the ships becoming an actual total loss (ATL) or a constructive total loss (CTL) during the last decade.[10] These ships can arguably be defined as 'wrecks'.[11] The term 'wreck' is commonly used when referring to a sunken or stranded ship or part of such a ship.[12] It has been estimated that there are approximately 3 million wrecks worldwide, including wrecks that are thousands of years old.[13]

Figure 1: Number of Total Losses during the last 10 years. Source: Lloyd's List Intelligence Casualty Statistics

[9] Ibid 8.

[10] *Herbert* (n 4) 8. In the case of *Masefield AG v Amlin Corporate Member Ltd* it was stated that an ATL occurs when the property is beyond recovery, in other words an absolute total loss. Whereas a CTL occurs when the property insured is reasonably abandoned because an ATL was unavoidable or because the costs for salvage and repair exceeded the value of the property insured and was uneconomical (section 60(1) of the Marine Insurance Act 1906).

[11] The term 'wreck' will be defined in detail later on in this thesis under Chapter 4.3.2 titled 'What is a wreck?'.

[12] Patrick Griggs, 'Law of Wrecks' in *The IMLI Manual of International Maritime Law*, (general editor David Joseph Attard, Volume II, IMO, 2016), 506.

[13] United Nations Educational, Scientific and Cultural Organization, *Underwater Cultural Heritage:Wrecks*,http://www.iocunesco.org/index.php?option=com_content&view=article&id=83:underwater-cultural-heritage&catid=14&Itemid=100063 (accessed 03 March 2022).

A wreck may be placed into various categories, depending on the following criteria: age, ownership, geographical location, and the cargo it was carrying. If a wreck is of significant importance or age, then it may fall under the category of cultural heritage. These wrecks are afforded protection at a national and international level as they can significantly contribute to help understand how man's relationship with the sea has developed over the centuries. In some cases, they can be a historical record preserved just waiting to be discovered.

The oceans cover over 70 per cent of the earth's surface and contain 97 per cent of the planet's water, it is estimated that more than 80 per cent of the subterranean world is unexplored.[14] 'Underwater cultural heritage' (UCH) is a phrase frequently used when referring to traces of human existence located underwater which have the potential to reveal important historical information.[15] Evidence of human existence can be found underwater throughout the ocean floor. The sea has been a burial place for countless numbers of people. The remains of these people and their endeavours are part of our heritage, in much the same way as our heritage on land. Underwater sites have the ability to reveal information of past human existence including the type and degree of human interaction and trade links throughout the years. They can also depict how historic naval battles took place.[16] Primarily because in part, water acts as a natural preservative due to the low oxygen levels in marine environments,

[14] National Oceanic and Atmospheric Administration (NOAA), How much water is in the ocean?, https://oceanservice.noaa.gov/facts/oceanwater.html (accessed 06 November 2022), NOAA, How much of the ocean have we explored?, https://oceanservice.noaa.gov/facts/exploration.html (accessed 06 November 2022).
[15] Sarah Dromgoole, *Underwater Cultural Heritage and International Law*, (Cambridge University Press, 2013) 1.
[16] Ibid 1.

slowing down both the alteration and the decomposition process, therefore the time for natural deterioration to occur will take longer, creating a so-called 'time capsule'.[17]

UCH is often associated with wrecks such as the *Mary Rose* or the recently discovered *Endurance* and submerged ancient cities such as Jamaica's *Port Royal*.[18] UCH covers a wide range of underwater archaeological sites, including structures, buildings and artefacts that have been underwater for at least 100 years,[19] however, in terms of numbers and variety, shipwrecks are the most significant and are the focus of this thesis.[20] In contrast to modern shipping, it has been calculated that during the 19th century, approximately 5 per cent of all seagoing vessels foundered every single year.[21] During World War I (WWI) and World War II (WWII) a great number of warships, State owned and merchant vessels were lost. It has been estimated that during WWI, between the years of 1914 and 1918, approximately

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[17] Valentina Sara Vadi, 'Investing in Culture: Underwater Cultural Heritage and International Investment Law', (2009) 42 *Vanderbilt Journal of Transnational Law*, 853, 857.

[18] In March 2022, the historic wreck of the explorer Ernest Shackleton, *Endurance*, was discovered in the Antarctic, 106 years after the ship was crushed by ice whilst on her way to a bay on the Weddell Sea. Due to its location in waters that are amongst the iciest in the world, it has been described as the 'most challenging shipwreck search'. The wreck has been found 'in a brilliant state of preservation' and is considered a historical monument and is protected by the Antarctic Treaty. See Henry Fountain, 'At the Bottom of an Icy Sea, One of History's Great Wrecks Is Found', (*The New York Times*, 9 March 2022) https://www.nytimes.com/2022/03/09/climate/endurance-wreck-found-shackleton.html (accessed 09 March 2022). Yin- Cheng Hsu, 'Developments in International Cultural Heritage Law: What Hampers the Convention on the Protection of the Underwater Cultural Heritage?' (2016) 3 *Edinburgh Student Law Review* 116, 117.

[19] Convention on the Protection of the Underwater Cultural Heritage (Paris, 2 November 2001, entered into force 2 January 2009), (2002) 41 ILM 37; hereinafter *UNESCO Convention*, Article 1.

[20] Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, (Martinus Nijhoff Publishers, 1995) 12.

[21] Tullio Scovazzi, 'Protection of Underwater Cultural Heritage: The UNCLOS and 2001 UNESCO Convention' 443-461, in David Joseph Attard (gen. ed.), Malgosia Fitzmaurice and Norman A Martinez Gutierrez (eds.), *The IMLI Manual on International Maritime Law*, (Vol. 1, International Maritime Organization, 2014) 443.

10,000 ships were sunk.[22] As stated by Bass *'The number of wrecks beneath the Seven Seas is truly unimaginable'.*[23] Therefore, the ocean is arguably the richest self-contained museum in existence.[24]

The rapid advancements in marine technology, over the past decades, allow exploration of the seabed at very great depths.[25] This, together with the increased utilisation of the oceans by mankind constitutes a huge threat to UCH. As a result of this technology researchers, scientists and archaeologists are able to penetrate deeper and further into the ocean floor with the result that new shipwrecks are being discovered constantly. However, these same technological benefits are also available to salvors, treasure hunters, the fishing and resource extraction industries who often fail to appreciate the significance of shipwrecks leading to premature erosion of the ships due to environmental disturbances and in extreme cases malicious destruction for objects and souvenirs.[26] Therefore, in order to adequately protect such wrecks, the international community responded by creating the Convention on the Protection of Underwater Cultural Heritage (UNESCO Convention).[27] The UNESCO Convention is primarily concerned with the protection of cultural heritage from human interference.

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[22] Michel L'Hour, 'Underwater Cultural Heritage from World War I: A Vast, Neglected and Threatened Heritage', in Guerin U., Rey da Silva A. and Simonds L. (eds.), *The Underwater Cultural Heritage from World War I* (United Nations Educational Scientific and Cultural Organisation, 2015) 97, 99.

[23] George F. Bass, *Beneath the Seven Seas: Adventures with the Institute of Nautical Archaeology*, (Thames and Hudson, 2005) 27.

[24] *Scovazzi* (n 21) 443.

[25] Sarah Dromgoole, 'Reflections on the Position of the Major Maritime Powers with Respect to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001', (2013) 38 *Marine Policy* 116, 116.

[26] *Strati* (n 20) xvi.

[27] *Dromgoole* (n 25) 116.

However, the significance of such wrecks could be disputable when they become an environmental or navigational hazard. The benefits of protecting UCH must be considered alongside the importance of protecting and preserving the marine environment. Some wrecks may therefore fall under the category of hazardous. These wrecks would typically have been carrying hazardous cargo including weapons, chemicals and fuels. A hazardous wreck, however, can also be a wreck that has become a problem to safe navigation due to its location. Such wrecks must be removed or necessitate an alternative course of action in order to mitigate such a threat. As will be examined later in this thesis, prior to 2015 international law did little to clarify the powers of a coastal State to deal with and regulate wrecks off its coast, nor did it apportion responsibility for the costs of wreck removal. The international community came to realise the importance and intricate issue of wreck removal and therefore the need for an international agreement became paramount. In an attempt to introduce a standard protocol, the International Maritime Organization (IMO)[28] produced the Nairobi International Convention on the Removal of Wrecks (Nairobi Convention).[29]

In addition, to complicate matters further a separate category would include State owned wrecks and wrecks that have been designated as war graves. War graves should be honoured as the final resting place for the sailors who lost their lives on them, whilst the interference with State owned wrecks is one of political sensitivity. Some of these wrecks may be placed in more than one category, which may result in

[28] The International Maritime Organization is a specialised agency of the United Nations which is concerned with the safety and security of shipping and the prevention of marine pollution.
[29] Nairobi International Convention on the Removal of Wrecks (adopted on 18 May 2007 in Nairobi, Kenya, entry into force 14 April 2015) 46 ILM 694; hereinafter *Nairobi Convention.*

a conflict of interests between concerned parties. To illustrate this point, we can consider cultural heritage endeavouring to protect and preserve wrecks whilst treasure hunters and recreational scuba divers attempt to remove parts for personal gain. Conflicting interests may also arise between ships that have been designated as war graves, which out of respect should be left untouched, and the environmental and navigational hazards which these wrecks may pose and therefore may need to be removed. A further complication with war graves and State owned wrecks which should be taken into consideration is the sovereign immunity from the jurisdiction of other States that is granted to or claimed by the flag State. Today, when a ship sinks it will inevitably cause an environmental concern to some degree. Under the UNESCO Convention, if a wreck remains underwater for 100 years it will become acknowledged as cultural heritage and as such be subject to the laws of cultural heritage and preservation.[30] Therefore, it is important to understand which norm would take precedence when dealing with a wreck which poses an environmental or navigational threat, but at the same time is protected by the preservation of cultural heritage or is a designated war grave. It is also vital to address the issue of State owned wrecks and what, if any, are the powers of other concerned States to intervene when such wrecks are hazardous.

Taking the aforementioned into consideration, the research question that this thesis aims to answer is the following: ‘Could the application of the Nairobi Convention be in conflict with the application of the UNESCO Convention?’ Whilst a reasonable amount of literature and research has been published on these topics independently,

[30] *UNESCO Convention* (n 19) Article 1(1)(a).

very little has been published on how these conventions would respond in a situation where both conventions are applicable. Further, this thesis will aim to examine the possibility of the emergence of a new rule of customary international law requiring States faced with an environmental threat from a wreck that is of historical or archaeological importance to eliminate the threat whilst at the same time protect and preserve the wreck *in situ* with minimal interference.

Chapter 2. Methodology

The methodology adopted to complete this thesis is primarily the doctrinal method, which is arguably the foundation used by most, if not all, legal researchers, constituting the most common methodology amongst legal research projects.[31] Doctrinal research is also referred to as 'library-based research' as it involves the examination and analysis of primary sources such as existing international law, legislation and case law as well as secondary sources such as journal articles and textbooks on a specific area of law.[32] The aim of doing so is to understand and answer the question of 'what is the law?' in a specific situation.[33] In 1987, the Pearce Committee defined doctrinal research as 'research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between [the] rules, explains areas of difficulty and, perhaps, predicts future developments.'[34]

The doctrinal method usually involves a two-part process, firstly the researcher will locate the sources of law and secondly will interpret and analyze the content of the sources.[35] The first part of the process is usually referred to as the 'literature

[31] Dawn Watkins and Mandy Burton, *Research Methods in Law*, (Second edition, Routledge, 2018) 8.
[32] Ibid 8. Primary sources include legislation, international conventions and case law whilst secondary sources include amongst others journal articles, periodicals, newspaper articles and books.
[33] Paul Chynoweth, 'Legal Research' in Andrew Knight and Les Ruddock (eds) *Advanced Research Methods in the Built Environment* (Wiley-Blackwell, 2008) 30.
[34] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, (Canberra: Australian Government Publishing Service, 1987).
[35] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83, 110.

review'.[36] In order to complete an adequate literature review on a specific topic the following questions must be answered: 1) what primary and secondary sources are available? 2) what has been said on the topic so far? The aim of the literature review is therefore to inform us of 'what is known and not known' on the topic.[37] Fink has defined a 'literature review' as 'a systematic, explicit and reproducible method for identifying, evaluating and synthesising the existing body of completed and recorded work produced by researchers, scholars and practitioners'.[38]

The second part of the process requires the use of 'tools' for the examination and analysis of the findings from the first part of the process. These 'tools' include the 'stare decisis and its complexities' and skills such as deductive logic, inductive reasoning, and analogy, which are the 'common law devices which allow lawyers to make sense of complex legal questions'.[39] *Stare decisis* is Latin for 'stand by the things decided', which is the requirement of the courts to base their decisions on previous precedent.[40]

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[36] Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 22–3.

[37]Maggie Walter (ed), *Social Research Methods* (Second edition, Oxford University Press, 2010) 485.

[38]Arlene Fink, *Conducting Research Literature Reviews: From the Internet to Paper*, (Second edition, Thousand Oaks, CA: Sage, 2019) 3.

[39] Irene Baghoomians, 'Thinking Like a Lawyer: A New Introduction to Legal Reasoning, by Frederick Schauer' (2009) 31(3) *Sydney Law Review* 499, 499.

[40] Chegwe Emeke Nelson, *Legal Research Methodology and Project Writing*, (LAP Lambert Academic Publishing, 2017), 247; International courts do not recognise the principle of stare decisis, therefore, there is no obligation for the court to follow the previous decision, however, in practice courts aim for consistency. For more information on the stare decisis principle and the practice of the international courts see: Gilbert Guillaume, The Use of Precedent by International Judges and Arbitrators, (2011), 2 *Journal of International Dispute Settlement* 1.

In the legal context, deductive logic has been described as 'the process of applying a rule of Law to a factual situation'.[41] In legal research, deductive reasoning gives rise to a syllogism. A researcher will identify the 'major premise' which is the 'given' general rule usually derived from legislation, which is then followed by the 'minor premise' which is a factual situation and finally, it is followed by the conclusion which will state whether the rule identified in the major premise can apply to the factual situation in the minor premise.[42] Inductive reasoning, however, identifies specific cases which then lead to the general rule, in other words 'the lawyer will have to examine several cases to find a major premise which underlies them all'. Finally, analogy is used by researchers to identify similar situations in various cases and then, argue that these cases should be decided applying the same general rule and should therefore result in similar outcomes. Farrar has stated that '[a]nalogy proceeds on the basis of a number of points of resemblance of attributes or relations between cases.'[43]

Turning specifically to this thesis, the aim will be to address the following questions: (1) what is the law and international treaties that currently govern international law of the sea, wreck removal and underwater cultural heritage? And (2) what has been stated on each of these topics so far?

Part two of this thesis will aim to address (1) how the international conventions work in practice, (2) what their strengths and weaknesses are and (3) if any conflicts exist

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[41] *Chynoweth* (n 33), 34.
[42] Ibid 32.
[43] *Hutchinson and Duncan* (n 35) 83.

in the application of both the Nairobi Convention and the UNESCO Convention and what consequences would that incur.[44]

[44] *McConville and Chui* (n 36).

Chapter 3. Need for global regimes that address wreck removal and the protection of UCH

3.1. Need for an International Convention on Wreck Removal

The need for the international community to react and create an international convention was highlighted in March 1967 when the *Torrey Canyon* ran aground on the Seven Stones, a submerged reef between Cornwall and the Isles of Scilly, which was then part of the high seas.[45] At the time of the incident there were no international laws governing the rights of a coastal State to intervene on the high seas in order to protect its coasts. The *Torrey Canyon* was in 1967 one of the largest oil tankers in the world, carrying 120,000 tons of crude oil en route from Mina, Kuwait to Milford Haven, Wales.[46] Following the accident, the cargo of oil immediately began to escape from the stricken vessel. The incident demanded that action had to be taken by the British government to protect its coastline and the marine and birdlife that would consequently be threatened. Within 12 hours of the spill the Royal Navy began spraying mixtures of highly toxic chemicals also referred to as detergents in an effort to emulsify the 30,000 tons of crude oil that had initially escaped from the wreck before it reached shore.[47] Efforts were also being made by Dutch salvage experts to refloat the vessel, these unfortunately were unsuccessful

[45] Richard Shaw, 'The Nairobi Wreck Removal Convention', (2007) 13 *Journal of International Maritime Law*, 429.

[46] Francesco Berlingieri, *International Maritime Conventions: Volume 3 Protection of the Marine Environment*, (Informa Law from Routledge, 2015), 3.

[47] Craig Vance Wilson, 'The Impact of the Torrey Canyon Disaster on Technology and National and International Efforts to Deal with Supertanker Generated Oil Pollution: An Impetus for Change?' (1973), Thesis submitted to the University of Montana, 85.

and resulted in the vessel breaking in two, releasing a further 50,000 tons of crude oil into the English channel.[48] In order to try and avoid further pollution, the British Government ordered that the wreck be destroyed by aerial bombardment, in the expectation that the remaining crude oil on board would burn off.[49] The Royal Navy and Royal Air Force dropped 28 tons of bombs, 16 rockets, 23,500 litres of petrol and large quantities of napalm on the wreck.[50] The attempt was partially successful, it has been estimated that the operation burned 20,000 tons of the remaining oil on board the wreck.[51] Unfortunately the oil that had escaped polluted 120 miles of the Cornish coast and 50 miles of the Normandy coast.[52] The disaster altogether including the clean-up operation which lasted months cost the United Kingdom (UK), France and the salvage company approximately USD24 million. An agreement was reached with the owners of the Torrey Canyon and USD7.2 million was paid which was divided equally between the UK and France.[53] They each received USD3.6 million, 70 per cent of which was paid by the insurers. The settlement was clearly not sufficient to cover the costs that the UK and France incurred.

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[48] Steven Rares, 'Ships that Changed the Law: The Torrey Canyon Disaster', (2018) *Lloyd's Maritime and Commercial Law Quarterly* 336, 338.
[49] Colin De La Rue and Charles Anderson, *Shipping and the Environment* (Second Edition, Informa, 2015) 10,11.
[50] *Rares* (n 48) 338.
[51] *Wilson* (n 47) 103.
[52] *Rares* (n 48) 338.
[53] *Wilson* (n 47) 128.

This incident clearly indicated that existing legal regulations regarding the intervention powers of a coastal State when faced with such an incident were inadequate. The UK Government in this case was criticized by the media and opposition members of parliament for acting too slowly. However, the Wilson Government proceeded with this action despite the fact that there was no precedent in law to do so and without having consulted the owners and salvors on the final decision to bomb the wreck.[54] Prime Minister Wilson stressed the urgent need for new international regulations and necessary changes to existing international laws and practice.[55]

The significance of the *Torrey Canyon* was that she presented to an unprepared world a new type of threat, the first major oil spill and the ensuing environmental disaster. It highlighted the inadequacies in international law when faced with such an incident. The intervention powers of a coastal State, the legal liability and the insurance to cover costs were fundamental issues that needed to be addressed.

The relevant question at the time was to what extent a coastal State has authority to intervene beyond its territorial sea in order to protect its coastline, harbours and territorial waters.[56] States in the past have justified their intervention on the grounds of self-preservation.[57] It has been suggested that the acceptance by the international community of the UK's intervention in the *Torrey Canyon* case created a new

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[54] Ibid 105.
[55] House of Commons Debate, 'Torrey Canyon', 04 April 1967 Vol 744 cc38-54, 42.
[56] Nicholas Gaskell and Craig Forrest, 'The Wreck Removal Convention 2007', (2016) *Lloyd's Maritime and Commercial Law Quarterly* 52.
[57] Robin R. Churchill and Vaughan Lowe, *The Law of the Sea*, (Third Edition, Manchester University Press,1999) 216.

principle of customary international law.[58] Customary international law will be analysed later on in the thesis, but it is essentially international custom which through State practice is accepted as law.[59] This has also been acknowledged by the IMO when it declared that the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969 (Intervention Convention) 'affirms' intervention rights on the high seas.[60] Whilst a customary right to intervene with a vessel that poses a threat to the environment may have come into existence following the *Torrey Canyon* incident, a convention would surely clarify and reinforce this new principle of customary international law.[61]

To initiate this action the IMO formed a Legal Committee, to look into the possible creation of international conventions that addressed the issues of liability and compensation when faced with such a disaster.[62] The outcome of the Legal Committee's deliberations was the adoption of the International Convention on Civil

[58] Ibid 355.

[59] Statute of the International Court of Justice, (adopted in San Francisco on 26th June 1945, entry into force 24th October 1945), 15 UNCIO 355, Article 38(1)(b); State practice includes but is not limited to national legislation, decisions by domestic courts, government publications, press releases, statements made by international organisations, statements in international conventions, parliamentary statements.

[60] IMO, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, https://www.imo.org/en/About/Conventions/Pages/International-Convention-Relating-to-Intervention-on-the-High-Seas-in-Cases-of-Oil-Pollution-Casualties.aspx (accessed 20 November 2022); International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (adopted in Brussels on 29th November 1969, entry into force 6 May 1975), 970 UNTS 211; hereinafter *Intervention Convention.*

[61] Craig Forrest, 'Culturally and Environmentally Sensitive Sunken Warships' (2012), 26 Australian and New Zealand Maritime Law Journal, 80, 87.

[62] The IMO Legal Committee came into existence as a subsidiary body of the Council following the *Torrey Canyon* incident. It now meets twice a year and oversees all the legal work of the IMO, including the negotiation of IMO conventions.

Liability for Oil Pollution 1969 (CLC),[63] the Convention on the Establishment of an International Fund for Oil Pollution Damage 1971 (Fund Convention), [64] and the Intervention Convention.[65]

3.1.1. Intervention Convention

The Intervention Convention was created in order to protect the interests of coastal States from the potential devastating consequences of a maritime casualty which could lead to the pollution of the sea and its coastline. It currently has 90 contracting

[63] International Convention on Civil Liability for Oil Pollution Damage, (adopted in Brussels on 29th November 1969, entry into force 19 June 1975), 973 UNTS 3; hereinafter *CLC*. The CLC and Fund Convention were created to deal with liability and compensation claims that may arise following an incident. The CLC as amended by the 1992 Protocol has been adopted by 140 States which represent 97% of the world's trade. It applies to pollution damage caused by a ship constructed to carry oil as cargo within the territorial sea of a contracting State or its EEZ. The CLC imposes strict liability on the ship owner at the time of the incident with limited exceptions which include acts of war, intentional damage caused by a third party and damage caused by the negligence of a government. In addition, it requires the owner of a ship carrying more than 2,000 tons of oil as cargo to maintain insurance to cover the possible pollution it may cause. Finally, it entitles the ship owner to limit his liability to a proportionate amount to the tonnage of the ship. *See* Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage (adopted in London on 27th November 1992, entry into force 30th May1996), 1956 UNTS 255, Articles II (a), II (b), III, VII, V.

[64] International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (adopted in Brussels on 18th December 1971, entry into force 16 October 1978), 1110 UNTS 57; hereinafter *Fund Convention.* The original 1971 Fund Convention was terminated in 2002 when the number of contracting states dropped below 25, at which point it was replaced by the 1992 Fund Protocol which came into force in 1996. It addressed two important concerns that were not dealt with under the CLC. The first concern was that the amount of compensation available under the CLC was insufficient to cover the actual costs of an incident due to the provision that empowers the ship owner to limit his liability. The second concern was that the burden placed on ship owners for providing full compensation in case of an incident under the CLC was too high. In order to address this concern, the burden had to be transferred to the oil industry as a whole and not exclusively on the ship owner. The fund is financed by receivers of oil cargoes in party States by applying a governmental levy. The key objective of the Fund Convention is to provide compensation in cases where the compensation provided under the CLC is insufficient because the cost exceeds the ship owner's liability or in cases where the ship owner has insufficient funds to cover the compensation and any financial security provided does not cover the full sum incurred. *See* Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971, (adopted in London on 27th November 1992, entry into force 30th May 1996).

[65] *Intervention Convention* (n 60).

States which represent 75.20% of the world's merchant fleet.[66] Under Article I of the Intervention Convention coastal States that are:

'Parties to the present Convention may take such measures on the high seas as may be necessary to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat of pollution of the sea by oil, following upon a maritime casualty or acts related to such a casualty, which may reasonably be expected to result in major harmful consequences'.[67]

Essentially the Intervention Convention empowers a coastal State to react and take measures on the high seas when its interests are threatened by pollution. That State is however, first obliged to consult with other affected States and the flag State of the vessel involved.[68] In addition, the convention fails to elaborate on what measures may or may not be enacted to successfully protect a State's coastline. It simply stipulates that the measures must be proportionate to the damage or threat posed.[69] It further states that measures taken should not go beyond what is reasonably necessary and shall not unnecessarily interfere with the rights of the flag State or other States.[70] If a State should undertake such excessive measures that result in damage to other parties then that State can be held accountable for compensation claims.[71] This lack

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[66] International Maritime Organization (IMO), 'Comprehensive information on the Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions', available at: https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20of%20IMO%20Treaties.pdf , (accessed 10 September 2022) 243.
[67] *Intervention Convention* (n 60) Article I.
[68] Ibid Article III(a).
[69] Ibid Article V (1).
[70] Ibid Article V (2).
[71] Ibid Article VI.

of clarity regarding the exact measures a coastal State may or may not take in order to protect its coastline may lead to different interpretations and actions by individual States. What may seem appropriate action to one State could be deemed inappropriate by another.

The Intervention Convention does not specifically include wrecks, even though the threat to the marine environment may emanate from one. Article II of the Intervention Convention defines a maritime casualty as:

'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it resulting in material damage or imminent threat of material damage to a ship or cargo.'[72]

Although the definition of 'maritime casualty' does not include the term wreck and specifically refers to ships and cargo, Article I states that a coastal State may take measures 'following upon a maritime casualty or acts related to such a casualty',[73] thus, arguably allowing a broad interpretation and application of the Intervention Convention. One could argue that acts relating to a maritime casualty could include the sinking of a vessel and therefore a coastal State could take measures if the threat emanates from a wreck. The drafting of the Intervention Convention is not clear, leaving certain aspects open for interpretation. It is safe to say that it is evident, from the wording of the convention, that it was drafted with the intention of applying to seagoing ships and not wrecks.

[72] Ibid Article II.
[73] Emphasis added.

However, if wrecks were to be covered by the Intervention Convention, paradoxically it could be interpreted as though a coastal State could also intervene if the threat emanates from a State owned wreck or sunken warship. This is because the Intervention Convention does not exclude the application of the convention to sunken warships or State owned wrecks. The Intervention Convention does not empower the coastal State to take measures against a warship or any other State-owned vessel if acting on government service, without obtaining the flag State's prior approval.[74] Article I (2) excludes the application of the convention to warships and State owned vessels due to sovereign immunity. It does not, however, exclude the application to sunken warships and State owned wrecks. This failure to exclude State owned wrecks potentially allows the coastal State the freedom to take action that it deems appropriate to contain the threat. In order to clarify this inconsistency, the possibility of a rule of customary international law will be looked into that prohibits the interference with sunken warships and State owned wrecks. Further, the definitions of a 'ship' and a 'wreck' will be examined later on in the thesis to clearly identify the distinction between them.

In addition, the Intervention Convention is only concerned with the threat of oil pollution, thereby excluding from its scope a wreck which is a navigational hazard but does not pose a direct danger of pollution. This was also highlighted by the Netherlands in a document submitted to the IMO which stressed the need of a freestanding regime. [75] This document emphasized the deficiencies to deal with such

[74] Ibid Article I (2).
[75] IMO Documents, 'The relationship between the draft wreck removal convention (DWRC) and the Intervention Convention' LEG 85/3/1 (17th September 2002).

wrecks that may still pose navigational and environmental problems but fail to meet the high threshold of 'grave and imminent danger to the coastline' required by the Intervention Convention.[76] Therefore, it was clear that the scope of the Intervention Convention was rather limited and predominantly focused on reaction with little emphasis on preventative measures.

It can therefore be concluded that the powers of a coastal State in international law were not sufficient when it came to regulating and dealing with wrecks off their coasts. An international convention addressing these legal gaps and uncertainties in relation to wrecks was clearly necessary.

3.2. Need for an International Convention on the Protection on UCH

Moving on to UCH and the need for an international convention, a shipwreck may have archaeological, aesthetic, educational, recreational, economic and spiritual value, as well as making a significant contribution to history; therefore, it is in everyone's best interest to make sure that such underwater sites are not plundered by unregulated activities.[77] Historic shipwrecks attract three main groups, the recreational scuba divers, the treasure hunters/salvors and the archaeologists.[78] However, each group has a totally different interest in the shipwrecks. The recreational scuba divers dive on wrecks mainly for leisure and excitement but often

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[76] Ibid.

[77] Anne M Cottrell, 'The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks', (1993) 17 *Fordham International Law Journal* 3, 667, 667.

[78] Douglas B. Shallcross and Anne G. Giesecke, 'Recent Developments in Litigation Concerning the Recovery of Historic Shipwrecks', (1983) 10 *Syracuse Journal of International Law and Commerce* 2, 371, 371.

aim to recover some 'souvenirs' as proof of their experiences. The treasure hunters/salvor's interests are for the money involved and are not necessarily concerned about the cultural value, while the archaeologist's main concern is with the preservation of the cultural and historical value.[79]

In 1977, during a debate in the Parliamentary Assembly of the Council of Europe on the progress of the 3rd United Nations Conference on the Law of the Sea (UNCLOS III) the need to address UCH was highlighted.[80] More specifically, speaking for the UK, Mr John Roper, who was the Vice Chairman and Rapporteur of the Committee on Culture and Education, pointed out the need for international control and responsibility.[81] He stated that without control '[a] skin diver going down can mess up in a weekend of exploration whole historical records which should be disinterred with care.'[82] Subsequently in 1978, the first in-depth study on UCH was published in a report known as the 'Roper Report' by the Council of Europe.[83] The report identified that the main dangers relating to UCH were the intentional interference by humans, illegal salvage by professional and amateur treasure hunters, damage caused by natural deterioration for example corrosion and unintentional human interference such as fishing and pipeline operations.[84]

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[79] Lucius Caflisch, 'Submarine Antiquities and the International Law of the Sea', (1982) 13 *Netherlands Yearbook of International Law* 3, 4.
[80] Council of Europe, Parliamentary Assembly – Official Report of Debates, Twenty-Eighth Ordinary Session, 24 January 1977, (20th Sitting) 653-688, 682.
[81] Ibid 682.
[82] Ibid 683.
[83] Council of Europe, *The Underwater Cultural Heritage*, Report of the Committee on Culture and Education, Parliamentary Assembly of the Council of Europe (Rapporteur: Mr. John Roper), Doc. 4200, Strasbourg, 1978.
[84] Ibid 6.

Nowadays, there is a far greater emphasis on the international community to recognise the significance of UCH. This can be seen by the joint effort of the international community to create a relevant Convention for the protection of UCH. UCH and more specifically shipwrecks are significant for various reasons as previously mentioned and therefore it is important from an archaeologist's point of view that they are protected.

3.2.1. Historic Value of wrecks

A shipwreck may have an archaeological and historical value as it can provide vital evidence of the past. Each shipwreck has its own fascinating story, which when uncovered can reveal vital clues to the past, such as the development and interaction of humans with the oceans.[85] It reveals how civilized societies lived and changed in the different eras, it shows the commercial routes taken and the evolution of marine technology.[86] Locating a shipwreck may assist archaeologists and scientists in resolving some of history's enigmas. For example, the discovery and investigation of the sunken warship *Vasa*, which sank just outside the harbour of Stockholm, Sweden on its maiden voyage on the 10th August 1628, contained many invaluable artefacts which significantly enhanced our knowledge of everyday life in the early 17th century.[87] Further examples of historic wrecks from past centuries include the *Mary Rose* which sank in 1545 in the Solent and *La Trinidad Valencera* which was part of

[85] *Vadi* (n 17) 857.
[86] Ibid 857.
[87] Carl O. Cederlund, Frederick M. Hocker, *Vasa I: The Archaeology of a Swedish Warship of 1628*, (The Swedish State Maritime Museum, 2006).

the Spanish Armada that sunk in 1588 off Ireland after the unsuccessful invasion of England.[88]

Whilst many will associate historic wrecks with wrecks from the past centuries, other factors should also be taken into account when determining whether a wreck is of historical importance including its uniqueness, connection to specific historical events and/or its association with important individuals.[89] Wrecks from WWI and WWII will inevitably have historic importance and are arguably worthy of protection due to their connection to historical events. Various States have protected such wrecks under their domestic legislation, for example, the UK has protected the WWI German fleet that was scuttled on 21st June 1919 at Scapa Flow, Scotland under the Ancient Monuments and Archaeological Areas Act 1979.[90]

A wreck may also have historic importance due to the fact that it is a unique type of vessel such as the *Graf Zeppelin*, which was the only aircraft carrier of Nazi Germany.[91] In some cases, wrecks may represent important historic events for specific States such as the *HMS Hood* which has been referred to as 'the greatest warship to have hoisted the White Ensign since *HMS Victory*'.[92] The *HMS Hood* was lost during the battle of the Denmark Strait in 1941 taking the lives of 1,415

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[88] *Forrest* (n 61) 80.

[89] Sarah Dromgoole and Craig Forrest, 'The Nairobi Wreck Removal Convention 2007 and Hazardous Historic Shipwrecks', (2011) *Lloyd's Maritime and Commercial Law Quarterly* 92, 106.

[90] Historic Environment Scotland, Scapa Flow, Wrecks of 3 battleships of German High Seas Fleet, accessed at http://portal.historicenvironment.scot/designation/SM9298 (accessed 11th November 2022); other examples include the Japanese vessels which sunk during World War II in Chuuk Lagoon which are protected under the Chuuk State Law.

[91] *Forrest* (n 61) 80.

[92] Bruce Taylor, *The Battlecruiser HMS Hood: An Illustrated Biography 1916-1941*, (Catham Publishing, London, 2004) 8.

members of the crew with only three survivors.[93] Today, it is protected under the Protection of Military Remains Act 1986.[94] Other wrecks may be of historical importance due to their connection with famous individuals such as the patrol torpedo boat *PT-109*. This boat was under the command of John F. Kennedy, who went on to become the 35th president of the United States of America (US), when it collided with the Japanese destroyer *Amagiri*.[95] However, those wrecks that have not reached the 100-year requirement under the UNESCO Convention can only be protected through national laws if they are located within a State's territorial sea.

3.2.2. Wrecks as War Graves and Maritime Gravesites

Apart from being historically important shipwrecks may be a burial site for people who lost their lives on them and as such should be respected as their last resting place.[96] The British government for example, designated the *HMS Hood* mentioned above as a war grave in 2002.[97] Similarly, the *HMS Royal Oak* is one of the UK's largest designated war graves having lost 458 sailors when it was sunk by German U-boat *U-47* in 1939.[98]

Although it is warships that usually gain status as war graves, merchant vessels that foundered during peace and war should also be respected. The *RMS Lusitania* which

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[93] Bruce Taylor, *The End of Glory: War &Peace in HMS Hood 1916-1941*, (Seaforth Publishing, 2012) 196.
[94] The Protection of Military Remains Act 1986 (Designated Vessels and Controlled Sites) Order 2017.
[95] *Forrest* (n 61) 80.
[96] Christopher R. Bryant, 'The Archaeological Duty of Care: The Legal, Professional, and Cultural Struggle Over Salvaging Historic Shipwrecks', (2001) 65 *Albany Law Review* 1, 97, 100.
[97] The Protection of Military Remains Act 1986 (Designated Vessels and Controlled Sites) Order 2002.
[98] *Forrest* (n 61) 81.

remained a passenger ship during WWI was torpedoed by German U-boat *U-20* and subsequently sank 18 minutes later in May 1915, killing 1,198 passengers.[99] Ireland has made an Underwater Heritage Order under Article 3 of the National Monuments (Amendment) Act 1987 which protects the *RMS Lusitania* from unwanted interference by people trying to 'tamper with, damage or remove any part of the wreck'.[100] Another example is that of the *Wilhelm Gustloff*, a cruise liner which was tasked with transporting over 10,000 German civilians trying to flee the Red Army.[101] The three torpedoes fired by the Russian submarine *S-13* on 30th January 1945 were enough to create the world's worst maritime disaster, killing 9,343 people.[102] In order to protect the wreck the Polish government has declared the site to be a war grave and has prohibited diving within a 500 metre radius.[103]

Not only is it important that such sites are respected as the last resting place for the people who lost their lives but should also be protected from interference as human remains can be discovered several hundred years later. This was the case with the *Mary Rose*, 385 personnel including soldiers and sailors lost their lives when the

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[99] Roberta Garabello and Tullio Scovazzi (eds.), *The Protection of the Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention*, (Martinus Nijhoff Publishers, 2003) 77.
[100] Underwater Heritage Order – Wreck of the Lusitania No. 14 of 1995.
[101] Bill Niven, 'The Good Captain and the Bad Captain: Joseph Vilsmaier's Die Gustloff and the Erosion of Complexity', (2008) 26 (4) *German Politics & Society* 82; The Red Army refers to the army and air force of the Russian Soviet Army created by the Communist government after the Bolshevik Revolution 1917.
[102] Ibid.
[103]Zarządzenia Porządkowego Nr 9 Dyrektora Urzędu Morskiego w Gdyni z dnia 23 maja 2006 r. w sprawie zakazu nurkowania na wrakach statków-mogiłach wojennych (Dz. Urz. Woj. Pom. z dnia 12 czerwca 2006 r. Nr 62, poz. 1276), https://www.umgdy.gov.pl/wp-content/uploads/2018/10/PM_Wykaz_wrakow_zabronionych_20180702.pdf (accessed 20 November 2022).

ship foundered in 1545. Subsequently, 92 skeletons were recovered intact.[104] Similarly, over 1,500 human bone fragments from at least 25 different individuals have been recovered from the *Vasa*.[105] Finally, human remains have also been found on *HMS Victory,* which foundered in the English Channel on 5th October 1744 taking the lives of approximately 900-1100 seafarers, marines, and volunteers.[106]

3.2.3. Economic Value of Wrecks

A shipwreck can be of economic value in that throughout the years vessels have been used to transport cargo of significant value. Some examples include the *SS Gairsoppa* and the *SS Mantola* both sunk as a result of action by German U-boats. The *SS Gairsoppa* sunk by torpedo in February 1941 was at the time carrying a large amount of silver with an estimated value of £600,000 (1941 value). Likewise the *SS Mantola* also sunk by a torpedo on 8th February 1917, had a cargo of silver worth £110,000 at that time.[107] The *Nuestra Señora de las Mercedes* was a Spanish warship carrying nearly 600,000 silver coins weighing 17 tons, hundreds of gold coins and other artefacts when it was sunk by a British frigate, on 5th October 1804 while the countries were at peace.[108]

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[104] Neil Cunningham Dobson & Hawk Tolson, 'A Note on Human Remains from the Shipwreck of HMS Victory, 1744', (2010) Odyssey Marine Exploration Papers 11 http://www.victory1744.org/documents/OMEPaper11-HumanRemainsfoundonVictory.pdf (accessed 10 November 2022), 6.

[105] Ibid.

[106] Ibid.

[107] Odyssey Marine Exploration, 'Odyssey Marine Exploration Reports Results for Third Quarter 2011', http://www.shipwreck.net/pr236.php (accessed 13 November 2021).

[108] Odyssey Marine Exploration, 'Shipwrecks', http://www.shipwreck.net/shipwrecks.php (accessed 13 November 2021).

Additional wrecks which have been despoiled include *The Geldermalsen* a Dutch East Indiaman ship, which foundered on the Admiral Stellingwerf reef, off Bintan Island near Indonesia in 1751 loaded with a cargo that contained porcelain, tea, silk and gold.[109] In 1986 a British ship salvor located the remains of the wreck and with little concern for the cultural significance proceeded to salvage 126 bars of gold and 160,000 pieces of porcelain. The cargo was clearly plundered for commercial gain totally disregarding its historical importance. The porcelain was subsequently auctioned in Amsterdam, Holland under the name of 'The Nanking Cargo'.[110] Similarly, in 1999 approximately 350,000 pieces of porcelain were salvaged from *The Tek Sing* which sank in 1822 in the South China Sea. The porcelain was subsequently auctioned in Stuttgart, Germany.[111] Once again the salvors showed little respect for the significance of the wreck and the 1,500 people who perished when the ship went down.[112]

However, more recent wrecks may also have a high salvage value, for example, the *HMS Edinburgh* which sank in 1942 after being attacked by German submarines and subsequently scuttled by her crew was transporting gold worth £70 million.[113] Similarly, the Japanese submarine *I-52* was carrying 2.2 tons of gold with an estimated market value of USD61 million when it was sunk on 25 June 1944.[114] The

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[109] United Nations Educational, Scientific and Cultural Organization, *Information Kit – UNESCO Convention on the Protection of the Underwater Cultural Heritage*, CLT/CH/INS/06/12, 7.
[110] Ibid 7.
[111] Ibid 6.
[112] Ibid.
[113] Michele Blagg, 'Let her Rest in Peace: HMS Edinburgh and her Cargo of Gold', (2014) 108 *Institute for Contemporary British History, King's College London*, 1.
[114] Paul M. Edwards, *Between the Lines of World War II: Twenty-One Remarkable People and Events*, (2010, McFarland & Company Inc.) 49, 52.

financial value of these ships is clearly evident and illustrates the debate between salvage companies, who are concerned with the monetary value involved, and archaeologists who are more concerned with the cultural and historical significance of UCH.

3.2.4. Possible Deterioration of Wrecks

Another concern when salvaging historically important objects is the risk of deterioration. This phenomenon occurs on substances such as wood and faience.[115] When the *Vasa* was raised in 1961 its exposure to oxygen caused chemical reactions in the wood.[116] In order to properly preserve the wreck from cracks and shrinkage the wreck underwent a thorough conservation treatment of spraying a water soluble wax on the wood.[117] In addition, specialised climate-control systems were installed in order to maintain the air humidity at optimum levels. Prior to the specialised climate-control systems, the extra moisture found around the wreck was absorbed by the wood which resulted in the creation of yellow and white acidic formations on the wood.[118] An almost identical technique was used to preserve the wreck of the *Mary Rose* and its objects recovered from the site.[119] It is important that such wrecks cannot be accessed by people who have little concern for their archaeological significance without prior consent and who possess insufficient knowledge of how to

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[115] Ibid 4.
[116] Vasa Museet,'Timeline for Vasa's Preservation', accessed at https://www.vasamuseet.se/en/research-preservation/how-we-preserve-vasa/preservation-timeline (accessed 22 September 2022).
[117] Ibid.
[118] Ibid.
[119] The Mary Rose, 'Conservation of the Mary Rose' accessed at: https://maryrose.org/conservation/ (accessed 10 October 2022).

properly conserve them. Even though preservation *in situ* is the ideal solution to preserve such wrecks, if they must be excavated the necessary conservation treatments should be taken in order to avoid deterioration. Clearly, an international convention that regulates activities on such wrecks would offer some protection. It has been argued that excavations without the proper conservation results in vandalism.[120]

3.3. Concluding Remarks

It is clearly evident that a gap existed in international law and that further treaties were needed to govern wreck removal as well as UCH. From the very first major oil disaster in 1967, coastal countries in particular have been playing catch up, trying to create a universal convention that would cover every eventuality. The Intervention Convention was limited in that it was primarily concerned with the threat of oil pollution and was very reactive with very little scope to be proactive. It failed to adequately address polluting shipwrecks and failed to give powers to coastal States to deal with such wrecks.

Likewise, the importance for the protection of UCH is indisputable, whether of historical, archaeological, or economic importance, or whether it is a maritime gravesite. It is important that such wrecks are appropriately protected from unwanted human interference that show little regard to protecting and preserving UCH. Prior to the adoption of the United Nations Convention on the Law of the Sea (UNCLOS), which will be discussed in detail in chapter 4, UCH at an international level was a

[120] Ibid 4.

trivialized and neglected subject.[121] This can be demonstrated by the absence of any substantial provisions regarding UCH in all other preceding international legal frameworks.[122] The lack of advanced technology prior to the 1950's made the recovery of antiquities non-viable and therefore it was unforeseeable at that time that problems would arise.[123] However, the aforementioned examples emphasised the significance of UCH and justify the need for an international regime that regulates their protection.

[121] United Nations Convention on the Law of the Sea, (opened for signature in Montego Bay 10 December 1982, entry into force 16 November 1994) 1833 United Nations Treaty Series (hereinafter UNTS) 3; hereinafter *UNCLOS.*

[122] Lowell B. Bautista, 'Gaps, Issues, and Prospects: International Law and the Protection of Underwater Cultural Heritage', (2005) 14 *Dalhousie Journal of Legal Studies* 57, 59.

[123] Anastasia Strati, 'Draft Convention on the Protection of Underwater Cultural Heritage: A commentary prepared for UNESCO', UNESCO Doc. CLT-99/WS/8, April 1999, 4.

Chapter 4. Analysis of the existing international frameworks

Having identified the importance and need for international regimes that govern the protection of UCH and wreck removal, it is worth taking a step back to ask what, if any, is the position under UNCLOS on these topics. In addition, in order to set the scene for a thorough analysis of the research question, it is vital to identify and define some of the key definitions that govern the jurisdiction of the seas under international law. Further, this chapter will examine and introduce the conventions created in response to the gaps identified in respect to hazardous wrecks and protection of UCH, namely the Nairobi Convention and the UNESCO Convention.

4.1. United Nations Convention on the Law of the Sea (UNCLOS)

Today, the international law of the sea is predominantly governed by UNCLOS, which came into force on the 16th of November 1994.[124] It is the main international convention governing jurisdiction of the seas and one of the most widely ratified treaties with 168 parties which represent 167 States and the European Union.[125] It has established a significant legal framework, which regulates two-thirds of the earth's surface. Therefore, it has rightly been described as '*a constitution for the*

[124] Status as at 26 November 2022, United Nations Treaty Collection, Depositary - Status of Treaties, United Nations Convention on the Law of the Sea, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI6&chapter=21&Temp=mtdsg3&clang=_en (accessed 26th November 2022).
[125] Ibid.

oceans'.[126] It was the culmination of the conflict between costal States wanting to extend their influence and sovereignty further away from their land and the freedom afforded to all States on the high seas.[127]

This convention as well as seeking to clarify the definition, nature and extent of international jurisdiction in the territorial sea, and other marine zones has also created new zones such as the exclusive economic zone (EEZ) and the Area. In total UNCLOS sets out six marine water zones, namely: internal waters,[128] territorial sea,[129] archipelagic waters,[130] contiguous zone,[131] EEZ,[132] and the high seas[133] and two underwater marine zones, the continental shelf,[134] and the Area.[135] Some argue that it may have also created an archaeological zone.[136] However, even though UNCLOS is considered to be the most extensive and detailed treaty of international law, as will be analysed below, the existence of legal gaps and ambiguities was inevitable. Often during the drafting phase, participating States fail to foresee or deliberately leave gaps as some topics at that time are not clearly understood or are

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[126] Ambassador Tommy Koh in the Statements made on 6 and 11 December 1982 at the final session of UNCLOS III, in Myron H. Nordquist (ed.), *United Nations Convention on the Law of the Sea 1982: A Commentary,* (Vol. 1, Martinus Nijhoff Publishers 1994) 11

[127] Maria Gavouneli, *Functional Jurisdiction in the Law of the Sea*, (Martinus Nijhoff Publishers 2007) 1. The high seas are open to all States, whether coastal or land locked. The concept is codified under Articles 86 - 87 of UNCLOS; *UNCLOS* (n 121) Articles 86 and 87.

[128] *UNCLOS* (n 121) Article 8.

[129] Ibid Article 2.

[130] Ibid Article 46.

[131] Ibid Article 33.

[132] Ibid Article 55.

[133] Ibid Articles 86 and 87.

[134] Ibid Article 76.

[135] *Gavouneli* (n 127) 3; UNCLOS (n 121) Article 1(1)(1).

[136] UNCLOS (n 121) Articles 303 and 149; see *Strati* (n 20); Tullio Scovazzi, The Protection of Underwater Cultural Heritage: Article 303 and the UNESCO Convention, in David Freestone, Richard Barnes and David Ong (eds.), The Law of the Sea. Progress and Prospects, (Oxford 2006) 120-136.

not developed enough and it is therefore anticipated that further developments will be needed in the future.

For the purpose of this thesis, it is vital to define the maritime zones that are referred to in both the Nairobi Convention and the UNESCO Convention. Further, it is important to examine whether UNCLOS addresses the two topics of interest, namely wreck removal and UCH or whether further development was anticipated and was necessary.

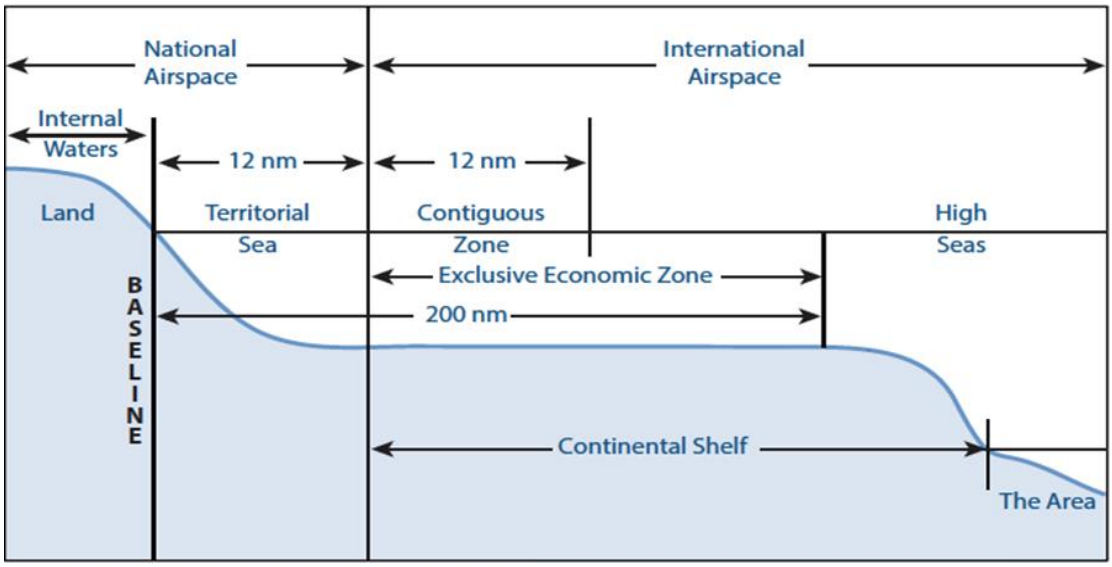

Figure 2: Schematic map of Maritime Zones. Source: International Institute for Law of the Sea Studies.

4.1.1. Territorial Sea

In accordance with Article 2(1) of UNCLOS:

‘The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.’[137]

States can exercise this sovereignty subject to the provisions of UNCLOS and other international laws.[138] The territorial sea can extend up to a limit of 12 nautical miles, measured from baselines.[139] Landward of the 12 nautical miles the coastal State has complete jurisdiction on all matters, including over its seabed and subsoil as well as the airspace above it, subject to other provisions of UNCLOS, such as the right of innocent passage by any foreign flagged vessel.[140] This implies that, subject to the right of innocent passage, the coastal State is entitled to regulate the removal of wrecks as well as the protection of UCH in any way it deems necessary.[141] A controversial subject within the territorial sea is the sovereign immunity of sunken warships and State owned wrecks, this will be analysed later on in the thesis under chapter 5.

4.1.2. The Exclusive Economic Zone and the Continental Shelf

One of the most important developments of UNCLOS was the formation of the EEZ. The EEZ is an area beyond and adjacent to the territorial sea, which does not extend

[137] *UNCLOS* (n 121) Article 2(1).
[138] Ibid Article 2(3).
[139] Ibid Article 3.
[140] Ibid Article 17.
[141] *Dromgoole* (n 15) 248.

beyond 200 nautical miles.[142] The EEZ was created to complement the continental shelf, which is defined under Article 76(1) of UNCLOS as:

'The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'[143]

Both zones provide coastal States sovereign rights, but only in relation to natural resources. Article 56(3) proclaims that where a State has established an EEZ, the provisions in relation to the seabed and subsoil of the EEZ will be dealt with in accordance with the provisions of the continental shelf.[144]

A coastal State that has claimed an EEZ has sovereign rights and jurisdiction 'for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.'[145] A coastal State also has jurisdiction over the establishment and use of artificial islands, installations and structures, marine

[142] *UNCLOS* (n 121) Article 57.
[143] Ibid Article 76(1).
[144] Ibid Article 56(3).
[145] Ibid Article 56(1)(a).

scientific research and the protection and preservation of the marine environment.[146] The rights afforded to the outer continental shelf, which is the area that extends beyond the 200 nautical mile EEZ, are governed by Article 77 (1) which states that 'the coastal State has sovereign rights for the purpose of exploring and exploiting its natural resources'.[147]

[146] Ibid Article 56(2).
[147] Ibid Article 77(1).

4.1.3. UNCLOS on UCH

As mentioned above, prior to the adoption of UNCLOS, UCH at an international level was a neglected subject. The issue of UCH was brought up during the negotiations for the adoption of UNCLOS, however, it received very little attention by the participating states, as it was considered to be a 'relatively new field of research'.[148] Therefore, it came as no surprise that there were only two provisions that made specific reference to UCH in UNCLOS, these being Article 149 and Article 303.[149] Both are arguably fragmented, vague and open to differing interpretation. Prior to the adoption of the UNESCO Convention, UNCLOS was the only substantive international law covering UCH.[150]

4.1.3.1. Article 303 – Archaeological and historical objects found at sea

Under Article 303(1) of UNCLOS 'States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.'[151] This implies that even though a coastal State has full sovereignty in its territorial waters as mentioned above, should an UCH site be discovered the coastal State is required to protect and to cooperate with other interested States for the protection of the UCH site. It follows that if a coastal State destroys or damages a

[148] Keith Muckelroy, *Maritime Archaeology,* (Cambridge University Press, 1978) 23
[149] *UNCLOS* (n 121) Articles 149, 303
[150] Vincent P Cogliati-Bantz and Craig J S Forrest, 'Consistent: The Convention on the Protection of the Underwater Cultural Heritage and the United Nations Convention on the Law of the Sea', 2013 2, *Cambridge Journal of International and Comparative Law*, 3, 536,537; it is worth mentioning that even though there was no substantive international law covering UCH prior to the UNESCO Convention, bilateral and multilateral treaties existed such as the 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).
[151] *UNCLOS* (n 121) Article 303(1).

sunken foreign flagged vessel within its own territory, without the prior approval from the other interested State it will possibly be in violation of not only the requirement to protect UCH but also the duty to cooperate.[152] This may be seen as undermining the exclusive sovereignty that coastal States rightly claim within their territorial waters, however, the duty to cooperate with other interested States is widely welcomed by flag States who for example, claim sovereign immunity over their sunken warships.

Article 303(2) provides that removal of objects of an archaeological and historical nature within the maritime zone referred to in Article 33, the contiguous zone, without the prior consent of the coastal State infringes its rights.[153] The contiguous zone is a maritime zone that can extend up to 12 nautical miles adjacent to the territorial sea and which may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.[154] It is the only zone under UNCLOS which provides the coastal States with sovereign rights in relation to UCH.

Article 33(1) of UNCLOS states:

'1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

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[152] Michail Risvas, 'The Duty to Cooperate and the Protection of Underwater Cultural Heritage', (2013) 2 *Cambridge Journal of International and Comparative Law* 3, 562, 570.

[153] Ibid Article 303(2) which states: '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.'

[154] Ibid Article 33 (2): '2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.'

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'[155]

The pertinent question that arises from this, is what rights Article 303(2) actually gives to a coastal State. This question continues to create major debates between academics. Article 303(2) essentially states that the removal of archaeological and historical objects from the contiguous zone of a State would violate domestic laws that have no relevance to UCH, such as customs, fiscal and immigration laws.[156] There are two viewpoints. On the one hand, it has been argued by numerous academics that Article 303(2) is based on a 'legal fiction'.[157] This means that the coastal States do not have control over the contiguous zone intrinsically but are allowed to presume that the removal of archaeological and historical objects within this zone infringes their territorial rights.[158] As defined by Rau, Article 303(2) 'extends the scope of application of article 33 to the removal of cultural relics from the contiguous zone, without, however, attributing to the coastal State legislative jurisdiction over archaeological objects found in the 24-mile zone.'[159] On the basis of this view, Article 33 does not provide the coastal State sovereign rights to UCH within the contiguous zone.

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[155] Ibid Article 33(1).
[156] *Garabello and Scovazzi* (n 99) 5.
[157] Markus Rau, 'The UNESCO Convention on Underwater Cultural Heritage and the International Law of the Sea', in Frowein J. A. and Woldrum R. (eds.), *Max Planck Yearbook of United Nations Law*, (Vol. 6, Kluwer Law International, 2002) 387, 399.
[158] *Dromgoole* (n 15) 251
[159] *Rau* (n 157) 399

On the other hand according to Carducci, Article 303(2) 'grants the coastal State an 'archaeological' zone of jurisdiction where it can exercise exclusive rights over UCH.'[160] Likewise, Strati argued that it is the combination of Article 303(2) and the duty to protect in Article 303(1) that allow the coastal State to claim a full 24 nautical mile jurisdictional 'archaeological' zone.[161] Unfortunately, the conflicting views between academics is a consequence of the differing interpretations of the article's ambiguities, which have led to uncertainty as to the actual powers afforded to a coastal State.

A further issue of Article 303(2) is its limitation concerning the removal of archaeological and historical objects. It could be argued that other States have authorisation to conduct research of archaeological and historical sites within the 24 nautical mile limit but would not have permission to remove located relics. The coastal State would also find itself powerless if the located remains are destroyed or damaged instead of being removed, for example by, oil exploitation companies unless the coastal State, who has jurisdiction over oil exploration on its continental shelf, imposes specific UCH conditions on it.[162] These inadequacies may arise from UNCLOS wishing to limit the rights of coastal States to within their territorial sea, thus avoiding the concept known as 'creeping jurisdiction'.[163]

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[160] Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of Underwater Cultural Heritage', (2002), 96 *The American Journal of International Law* 2, 419,428-429.
[161] *Strati* (n 20) 169.
[162] *Garabello and Scovvazzi* (n 99).
[163] Ibid 6.

It is important to keep in mind that in order for a coastal State to follow the requirement under Article 303(2) certain procedures must be followed, which can prove complicated to implement without legislative jurisdiction. It is evident that the laws of fiscal, immigration and customs are not appropriate and therefore, laws more relevant to UCH are required. State practice shows that more and more States are implementing domestic laws, which incorporate Article 303(2). Some examples include Denmark, which was one of the first European countries in 1984 to enact legislation that made use of Article 303(2), even though Denmark only formally claimed a contiguous zone in 2005.[164] The contiguous zone must be claimed by a coastal State, as it does not exist automatically.[165] However, it has been argued by scholars, including Strati, that a State does not have to claim a contiguous zone to be entitled to have jurisdiction powers under Article 303(2).[166] Therefore, under the Danish legislation, Conservation of Nature Act as amended by Act No.530 of 10 October 1984, underwater ruins and shipwrecks over 100 years old, located within the 24 nautical mile contiguous zone, cannot be interfered with or removed without prior authorisation.[167]

Similarly, South Africa has had a 'cultural zone' of 24 nautical miles since 1994. South Africa has asserted the same sovereign rights and powers in relation to UCH

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[164] *Dromgoole* (n 15) 253.

[165] Ibid 253; The UK has not claimed a contiguous zone to date, however, in 2008 a bill was drafted which included a provision on the contiguous zone under Section 226(4) of the Heritage Protection Bill. The bill was not approved and has therefore since lapsed.

[166] *Strati* (n 20) 186.

[167] Conservation of Nature Act 1978 Act No. 435 of 1 September 1978 as amended by Act No. 530 of 10 October 1984, Section 49(1), (2).

in this zone as it does in its territorial sea.[168] More recently, in 2004 without officially claiming a contiguous zone, Italy enacted legislation requiring that archaeological objects located within a 24 nautical mile radius to be treated according to international standards.[169] The most interesting position is that of the US. In 1999, the US claimed a contiguous zone when President Clinton signed Proclamation 7219, this Proclamation affirms that this was an important step in protecting UCH from being removed when found in this zone.[170] However, the US already had domestic legislation applicable only to US citizens, which protected UCH as far as 200 nautical miles.[171] The clear intention was to be able to have legislative jurisdiction covering foreign flagged vessels within the contiguous zone.[172]

From these few examples, it is clearly evident that there is an increasing tendency by States to make use of Article 303(2) in order to have some legislative and enforceable jurisdiction over UCH in their contiguous zone. It is interesting to highlight that to date there have been no formal objections by States who are concerned about 'creeping jurisdiction'. Therefore, States should be encouraged to utilise this provision in order to protect UCH in their contiguous zones.

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[168] Maritime Zones Act No. 15 of 1994, Section 6.
[169] Italian Cultural Code (Legislative Decree 42/2004), Article 94.
[170] Presidential Proclamation 7219 of August 2,1999: The Contiguous Zone of the United States, 64 Federal Register 48, 701 (September 9, 2009).
[171] Title III of the Marine, Protection, Research and Sanctuaries Act of 1972, 16 USC Section 1431.
[172] Ole Varmer, 'United States of America', in Sarah Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, (Second Edition, Martinus Nijhoff Publishers, 2006) 351, 382.

Article 303(3) also adds to the confusion over the protection of UCH. Article 303(3) states '[n]othing 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.'[173] This provision arguably provides that the law of salvage and the rules of admiralty take preference over the protection of UCH. Therefore, Article 303(1) and Article 303(3) could be seen to undermine each other. Further, UNCLOS does not define the meaning of the law of salvage and other rules of admiralty. The issue of the law of salvage and UCH will be further analysed under chapter 5.

4.1.3.2. Article 149 - Archaeological and historical objects found in 'The Area'

One of the main purposes of UNCLOS was to establish an international framework for the mineral resources found in the deep seabed. The convention, therefore, created a new maritime zone, the 'Area', which is governed under Part XI of UNCLOS. The 'Area' which covers 54 per cent of the world's oceans is defined as 'the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction.'[174] It has also created the 'International Seabed Authority' (ISA), which regulates all activities directed to mineral resources in the Area on behalf of mankind.[175] Article 149 of Part XI deals specifically with UCH found within the Area.

Article 149 provides that:

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[173] *UNCLOS* (n 121) Article 303(3).
[174] Ibid Article 1 (1)(1); International Seabed Authority, 'About ISA', https://www.isa.org.jm/about-isa (accessed 25 November 2022).
[175] *Dromgoole* (n 25) 261.

'All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.'[176]

This Article introduces two concepts in relation to the protection of UCH. Firstly, that UCH must be protected for the benefit of mankind and secondly, it gives preferential rights to specific States. It can be said that Article 149 is ambiguous and has been correctly criticized for a number of reasons. Firstly, it does not clarify how the objects should be 'preserved or disposed of' nor does it clarify who will provide the required funding for the preservation or disposal.[177] The word 'preservation' may be interpreted in various ways, it may refer to *in situ* preservation or preservation in a museum.[178] Likewise, the word disposal may refer to the complete removal of UCH in order to be able to retrieve natural resources below[179] or it may also mean disposal in the context of recovering the objects in order to place them in a museum.[180] The only remaining authority to turn to is the ISA, however, from the provisions of Part XI it is clear that the obligations of the ISA are limited to controlling activities in relation to the exploration or exploitation of the mineral resources.[181] In doing so the ISA has created the 'Mining Code' which includes

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[176] *UNCLOS* (n 121) Article 149.
[177] *Strati* (n 20) 300.
[178] Luigi Migliorino, 'In Situ Protection of the underwater Cultural Heritage under International Treaties and National Legislation', (1995) 10 *International Journal of Marine and Coastal Law* 483, 486.
[179] Lyndel V Prott & Patrick J O'Keefe, *Law and the Cultural Heritage: Volume 1: Discovery and Excavation,* (Professional Books, 1984) 98.
[180] *Cogliati-Bantz and Forrest* (n 150) 538.
[181] *Dromgoole* (n 25) 262.

rules, regulations and procedures that must be followed during prospecting, exploration and exploitation of the marine minerals in the Area.[182] Three sets of exploration regulations have already been adopted, whilst regulations that govern the exploitation of mineral resources are in the process of being developed.[183] Interestingly, all three adopted exploration regulations make reference to human remains and objects and sites of an archaeological or historical nature. They provide that if such an archaeological or historical site is located the prospector or contractor must notify the Secretary-General in writing immediately who will then transmit this information to the Director General of UNESCO and any other relevant international organization.[184] If exploration has commenced and such object, site or human remains is located in the exploration area then 'in order to avoid disturbing such human remains, object or site, no further prospecting or exploration shall take place, within a reasonable radius, until such time as the Council decides otherwise after taking account of the views of the Director-General of the United Nations Educational, Scientific and Cultural Organization or any other competent

[182] International Seabed Authority, 'The Mining Code', https://www.isa.org.jm/mining-code (accessed 25 November 2022).

[183] Ibid, the three sets of exploration regulations that are already adopted cover: Polymetallic nodules, Polymetallic sulphides and Cobalt-rich ferromanganese crusts.

[184] Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Cobalt-rich Ferromanganese Crusts in the Area, Eighteenth Session, ISBA/18/A/11, (Kingston, Jamaica, 2012), Part II – Regulation 8, Part V – Regulation 37, Annex IV - Section 7; Decision of the Council of the International Seabed Authority relating to Amendments to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area and related matters, Nineteenth Session, ISBA/19/C/17, (Kingston, Jamaica, 2013), Part II – Regulation 8, Part V – Regulation 35, Annex IV – Section 7; Decision of the Assembly of the International Seabed Authority relating to the Regulations on Prospecting and Exploration for Polymetallic Sulphides in the Area, Sixteenth Session, ISBA/16/A/12/Rev.1, (Kingston, Jamaica, 2010), Part II – Regulation 8, Part V – Regulation 37, Annex 4 – Section 7.

international organization.'[185] Therefore these regulations provide some form of protection to UCH when located during prospecting and exploration of the Area for marine minerals.[186] However, they do not provide an answer as to how the objects should be 'preserved or disposed of for the benefit of mankind' as required under Article 149 of UNCLOS.

Secondly, Article 149 gives 'preferential rights' to a number of States, therefore interpretation issues may arise as to who should have these 'preferential rights'. The provision does not clearly distinguish between the 'State of origin', 'State of cultural origin', 'State of historical origin' or the 'State of archaeological origin'. It also fails to create an obligation to report or notify interested parties when an accidental discovery of UCH is made.

Within the Area, States enjoy the freedoms of the high seas, this includes the freedom to search for and recover UCH. However, although this freedom exists, one should keep in mind the general duty to protect and cooperate in respect to UCH, under Article 303(1) of UNCLOS.[187]

4.1.3.3. UCH in the EEZ and Continental Shelf

As mentioned above a coastal State has sovereign rights for the purpose of exploring and exploiting its 'natural resources' within its EEZ and Continental Shelf. An important consideration that has to be clarified is whether archaeological and

[185] Ibid.
[186] The draft Exploitation Regulations which have not been adopted yet also provide the same protections for UCH, Draft Regulations on Exploitation of Mineral Resources in the Area, Twenty-fifth Session, ISBA/25/C/WP.1, (Kingston, Jamaica, 2019) Section 5 - Regulation 35.
[187] *UNCLOS* (n 121) Article 303(1).

historical objects can be interpreted as 'natural resources'. In 1956, the International Law Commission (ILC) made clear that in its own opinion, natural resources do not include shipwrecks and their cargo.[188] The majority of commentators agree with the ILC as 'natural resources' are not man-made. As argued by Korthals Atles, wrecks are 'resources', but are not 'natural resources'.[189] Likewise, in the view of Churchill and Lowe, the recovery of shipwrecks or UCH in the EEZ is not dealt with under the UNCLOS provisions.[190] However, there are a number of scholars who are of the opinion that the interpretation of 'natural resources' should include UCH. For example, in Auburn's view 'natural resources' should include archaeological and historical objects over 100 years old.[191] Similarly, in the view of Meenan 'perhaps natural resources should be liberally construed' in order to include UCH.[192] This was also the decision made in *Subaqueous Exploration v The Unidentified, Wrecked and Abandoned Vessel*.[193] In this case the US District Court held that the remnants of a

[188] United Nations, *Yearbook of the International Law Commission: Documents of the eighth session including the report of the Commission to the General Assembly,* (1956), Vol II, 298.
[189] Alexander Korthals Altes, 'Submarine Antiquities: A legal Labyrinth', (1976) 4 *Syracuse Journal of International Law and Commerce* 80.
[190] Robin R. Churchill and Vaughan Lowe, *The Law of the Sea*, (Second Edition, Manchester University Press, 1988) 114.
[191] Auburn F. M., 'Convention for Preservation of Man's Heritage in the Ocean' (1974) 185 *Science,* 763, 764.
[192] James K. Meenan, 'Note: Cultural Resources Preservation and Underwater Archaeology – Some Notes on the Current Legal Framework and a Model Underwater Antiquities Statute', (1978) 15 *San Diego Law Review*, 623, 644.
[193] *Subaqueous Exploration and Archaeology, Ltd. and Atlantic Ship Historical Society Inc. v The Unidentified, Wrecked and Abandoned Vessel,* 577 F. Sup. 597 [D. Md. 1983], aff'd, 765 F. 2d 139, 4 Cir. 1985.

200 year old abandoned shipwreck, which had remained under sand continuously for centuries, could be characterised as a natural resource.[194]

On this issue, it is also important to highlight the decision made in the case of *Treasure Salvors Inc. v Abandoned Sailing Vessel Believed to be the Nuestra Senora de Atocha.*[195] This case involved a Spanish vessel, which foundered in the sea off Marquesas Keys in Florida in 1622. The shipwreck was discovered on the continental shelf of the US and was subject to a salvage operation, which raised artefacts worth approximately USD 300million. The judgment in this case supported the view that 'natural resources' do not include archaeological remains or shipwrecks.[196]

There is a clear divide on whether or not archaeological remains that have been under water for years can be classified as 'natural resources'. However, taking into account the view of the ILC and the judgment in the afore-mentioned case, it is fair to say that 'natural resources' do not cover shipwrecks. Therefore, UNCLOS does not make specific reference for shipwrecks or UCH found beyond the 24 nautical mile limit. It is important to note at this point the difference between the seabed within 200 nautical miles and beyond 200 nautical miles. Within the 200 nautical mile EEZ there is no residual regime, rights are followed in accordance with the provisions of UNCLOS. Beyond the 200 nautical mile EEZ and up to the outer

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[194] Roberta Garabello, 'Will Oysters and Sand save the Underwater Cultural Heritage? The Santa Rosalea Case' in Guido Camarda & Tullio Scovazzi (eds.), *The protection of the Underwater Cultural Heritage: Legal Aspects*, (Giuffre Editore 2002) 73.

[195] *Treasure Salvors Inc. v Abandoned Sailing Vessel Believed to be the Nuestra Senora de Atocha* 408 F. Supp. 907 (S. D. Fla. 1976).

[196] Janet Blake, *International Cultural Heritage Law*, (Oxford University Press 2015) 80.

continental shelf the status of the zone is the high seas and therefore, the freedoms of the high seas are applicable, and search and recovery of UCH is arguably within these freedoms.[197] The situation in the EEZ, within the 200 nautical miles, is substantially different. The status of this zone is *sui generis*; it cannot be classed as the high seas nor an area in which the coastal State has full sovereignty.[198] Instead, all rights granted to a coastal State are outlined under Part V of UNCLOS.

Due to the fact that Part V does not afford the right to recover and/or search for UCH, it can be referred to as an 'unattributed right' and any dispute that arises in the EEZ in relation to such activities must be dealt with under Article 59 of UNCLOS.[199] Article 59 provides that when:

'[a] conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.'[200]

This implies that if an issue occurs in relation to activities in the EEZ each case has to be dealt with on an individual basis. Strati has listed a number of factors which could be taken into account when trying to reach a settlement on issues relating to UCH.[201] Firstly, the existence of a cultural link between the cultural artefact and one

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[197] *UNCLOS* (n 121) Article 87 provides: '[t]he high seas are open to all States', it provides a list of freedoms one is entitled to, the search and recovery of UCH is not expressly stated, however, it is a non-exhaustive list. *Churchill and Lowe* (n 190) 205-206.
[198] *Dromgoole* (n 25) 258-259
[199] *Churchill and Lowe* (n 190) 175, 461
[200] *UNCLOS* (n 121) Article 59
[201] *Strati* (n 20) 266.

of the parties of the dispute must be taken into consideration. Secondly, in relation to shipwrecks, the flag State of the sunken vessel will be relevant. Thirdly, the interests of the international community in relation to the protection and preservation of UCH must also be taken into account.[202] Finally, consideration must be made in relation to the rights of a coastal or flag State.[203]

Arguably, it may be worth trying to find indirect ways of controlling UCH in the EEZ. For example, one could argue that the sovereign rights afforded to a coastal State relating to 'activities for the economic exploitation and exploration of the zone' under Article 56(1)(a) could permit coastal States to prevent commercial exploitation of UCH within the EEZ.[204] It can also be argued that there is nothing in UNCLOS preventing a coastal State from creating protective measures in exercising their jurisdiction over the continental shelf and EEZ.

An increasing number of States including, Australia, Spain, Cyprus, Morocco and Ireland have already extended their jurisdiction over UCH beyond the 24 nautical mile contiguous zone. They require prior consent for the removal of UCH beyond the 24 nautical mile contiguous zone.[205] Under the Spanish Historical Heritage Act (HHA) 16/1985 of 25th June 1985 'Historical Heritage' is defined to include objects of a historical value irrespective of the passage of time, this contradicts the 100 year

[202] Ibid 266.
[203] Ibid 266.
[204] *Blake* (n 196) 82.
[205] Barbara Kwiatkowska, 'Creeping Jurisdiction Beyond 200 Miles in the Light of the 1982 Law of the Sea Convention and State Practice', (1991) 22 *Ocean Development and International Law* 153, 163.

requirement under the UNESCO Convention.[206] Under Article 40(1) the HHA defines archaeological heritage as 'movable or immovable property of a historical nature that can be studied using archaeological methodology forms part of the Spanish Historical Heritage, whether or not it has been extracted and whether it is to be found on the surface or underground, in territorial seas or on the continental shelf.'[207] In addition a party interested in UCH on their continental shelf requires prior permission before engaging in excavations or archaeological prospecting.[208] As a result this law goes beyond the powers given to the State under both UNCLOS and the UNESCO Convention.

Similarly, with the Jamaican Exclusive Economic Zone Act No.33 1991, Jamaica has claimed full sovereignty over archaeological and historical objects in its EEZ. Under Section 4 (c) (i), the Crown has jurisdiction in respect of 'the authorization and control of scientific research and the recovery of archaeological or historical objects.'[209] In addition, under Section 7(1) 'No person shall within the Zone … (b) carry out any search, excavation or any activity relating to the recovery of archaeological or historical objects.'[210] It is evident that Jamaica has essentially created an archaeological zone, which goes beyond the limits of the contiguous zone and the territorial sea provided in UNCLOS.

It is becoming a widely held contention between academics that the increasing extensions of jurisdictions by coastal States may lead to the emergence of customary

[206] Historical Heritage Act 16/1985 BOE of 29 June 1985, Article 1 (2).
[207] Ibid Article 40(1).
[208] Ibid Article 42.
[209] The Exclusive Economic Zone Act 33 of 1991, Section 4(c) (i).
[210] Ibid Section 7(1).

international law over UCH found in their EEZ or their continental shelf.[211] Arguably, the coastal State may have justification for creating reasonable measures, this being the fulfilment of their duty to protect UCH under Article 303(1) of UNCLOS.[212]

From the above analysis, it is evident that the provisions dealing with UCH in UNCLOS do not provide a comprehensive and adequate legal framework. States should be encouraged to take advantage of the provisions under Article 303 and establish domestic laws that protect the UCH within the 24 nautical mile limit. However, UNCLOS does little to protect UCH beyond the contiguous zone and with the growing problem of unwanted interference with such sites, UNCLOS provides little to contest it. In light of this and in order to eliminate these ambiguities, a new international legal framework dealing with UCH was clearly needed.

4.1.4. UNCLOS on Wreck Removal

In a corresponding way to the Intervention Convention mentioned previously, UNCLOS also failed to specifically address the issue of wrecks and thereby did little to clarify the existing shortfalls of the Intervention Convention. It did, however, incorporate a number of articles that deal with the protection of the marine environment.[213] More specifically, under Article 192 State parties are obliged to

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[211] *Rau* (n 157) 402.
[212] *Dromgoole* (n 15) 267.
[213] *UNCLOS* (n 121) Article 1(4) defines 'pollution of the marine environment' as 'the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.

protect and preserve the marine environment.[214] In order to do so, the convention grants State parties the right to implement measures, individually or jointly with other affected States, in order to preserve and protect the marine environment from any polluting source.[215] Further, Article 197 calls for States to cooperate on a global or regional basis, amongst them or through relevant international organizations, in developing international rules, standards and practices for the best protection and preservation of the marine environment.[216]

In addition, under Article 221, UNCLOS reaffirmed the rights given to coastal States by the Intervention Convention.[217] It specifically deals with '[m]easures to avoid pollution arising from maritime casualties', it empowers States to:

'…take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline or protected interests, including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty, which may reasonably be expected to result in major harmful consequences'.[218]

It seems that UNCLOS has a lower threshold when compared with the Intervention Convention as it does not require a 'grave and imminent danger' to exist before a

[214] Ibid Article 192.
[215] Ibid Article 194.
[216] Ibid Article 197.
[217] Ibid Article 221, Article 221(2) defines 'maritime casualty' as 'a collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.'
[218] Ibid Article 221.

State can take action.[219] The inclusion of the phrase 'grave and imminent danger' was opposed by a number of States, especially France following the *Amoco Cadiz* disaster in March 1978. The *Amoco Cadiz* ran aground off the coast of Brittany in France carrying 220,000 tons of crude oil. The resulting fracture of her hull created the largest oil spill of its kind to that date.[220] The French position was that the threshold should be lower, to enable a more rapid and effective response to such disasters as the previously mentioned *Amoco Cadiz*. To wait until the situation deteriorates to the point where it satisfied the threshold of the Intervention Convention would impede the effectiveness of the concerned State to prevent or minimise the contamination. The phrase was in fact omitted from UNCLOS, suggesting that UNCLOS provides a substantially different intervention threshold than that of the Intervention Convention.

Even though the intervention threshold under UNCLOS appears to be lower than that of the Intervention Convention, Article 220 places certain limitations on the powers of a coastal State and highlights the inadequacies of the Convention to effectively protect the EEZ from a wreck posing an environmental threat.[221] The powers available to a coastal State are restricted to requesting relevant information to establish if any violations 'of applicable international rules and standards for the prevention, reduction and control of pollution or laws and regulations of that State conforming or giving effect to such rules and standards' have occurred.[222] They may only examine or board a suspicious vessel if there has been a major and obvious

[219] *LEG 85/3/1* (n 75).
[220] *Gaskell and Forrest* (n 56) 58.
[221] *UNCLOS* (n 121) Article 220.
[222] Ibid Article 220 (3).

discharge that may threaten the marine environment and only if 'the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection'.[223] Tan argues that in practice this 'inspection power is meaningless, as it is unlikely that a coastal State can detect a discharge and still be able to board the vessel while it is still in the EEZ'.[224] In the past, it was very difficult to identify which ship was actually responsible in a busy shipping area with tides and currents. However, with modern technology it is possible to identify which ship is responsible through radar satellite imagery and data.[225] It is clear that Article 220 was drafted with seagoing vessels in mind, this may be inferred from the use of the words 'a vessel navigating in the EEZ' and the fact that a wreck cannot be boarded and inspected.[226] It does not make a reference to wrecks thereby arguably limiting the coastal State's powers to pollution from seagoing vessels. It could therefore be inferred that the aforementioned regulations would not apply if the threat of pollution emanates from a wreck within the EEZ. This in itself is ambiguous as UNCLOS does not expressly deal with the issue of wrecks. It can therefore be perceived that the powers afforded to coastal States in the EEZ are both limited and indistinct.

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[223] Ibid Article 220 (5).

[224] Alan Khee-Jin Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation*, (Cambridge, Cambridge University Press, 2006), 213.

[225] The Maritime Executive, '"Magic Pipe" MARPOL Violations Can be Spotted from Space', can be accessed at https://www.maritime-executive.com/article/magic-pipe-marpol-violations-can-be-spotted-from-space (accessed 24th April 2020).

[226] *UNCLOS* (n 121) Article 220(2), 220 (3), 220 (5), 220 (6).

Further, UNCLOS does not expressly bestow or deprive a State of intervention powers when a wreck becomes a navigational hazard within its EEZ. Throughout the negotiations regarding this topic, views differed as to what powers a coastal State holds in particular for wrecks that are non-pollutant. A wreck, however, whilst posing a navigational hazard may also be an environmental threat. It is important to keep in mind that a ship which sinks in a busy shipping lane and is a navigational hazard could inevitably also cause an environmental threat to a coastal State due to the possibility of another vessel colliding with the wreck. In addition to any hazardous cargo the wreck may have been carrying, it may also be loaded with fuel oil which if spilled would cause major environmental damage. Typical examples of this are damage to coral reefs, contamination of all kinds of marine life and general pollution of shores and beaches of coastal States.[227]

Consequently, it is reasonable to conclude that although a coastal State has certain powers in order to protect its coastline from pollution or the threat of pollution under UNCLOS, the powers are rather limited in relation to wrecks and open to argument. Neither UNCLOS nor the Intervention Convention expressly empower a coastal State to intervene or remove a wreck which is a navigational hazard from areas beyond its territorial sea. It is clearly evident that further conventions would be needed in order to eliminate any ambiguities and fully protect the coastal State from possible environmental threats not covered by the existing conventions.

[227] IMO Documents, 'The mandate of IMO to regulate the coastal State intervention powers in the EEZ' LEG 86/4/1 (8th April 2003), para 14.

4.1.5. Agreements in furtherance of UNCLOS

As briefly mentioned, the aim of UNCLOS was to govern all aspects of the oceans, which resulted in a substantial number of topics making their way into the convention. This meant that it was impossible to successfully cover all legal issues in depth and legal gaps would be inevitable, requiring the development of further international agreements.[228] This was acknowledged throughout UNCLOS, more specifically, Article 311(3) provides that States are essentially entitled to enter into bilateral or multilateral agreements which may alter the obligations agreed in the convention so long as the agreement is not incompatible with the effective execution of UNCLOS and does not affect the rights or obligations of other States Parties under the Convention.[229]

Bilateral agreements are beneficial in that they can provide alternative regulations for different regional features, such as varied ecological characteristics. However, at the same time if bilateral agreements are taken too far, they can weaken the uniformity of an international law of the seas. It is clear that UNCLOS does not forbid further agreements being reached, in fact they have actually been the main

[228] Oceans & Law of the Sea United Nations, 'United Nations Convention on the Law of the Sea of 10 December 1982 – Overview and full text' can be accessed at: https://www.un.org/depts/los/convention_agreements/convention_overview_convention.htm (accessed 04 September 2022)

[229] *UNCLOS* (n 121) Article 311(3) states: 'Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.'

method by which the provisions of Part XII of UNCLOS have been implemented.[230] Although it must be noted that there have been a few examples of agreements that are alleged to have contravened Article 311(3), mentioned above, none have been notified by the concerned States to the other States party to UNCLOS via the Secretary General as required by Article 311(4).[231]

From the analysis made in this chapter, it is fair to conclude that UNCLOS does not address the issue of wrecks and UCH in detail and that further agreements would be needed. This was anticipated when drafting the Convention. Article 237 which falls within the remit of the 'Protection and Preservation of the Marine Environment' explicitly recognises that States may adopt 'agreements which may be concluded in furtherance of the general principles set forth in this convention'.[232] It continues that States are entitled to maintain obligations under conventions on the marine environment so long as they are 'carried out in a manner consistent with the general principles and objectives' of UNCLOS.[233] In a corresponding way Article 303(4) anticipated that further agreements regarding UCH would be needed in the near future.[234]

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[230] Part XII of UNCLOS deals with the Protection and Preservation of the Marine Environment. Good examples include the Food and Agriculture Organization's regional fisheries agreements and the United Nations Environment Programme's regional seas agreements.
[231] *UNCLOS* (n 121) Article 311(3), (4). A good example is the Galapagos Agreement, which seeks to control access to high seas fishing in the southeast Pacific which arguably goes against the high seas fishing rights under UNCLOS; see Alan Boyle, 'EU Unilateralism and the Law of the Sea', 21(1) *The International Journal of Marine and Coastal Law* 15, 19.
[232] Ibid Article 237.
[233] Ibid Article 237(2).
[234] Ibid Article 303(4).

In short, UNCLOS is not an immutable convention and the lack of the explicit reference to wreck removal and the inadequate articles on UCH should not prevent new agreements and conventions from being formed. To this end, the international community responded by creating the UNESCO Convention and the Nairobi Convention which will be analysed below.

4.2. The UNESCO Convention

4.2.1. Development of the UNESCO Convention

In 1993, UNESCO started to consider the possibility of creating an international agreement for the protection of UCH. In its 141st Session the executive board ordered a feasibility study for a new instrument.[235] The study highlighted the need for an international agreement by stating that:

'At the present time there is literally no object which cannot be located and explored on the sea-bed. Sophisticated equipment can pinpoint any anomaly on the sea-bed, and advanced technology enables the lifting of objects.'[236]

The study emphasised that shipwrecks in coastal waters being more easily accessible had been systematically plundered. In fact, a study carried out by Turkish authorities in 1974 found that all classical age wrecks examined off the coast of Turkey had

[235] United Nations Educational Scientific and Cultural Organization, *Report by the Director-General on the reinforcement of UNESCO's action for the protection of the world cultural and natural heritage*, Hundred and Forty-First Session, 141/EX/18, (Paris, 26 March 1993), 5.
[236] United Nations Educational Scientific and Cultural Organization, *Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage*, Hundred and Forty-Sixth Session, 146 EX/27, (Paris, 23 March 1995), 2.

been interfered with.[237] Shipwrecks on the outer continental shelf, however, remained undisturbed and undiscovered mainly because of the deep water and the inhospitable environment. The remains of these wrecks could prove to be extremely important as they may in part be untouched and well preserved due to 'various chemical and biological reasons'. [238] The study also found that salvage law did little to help the protection of UCH, by allowing the removal of material for commercial reasons, with little regard for the desolation inflicted on the UCH. In the late 1960's major improvements to sub-aqua equipment led to a great many wrecks being discovered including wrecks of historical importance such as the wrecks of the British warships *HMS Association* and *HMS Romney* which were lost in 1707.[239] The *HMS Association* was returning from a successful military operation in the Mediterranean when she struck rocks off the Isles of Scilly whilst carrying a large amount of gold and silver coins. [240] In 1967 following the discovery of the wreck the Ministry of Defence (MoD) published the find which attracted divers from the UK and abroad. As a result, the divers quarrelled over the wreck, each collecting various artefacts which were later sold at auction. However, the methods used to recover the artefacts were often crude and included the use of explosives which obliterated the site beyond any recognition.[241]

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[237] Ibid.
[238] Ibid.
[239] Sarah Dromgoole, 'United Kingdom', in *Legal Protection of the Underwater Cultural Heritage: National and International Perspectives,* (Kluwer Law International, 1999)181-182.
[240] Sarah Dromgoole, 'Protection of Historic Wreck: The UK Approach – Part I: The Present Legal Framework' (1989) 4 *International Journal of Estuarine and Coastal Law* 26-51 at 36.
[241] Ibid 36.

The *HMS Association* and the *HMS Romney* are two of many historically important wrecks that were being exploited during the late 1960's. Other wrecks which suffered the same fate include the Dutch East Indiaman *Hollandia* lost off the Isles of Scilly in 1743 and the Dutch East Indiaman *de Liefde* lost off the Shetland Isles in 1711.[242] Another significant wreck is the royal yacht *Mary* which belonged to King Charles II and went down off Anglesey, North Wales in 1675. In 1971 numerous salvors began looting this wreck until the Royal Navy intervened.

Incidents such as these highlighted the need for an international treaty. The lack of any regulations governing the administration of these wrecks left them vulnerable to acts of vandalism by feuding treasure hunters. The salvors were not required to keep records of the location or any artefacts that they found. Above all, there was no regulation regarding conservation of the finds and nothing that prevented the disposal of them. As a result, maritime heritage was being pillaged and ruined. Peter Marsden described incidents pertaining to these unacceptable actions as follows:

'Stories are all too common of underwater fighting, of the sabotaging of rival groups' equipment, of the uncontrolled use of explosives to 'loosen up' wrecks and in one instance injuring a diver, of a shooting incident, of powered boats weaving about dangerously over a wreck as divers were surfacing, of the disappearance of silver coins and bronze cannons from wrecks, and of their being secretly brought ashore at secluded areas of coastline'.[243]

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[242] Peter Marsden, Archaeology at sea, (1972) 46 *Antiquity* 183, 198.
[243] Ibid 200.

The study emphasised three main areas of concern, firstly jurisdiction, how to regulate and police the seabed not only in coastal waters but beyond national jurisdiction. Secondly, the influence of salvage law; and thirdly, to introduce archaeological standards to ensure suitable precautions and measures are employed uniformly.

The findings of the study showed that an international convention should be developed to improve the protection of UCH.[244] In October through November 1995 during the 28th Session of the UNESCO General Conference it was evident that States were in favour of further development. For example, Greece stated that it '[i]s naturally in favour of the adoption of a convention on archaeological objects found at sea…'.[245] Similarly, Italy expressed that it 'is keenly interested in the proposal for an international instrument to preserve the underwater cultural heritage'.[246] To this end, the Director General was tasked, together with the UN, the IMO and various experts in the fields of archaeology, salvage and jurisdiction to formulate an acceptable structure.[247] At the 29th Session of the UNESCO General Conference in

[244] Ibid 8.
[245] United Nations Educational Scientific and Cultural Organization, *Preliminary Study on the Advisability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage*, Twenty-Eighth Session, 28 C/39, (Paris, 4 October 1995) Annex.
[246] Ibid Annex.
[247] United Nations Educational Scientific and Cultural Organization, *Records of the General Conference - Resolutions*, Volume 1, Twenty-Eighth Session, (Paris, 25 October to 16 November 1995) Resolution 3.13, 48.

October 1997 the Conference asked the Director General to prepare a first draft which was published in 1998.[248]

UNESCO organized a total of four meetings, which took place at their headquarters in Paris over the next five years. The first meeting, which initiated the commencement of negotiations took place between 29th June and 2nd July 1998.[249] The second occurred between the 19th and 24th April 1999.[250] The third session took place between 3rd and 7th July 2000,[251] and finally the last meeting before the text was officially finalised was held in two sessions the first between 26th March and 6th April 2001 and the second 2nd to 7th July 2001. The negotiations received extensive interest, over 350 experts from nearly 100 countries attended as well as governmental and non-governmental organizations.[252]

During the General Conference of the UNESCO meeting in Paris which took place from 15 October to 3 November 2001 the vast majority of delegates expressed their

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[248] United Nations Educational Scientific and Cultural Organization, *Records of the General Conference - Resolutions*, Volume 1, Twenty-Ninth Session, (Paris, 21 October to 12 November 1997) 52.

[249] United Nations Educational Scientific and Cultural Organization, *Final Report of the First Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage*, (Paris, 29 June to 2 July 1998).

[250] United Nations Educational Scientific and Cultural Organization, *Final Report of the Second Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage*, (Paris,19 to 24 April 1999).

[251] United Nations Educational Scientific and Cultural Organization, *Final Report of the Third Meeting of Governmental Experts on the Draft Convention on the Protection of Underwater Cultural Heritage*, (Paris, 3 to 7 July 2000).

[252] United Nations Educational Scientific and Cultural Organization, *Draft Convention on the Protection of the Underwater Cultural Heritage*, Thirty-First Session, 31 C/24, (Paris, 3 August 2001) 1.

intentions to adopt the UNESCO Convention without any further amendments.[253] The UNESCO Convention was subsequently adopted in Paris on 2nd November 2001, 94 States voted in favour, five against with 19 abstentions.[254] Article 27 of the UNESCO Convention states that the convention would come into force following the 20th ratification, acceptance, approval or accession.[255] This occurred after the acceptance of Barbados and the Convention came into force on 2nd January 2009.

The main objective of the UNESCO Convention is to offer adequate jurisdictional mechanisms for UCH located in maritime zones beyond 24 nautical miles, in order to complement and improve on the already existing arguably inadequate mechanisms of UNCLOS. As mentioned previously, it appears that UNCLOS under Article 303(4) anticipated that a new treaty regarding UCH would be needed. Article 303(4) states that UNCLOS does not prejudice 'other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature'.[256] This because UNCLOS offers a restricted protection of UCH, up to the 24 nautical mile contiguous zone, leaving UCH located seaward of the 24 nautical miles unprotected. The UNESCO Convention is the first Convention specifically dealing with UCH, following the failure of the 1985 Draft European

[253] United Nations Educational Scientific and Cultural Organization, *Records of the General Conference – Proceedings*, Volume 2, Thirty- First Session, (Paris, 2001), 559. Some States including the UK, France, the Russian Federation and Sweden expressed their concern regarding the sovereign immunity of their sunken warships – this will be analysed further in Chapter 5 of this thesis.
[254] Ibid 559.The five States against include: The Russian Federation, Norway, Turkey, Venezuela and the US as observer. Some of the States who abstained include, The UK, France, Greece and Germany.
[255] *UNESCO Convention* (n 19) Article 27.
[256] *UNCLOS* (n 121) Article 303(4).

Convention.[257] As of May 2022, the total number of contracting States to the UNESCO Convention is 71, with the latest additions of Malta, Poland, Guinea and Dominican Republic.[258]

The key principles of the UNESCO Convention include: 1) the obligation to preserve and protect UCH; 2) In situ preservation as first option; 3) No commercial exploitation; and 4) Training and information sharing.

4.2.2. What is UCH?

UCH does not have a generally accepted definition and although it is referred to in a number of conventions, each convention has a different definition. To begin with, Article 1(1) of the Draft European Convention, which did not come into force, defines UCH as follows '[a]ll remains and objects and any other traces of human existence located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or recovered from any such environment, or washed ashore, shall be considered as being part of the underwater cultural heritage, and are hereinafter referred to as 'underwater cultural property''.[259] In addition, protection would be granted to all objects which have been underwater for at least 100 years, but with the discretionary exclusion of less important objects once they

[257] Janet Blake, 'The Protection of the Underwater Cultural Heritage', (1996) 45 *International & Comparative Law Quarterly* 819, 824-825.
[258] A full list of contracting States can be found in Appendix I.
[259] *Strati* (n 20) 2.

have been properly categorized and the inclusion of historically significant objects which have been underwater for less than 100 years.[260]

Under Article 149 and 303 of UNCLOS the term 'objects of an archaeological and historical nature' is used in defining cultural heritage.[261] However, it is sometimes difficult to establish if the objects could potentially fall either inside or outside of the definition.[262] Conceivably, there are two potential interpretations, a restrictive interpretation that would cover objects hundreds of years old, or a more broad interpretation which would include relatively new objects.[263]

Under the UNESCO Convention "Underwater cultural heritage" means all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as:

'(i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;

(ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and

(iii) objects of prehistoric character.' [264]

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[260] Council of Europe, Parliamentary Assembly, Recommendation 848 on the underwater cultural heritage, Thirtieth Ordinary Session, 4th October 1978, (18th Sitting).
[261] *Strati* (n 20) 2.
[262] Ibid.
[263] Ibid 181.
[264] *UNESCO Convention* (n 19) Article 1.

This definition implies that shipwrecks from WWII are not yet covered under the convention, whilst shipwrecks from WWI have only recently satisfied the 100 year requirement. Arguably, not every site, wreck or object located underwater for over 100 years is of cultural, historical or archaeological character.[265] Relatively recent casualties such as those from WWII discussed earlier in this chapter, may have a historical character but are not covered by the definition of UCH as they do not meet the 100 year threshold. Therefore, the definition of UCH provided in the Draft European Convention would be more appropriate for wrecks such as those from WWII.

However, the UNESCO Convention 'Operational Guidelines' issued in 2015 by UNESCO clarify that the convention provides the minimum requirements for the protection and preservation of UCH and that each State party has the option of including a more stringent approach for protecting such sites.[266] It further explains that State parties may elect to protect certain UCH at a national level that have not yet reached the 100 year requirement.[267] Therefore, States are arguably encouraged to protect wrecks that have been underwater for less than 100 years if they have a historical or archaeological importance.[268]

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[265] Ibid Article 1 (b)-(c) expressly excludes from the definition of UCH pipelines and cables placed on the seabed and installations other than pipelines and cables, placed on the seabed that are still in use.

[266] United Nations Educational Scientific and Cultural Organization, *Operational Guidelines for the Convention on the Protection of the Underwater Cultural Heritage*, (August 2015), CLT/HER/CHP/OG1/REV, 4, adopted by Resolution 6 / MSP 4 and Resolution 8 /MSP 5.

[267] Ibid 4.

[268] A good example is Australia, under its national legislation and section 4A of the *Historic Shipwrecks Act 1976* provides that wrecks of at least 75 years old may be declared as historic shipwrecks. *Historic Shipwrecks Act 1976*, (Cth) part II s 4A(1)(b).

4.2.3. Geographical Scope of the UNESCO Convention

4.2.3.1. The Territorial Sea

Although the main aim of the UNESCO Convention was to regulate jurisdiction in maritime zones beyond the 12 nautical mile zone, provisions were also made for the territorial waters in order to ensure uniformity. This can be found under Article 7(1) of the UNESCO Convention, which stipulates that:

'State Parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorize activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.'[269]

As alluded to previously, numerous countries have already utilised this power by enacting regulations that govern shipwrecks found in their jurisdiction that have historic or archaeological value.[270] The US for example created the Abandoned Shipwreck Act of 1987.[271] This Act includes shipwrecks within the US National preservation program, but it only covers shipwrecks within its own jurisdiction.[272]

However, a controversial issue that can be found in this Article is the use of the word 'exclusive'. This arguably implies that the coastal State has unrestricted rights to regulate and authorise activities in the territorial waters. This could be seen to undermine Article 2(3) of UNCLOS, which makes clear that the sovereignty of a coastal State is subject to the provisions of UNCLOS and other international

[269] *UNESCO Convention* (n 19) Article 7(1).
[270] *Korthals Altes* (n 189).
[271] Abandoned Shipwreck Act of 1987, 43 U.S.C 1988.
[272] Bernard H. Oxman, 'Marine Archaeology and the International Law of the Sea', (1987), 12 *Columbia Journal of Law & the Arts*, 353, 357.

frameworks.[273] In addition, if this was the case then the possible sovereign immunity of sunken warships and State wrecks located within territorial waters, which will be examined later, would create a conflict between the 'exclusive' sovereignty of the coastal State afforded under this Article and the sovereign immunity afforded to the sunken warship. Paradoxically, granting 'exclusive' sovereignty to the coastal State undermines Article 303(1) of UNCLOS which requires the cooperation of States for the protection of archaeological objects.[274] Article 7(1) empowers the coastal State with 'exclusive' sovereignty whilst Article 7(3) requires the coastal State to inform the flag State or States with a verifiable link of the discovery of State vessels with a cultural, historical or archaeological link.[275]

The UNESCO Convention goes even further under Article 7(2) by obliging member States to ensure that the Rules in the Annex are followed in relation to activities targeting UCH in these waters.[276] The contracting States would have to carefully examine their domestic laws to make sure they comply with all the requirements of the Annex. Some domestic laws that already exist would come into conflict with the UNESCO Convention; for example, the UK Merchant Shipping Act 1995 would come into conflict with Rule 2 of the Annex, regarding commercial exploitation, as the Act allows for a salvage reward to be paid from the sale of an unclaimed shipwreck.[277] The extensive work that has to be made by States needing to modify

[273] *UNCLOS* (n 121) Article 2(3).
[274] Ibid Article 7(1) and 7(2).
[275] *UNESCO Convention* (n 19) Article 7(3).
[276] Ibid Article 7(2).
[277] Merchant Shipping Act 1995 sections 240-243.

their existing laws in order to comply with the UNESCO Convention may discourage the States from ratifying the convention.

4.2.3.2. The Contiguous Zone

The Contiguous Zone is covered under Article 8 of the UNESCO Convention, and it provides that:

'Without prejudice to and in addition to Articles 9 and 10, and in accordance with Article 303, paragraph 2, of the United Nations Convention on the Law of the Sea, States Parties may regulate and authorize activities directed at underwater cultural heritage within their contiguous zone. In so doing, they shall require that the Rules be applied.'[278]

Article 8 confirms and strengthens Article 303(2) of UNCLOS. However, Article 8 requires that a State party to the Convention must ensure that the Rules of the Annex are used in matters relating to UCH.[279] It does not merely refer to the 'removal' of archaeological and historical objects but refers to the 'activities directed at underwater cultural heritage', arguably allowing a broader interpretation than UNCLOS. However, it also provides that the use of this Article must be 'in accordance' with Article 303(2) of UNCLOS, making it clear that Article 8 must not go beyond the rights given under Article 303(2).

[278] *UNESCO Convention* (n 19) Article 8.
[279] Ibid Article 8.

4.2.3.3. The Continental Shelf and the Exclusive Economic Zone

The core objective of the UNESCO Convention was to establish control of the continental shelf and the EEZ. Most of the States that participated in the negotiations leading up to the UNESCO Convention were eager to extend their jurisdiction rights over UCH found on their continental shelf and EEZ.[280] However, a number of States were of the opinion that the expansion of jurisdiction over the continental shelf and the EEZ would challenge the already established balance UNCLOS has created between the rights and obligations of coastal States and other States.[281] A compromise was reached, creating Article 9 and Article 10. Article 9 requires reporting and notification, while Article 10 requires consultation and protection.[282]

Article 9(1) reaffirms the general requirement under Article 303(1) to protect UCH. It requires the States to protect UCH within their EEZ and on their continental shelf.[283] The subsequent parts of Article 9 outline the manner under which the duty to protect must be performed. Essentially, the UNESCO Convention prohibits secret activities or discoveries. It specifies that a State party to the convention will oblige its nationals or vessels flying its flag to report and notify them for any activities or discoveries in relation to UCH in the EEZ or continental shelf of another State. The State party to the convention will then ensure the rapid transmission of such reports to the other States,[284] or 'the national or master of the vessel to report such discovery

[280] *Scovazzi* (n 21) 453.
[281] Ibid.
[282] *UNESCO Convention* (n 19) Article 9 and 10.
[283] Ibid Article 9 (1).
[284] Ibid Article 9 (1)(b)(ii).

or activity to them and to the other State Party.'[285] In addition, the State must notify the Director General of UNESCO, who will rapidly notify all other States.[286]

As soon as information of a discovery or planned activities are due to take place, it is essential that a provision exists in order to regulate such activities. Article 10(2) of the UNESCO Convention provides that:

'A State Party in whose exclusive economic zone or on whose continental shelf underwater cultural heritage is located has the right to prohibit or authorize any activity directed at such heritage to prevent interference with its sovereign rights or jurisdiction as provided for by international law including the United Nations Convention on the Law of the Sea.'[287]

This Article provides a coastal State the power to either permit or prohibit activities targeting UCH within its EEZ or continental shelf, only if their sovereign rights or jurisdiction under UNCLOS are threatened. UNCLOS affords coastal States sovereign rights in the EEZ and the continental shelf only in relation to 'natural resources', economic exploration or exploitation, marine scientific research and preservation of the marine environment. [288] Therefore, it could be argued that Article 10(2) acknowledges a link between 'natural resources' and UCH whilst being mindful of their differences. Having in mind that the definition of UCH under the UNESCO Convention refers to remnants over 100 years old, due to the long period

[285] Ibid Article 9 (1)(b)(i).
[286] Ibid Article 9 (3),(4).
[287] Ibid Article 10(2).
[288] *UNCLOS* (n 121) Article 77.

of time underwater the artefact arguably could become part of the marine ecosystem and therefore, any interference with it would likely to have an impact on natural resources.[289] However, as analysed above under Chapter 4.1.3, opinions differ as to whether UCH can be deemed a 'natural resource'.[290] Given the uncertainty and divide on this topic it is unlikely that UCH will gain the status of 'natural resources'. Further, it can be argued that a coastal State may permit or prohibit activities on UCH for the protection and preservation of the marine environment.

4.2.3.4. The Area

Although UNCLOS makes reference to the Area under Article 149, as previously mentioned, the provision was vague and inadequate as it did not specify who would be responsible for the preservation or how. The UNESCO Convention seeks to bring clarity to these points, by implementing Articles 11 and 12.[291] These Articles follow the same procedures as in the EEZ and the continental shelf, which have been outlined previously under Articles 9 and 10.

Article 11(1) provides that States party to the convention have a responsibility to protect UCH in the Area, in accordance with UNCLOS. Article 11 echoes the mechanism under Article 9 for the reporting and notification of discoveries of UCH. A State party to this Convention obliges its nationals or the master of the vessel to notify them of any discovery of UCH or of any intention to commence activities in

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[289] *Dromgoole* (n 15) 292.
[290] For example, the decision in the case of *Treasure Salvors Inc. v Abandoned Sailing Vessel Believed to be the Nuestra Senora de Atocha* 408 F. Supp. 907 (S. D. Fla. 1976).
[291] *UNESCO Convention* (n 19) Article 11 and 12.

connection to UCH in the Area.[292] The State must then inform the Director-General of UNESCO and also the Secretary General of the International Seabed Authority (ISA).[293] The Director-General of UNESCO must then make such information available to all States. This allowing any State with a confirmed interest in the UCH an opportunity to consult on the most appropriate way to deal effectively with the UCH.[294]

Likewise, Article 12 is very similar to Article 10. However, Article 12 states that when dealing with UCH in the Area, the Director-General must invite the States that have asserted interest to decide together the best way for protection of the UCH and to appoint a coordinating State to make sure that the measures for protection agreed between the States are followed.[295] Under Article 12(3) all States party to the Convention have the power to take any measures necessary, when UCH is in immediate danger.[296]

4.3. Nairobi Convention

The Nairobi Convention was adopted at a conference, which took place in Nairobi, Kenya between 14th-18th May 2007.[297] Pursuant to Article 18 (1) of the Nairobi Convention the convention would come into force twelve months after the 10th ratification, accession or acceptance.[298] This was achieved on 14th April 2014 by the

[292] Ibid Article 11.
[293] Ibid Article 11(2).
[294] Ibid Article 11 (4).
[295] Ibid Article 12(2)-(5).
[296] Ibid Article 12 (3).
[297] Ibid.
[298] Ibid Article 18(1).

ratification of Denmark, consequently the Nairobi Convention came into force on 14th April 2015.[299] As of 27th September 2022, the number of contracting States to the Nairobi Convention was 64, representing over 80% of the world tonnage.[300] The main objective of the Nairobi Convention was to establish a uniform approach in maritime law to tackle the issue of wreck removal,[301] create a legal regime that empowers coastal States to remove a wreck that may pose a navigational or environmental threat in their EEZ and apportion responsibility for the costs associated with the removal of the wreck.[302] It deals with all necessary measures for the wreck to be removed effectively; this includes reporting, locating, marking and the subsequent removal.[303]

4.3.1. What is a Ship/Vessel?

In order for the Nairobi Convention to apply the first thing to determine is whether a ship has become a wreck. In order to clarify this both the definitions of a ship and a wreck must be analysed in order to clearly identify when the transition occurs.

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[299] International Maritime Organization (IMO), 'Comprehensive information on the Status of Multilateral Conventions and Instruments in respect of which the International Maritime Organization or its Secretary-General Performs Depositary or other Functions', available at: https://wwwcdn.imo.org/localresources/en/About/Conventions/StatusOfConventions/Status%20of%20IMO%20Treaties.pdf , 543 (accessed 10 September 2022).

[300] Ibid, a full list of all State parties can be found in Appendix II.

[301] *Nairobi Convention* (n 29).

[302] The EEZ is an area which does not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured; *UNCLOS* (n 121) Article 57.

[303] *Nairobi Convention* (n 29) Article 5 requires a State party to require the master and operator of a ship flying its flag to report to the Affected State without delay when that ship has been involved in a maritime casualty resulting in a wreck; Article 7 requires the Affected State to warn mariners and other States concerned of the nature and location of the wreck as a matter of urgency; Article 8 requires the Affected State to mark the wreck and ensure that the markings conform to the internationally accepted system of buoyage. The Affected State shall also promulgate the particulars of the marking of the wreck by use of all appropriate means, including relevant nautical publications; Article 9 outlines the measures to facilitate the removal of wrecks.

The term ‘ship’ used in everyday language connotes a boat that is capable of navigation in order to transport goods or people on water. The definition of ‘ship’ provided in the Oxford English Dictionary is ‘a large boat for transporting people or goods by sea’.[304] However, when it comes to defining the term ‘ship’ and the term ‘vessel’ in international law, legislators throughout the years have failed to present a definitive definition. Therefore, these terms are being used alternatively in various international treaties, where they can be markedly disparate with no single internationally accepted definition. While this may create a certain amount of confusion it does not necessarily mean that there is a deficiency in international law, it could simply be that each international convention requires a different definition.

Two questions have to be answered regarding the definition of a ‘ship’. The first is whether in order to satisfy the term ‘ship’ flotation is a requirement. The second is whether the ‘ship’ must be capable of performing the function and role it was built for. It is vital for the purpose of this thesis to establish when a ‘ship’ becomes a ‘wreck’. In order for this to be achieved various definitions of the terms ‘ship’ and vessel’ found in international conventions will be examined to conclude if in fact flotation and the capability of performing its purpose are actually necessary.

First and foremost, the definition of the term ‘ship’ in the Nairobi Convention will be examined. It is defined under Article 1(2) as:

‘a seagoing vessel of any type whatsoever and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and floating platforms, except when such

[304] *Oxford English Dictionary*, Oxford University Press, (Ninth Edition, 2006) 640.

platforms are on location engaged in the exploration, exploitation or production of seabed mineral resources.'[305]

The definition provided is very broad, simply requiring that the ship is 'a seagoing vessel of any type whatsoever'. Prior to incorporating the word 'seagoing', the definition of the word 'ship' in the Draft Convention on Wreck Removal included 'a vessel of any type whatsoever operating in the marine environment'.[306] The reference to 'seagoing' vessels was incorporated to be in accord with definitions in other international conventions that require compulsory insurance.[307]

However, it is not clearly defined how the word 'seagoing' should be interpreted. The explanation given by the States who suggested incorporating the word 'seagoing' was that the convention would include ships that navigate from the sea up rivers in order to deliver cargo but would exclude ships that only operate in internal waters.[308] This explanation was substantiated in the case of the *Victoriya*. The Russian tanker suffered a fire and explosion whilst loading crude oil at a terminal on the Volga river in 2003; as a result oil spilled into the river.[309] The question was whether the 1992 Civil Liability Convention (1992 CLC) and the 1992 International

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[305] *Nairobi Convention* (n 29) Article 1.2.

[306] IMO Documents, 'Draft Convention on Wreck Removal' LEG 80/INF.2, (30th September 1999).

[307] IMO Documents, 'Report of the Legal Committee on the work of its ninety-second session' LEG 92/13, (6th November 2006), para. 4.22. The International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (Bunkers Convention) and the CLC are examples of conventions that require compulsory insurance. International Convention on Civil Liability for Bunker Oil Pollution Damage 2001 (adopted 23 March 2001, entry into force 21 November 2008), 40 ILM 1493, hereinafter *Bunkers Convention*.

[308] IMO Documents, 'The application of the draft wreck removal convention in the territorial sea' LEG 92/4/3 (12th September 2006).

[309] IOPC Funds Document, International Oil Pollution Compensation Fund 1992, 'Record of Decisions of the Twenty Second Session of the Executive Committee' 92FUND/EXC.22/14, 24 October 2003, 16-17.

Oil Pollution Compensation Fund (1992 Fund Convention) applied to this case. Under the 1992 CLC the owner of a vessel from which oil has escaped or has been discharged is strictly liable for the pollution caused.[310] The definition of ship in the CLC 1992 requires that the vessel is 'seagoing'.[311] The Executive Committee of the 1992 Fund Convention decided that even though the *Victoriya* at the time of the incident was in the Volga river she regularly traded in the Mediterranean, Black Sea and Baltic Sea areas, therefore, the vessel was a 'seagoing' vessel and was thus subject to the 1992 CLC and 1992 Fund Convention. The intention when incorporating the term 'seagoing' in the Nairobi Convention was to include such ships as the *Victoriya.* It is important to mention that in order for the ship to be capable to navigate from the sea up rivers to deliver cargo it must be capable of performing the obligations it was built for, thereby requiring the ship to be afloat.

One could argue, however, that the term 'seagoing' could be interpreted to apply to any vessel that is capable of navigating at sea, including the non-exhaustive list provided in Article 1 (2), hydrofoil boats, air-cushion vehicles, submersibles, floating crafts and floating platforms. The reference to floating crafts clearly excludes crafts which have sunk from the definition of 'ship' as the craft must be afloat. The inclusion of submersibles still implies that the submersible must be operational. It can be said that an operational submersible still floats whether it is on the surface or under the surface.

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[310] IOPC Funds, The 1992 Civil Liability Convention, https://www.iopcfunds.org/about-us/legal-framework/1992-civil-liability-convention/ (accessed 24 November 2022).
[311] *CLC* (n 63) Article 1 (1).

The International Regulations for Preventing Collisions at Sea 1972 (COLREGS) define the word 'vessel' as 'every description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water.'[312] This definition requires that the vessel is capable of transporting people or goods on water, thereby requiring the vessel to be afloat and capable of performing the obligations it was built for.

Similarly, the International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea (HNS Convention) defines the word 'ship' as 'any seagoing vessel and seaborne craft, of any type whatsoever.'[313] This definition may be depicted in many different ways including that the referred 'ship' must be afloat.

Further, the Maritime Labour Convention (MLC) 2006 defines a 'ship' under Article II (1)(i) as 'a ship other than one which navigates exclusively in inland waters or waters within, or closely adjacent to, sheltered waters or areas where port regulations apply'. Article II (4) goes on further to clarify that 'except as expressly provided otherwise, this Convention applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This

[312] Convention on the International Regulations for Preventing Collisions at Sea, (adoption 20 October 1972, entry into force 15 July 1977) 1050 UNTS 16, hereinafter *COLREGS*, Rule 3.

[313] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, (adoption 3 May 1996, not in force), 35 I.L.M. 1406, Article 1 (1).

Convention does not apply to warships or naval auxiliaries.'[314] The MLC's purpose is to ensure that seafarers' rights to decent work conditions are upheld; clearly seafarers are not employed to provide services on wrecks. Once again it seems that the intention when drafting the convention was to include ships that are capable of performing their purpose.

Even though each convention has a different definition for the terms 'ship' and 'vessel' it can generally be said that the general concurrence is that they all require the vessel to be afloat. All the conventions mentioned above were drafted having seaworthy vessels in mind and not wrecks which are incapable of performing the purpose of a ship.

From another point of view, in *Pelton Steamship Co. Ltd. v The North of England Protecting and Indemnity Association* it was argued that if there is a reasonable prospect of salving a sunken ship then that sunken ship remains a ship.[315] Mr Justice Greer stated that 'just as a man may be moribund without ceasing to be a man if the doctors are hopeful that they will be able to secure his recovery by treatment, so I think a ship may remain a ship or vessel even though she be damaged and incapable of being navigated if she is in such a position as would induce a reasonably minded owner to continue operations of salvage; and if so she would in the ordinary use of the English language be still described as a ship or vessel though described as one

[314] Maritime Labour Convention 2006 (adoption in Geneva on 23rd February 2006, entry into force 20 August 2013), UNTS Volume Number 2952-I-51299, hereinafter *MLC*, Article II (4).
[315] Gotthard Mark Gauci, 'Is it a vessel, a ship or a boat, is it just a craft, or is it merely a contrivance?', Journal of Maritime Law & Commerce Vol. 47, No. 4, (October 2016).

which was in serious danger of ceasing to be a ship or vessel.'[316] Thus, in the opinion of Mr Justice Greer navigability cannot be the determining factor as to whether a ship ceases to be a ship and becomes a wreck. The determining question should be whether or not a reasonably minded owner would continue salvage operations in the hope that the ship will be recovered and navigable following repairs.[317]

It is reasonable to conclude that as a general rule the term 'ship' in the conventions is used with intention to refer to ships that can be used to transport goods or people and not ships which are incapable of performing their duties.

4.3.2. What is a wreck?

For the purposes of the Nairobi Convention a 'wreck' is defined under Article 1(4) as follows:

'A wreck, following upon a maritime casualty, means:

a) a sunken or stranded ship; or

b) any part of a sunken or stranded ship, including any object that is or has been on board such a ship; or

c) any object that is lost at sea from a ship that is stranded, sunken or adrift at sea; or

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[316] *Pelton Steamship Co. Ltd. v The North of England Protecting and Indemnity Association* (1925) 22 LL. L REP. 510 at 512.
[317] Ibid.

d) a ship that is about, or may reasonably be expected, to sink or to strand, where effective measures to assist the ship or any property in danger are not already being taken'.[318]

It is apparent that there is one very important requirement which must be met before a 'ship' becomes a 'wreck'. In accordance with the definition provided, a wreck is one which occurs 'following upon a maritime casualty'.[319] A 'maritime casualty' is defined under Article 1(3) of the Nairobi Convention as 'a collision of ships, stranding or other incident of navigation, or other occurrence on board a ship or external to it, resulting in material damage or imminent threat of material damage to a ship or its cargo.'[320] The definition is very broad allowing a wide interpretation when faced with the question of whether an incident meets the definition of 'maritime casualty'. The definition was derived from the Intervention Convention and UNCLOS which define maritime casualty under Article II (1) and under Article 221(2) respectively.[321]

As stated by Shaw, it is hard to envisage a ship becoming a wreck without the occurrence of a maritime casualty.[322] However, it has been argued by academics such as Gaskell and Forrest that the Nairobi Convention does not apply to vessels which were sunk for operational reasons or dumped. A further interpretation could provide that scuttling and sinking for operational purposes could be covered by the

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[318] *Nairobi Convention* (n 29) Article 1(4).
[319] Ibid Article 1(4).
[320] Ibid Article 1(3).
[321] The definitions of 'maritime casualty' provided in the Intervention Convention and UNCLOS have already been quoted earlier on in this chapter.
[322] *Shaw* (n 45) 434.

wording ‘or other occurrence on board a ship or external to it’. The inclusion of this phrase in the definition of ‘maritime casualty’ in the Nairobi Convention allows a broad interpretation and can be very ambiguous.

Furthermore, in order to deal with ships that are afloat and adrift the definition of a wreck includes a ship that is about, or may be expected to sink or to strand, so long as effective measures to assist the ship or any property in danger are not already being undertaken.[323] Therefore, as soon as salvage activity commences on a ship that is about or may be expected to sink or to strand, the ship will be excluded from the definition of a wreck. Subsequently, as soon as a ship sinks or strands, that ship is a wreck irrespective of possible salvage activity. It is important to mention the requirement under the Nairobi Convention that the measures being taken must be ‘effective’. The word ‘effective’ was included at the request of the Comite Maritime International (CMI) and the International Salvage Union in order to ensure that the coastal State would not interfere with the salvor if effective measures were taken.[324] The definition of effective can be open to individual interpretation, what is effective for one party may not be effective for another.

Take for example, a ship that has sunk or is about to sink and the owners decide to commence salvage operations in an effort to save the ship. The salvors successfully refloat the vessel, and it is moored safely alongside a berth. The vessel’s main engine

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[323] *Nairobi Convention* (n 29) Article 1(4)(d).

[324] The CMI is a non-governmental, non-profit international organisation, which was established in Antwerp 1897. The objective of the CMI is to unify wherever possible the complex and diverse maritime laws of each State; The International Salvage Union (ISU) is the global trade association representing marine salvors. Its members provide essential services to the world’s maritime and insurance communities. Members are engaged in marine casualty response, pollution defence, wreck removal, cargo recovery, towage and related activities; *Shaw* (n 45) 434.

is destroyed beyond repair, and owners declare the ship to be a CTL. Could it still be considered a ship, or would it fall under the definition of a wreck under Article 1(4) of the Nairobi Convention? It can be argued that the vessel in this factual situation would not meet any of the criteria required for it to be a wreck. More specifically, the vessel is no longer sunken and there is no indication that the vessel 'is about, or may reasonably be expected' to sink again as she is safely moored and in a stable position. In the case of *Fraser Shipping Ltd v Colton* the English Courts have confirmed that whether or not a vessel has become a wreck 'involves consideration of the particular characteristics of the insured property'.[325] The Court further drew a distinction between a wreck and a dead ship capable of being towed away for scrap.[326]

4.3.3. Two types of wrecks

The Nairobi Convention applies to two types of wrecks that pose a hazard to the Convention Area.[327] This is outlined in Article 2(1) of the Nairobi Convention which expressly states that 'a State may take measures in accordance with this Convention in relation to the removal of a wreck which poses a hazard to the Convention area'.[328] The term hazard is defined under Article 1(5) of the Nairobi Convention as 'any condition or threat that: (a) poses a danger or impediment to navigation, (b) 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

[325] *Fraser Shipping Ltd v Colton* [1997] 1 Lloyds Rep. 586.
[326] Ibid.
[327] The 'Convention Area' is defined under Article 1(1) of the Nairobi Convention as 'the exclusive economic zone of a State Party'.
[328] *Nairobi Convention* (n 29) Article 2(1).

more States.'[329] Therefore, the definition distinguishes between two types of wrecks which the Nairobi Convention focuses on, those that pose a danger to navigation and those that may reasonably be expected to pollute the marine environment.[330]

Firstly, it focuses on wrecks that are a danger or obstruction to navigation, as illustrated in the case of the *Tricolor*. On 14th December 2002 the car carrier *Tricolor* collided with the containership *Kariba* and subsequently sank in a busy shipping lane within the French EEZ. The *Tricolor* sank at a depth of 35 metres and was visible during low tide. Although numerous safety measures were taken such as navigational warnings and the placement of navigational buoys, within two days of the ship sinking a small vessel, the *Nicola*, collided with the *Tricolor* on 16th December 2002.[331] Likewise, on 1st January 2003 the Turkish tanker *Vicky* laden with 66,000 m^3 of diesel struck the *Tricolor*. Due to the collision fuel oils escaped from the *Tricolor* and 200 m^3 of diesel poured out from the *Vicky*. It is evident that should a wreck constitute a navigational threat its removal would be necessary, as it could potentially become an environmental threat and a threat to life.[332] It is also possible for a historic wreck to become a navigational hazard years after sinking, for example, the wreck of the World War I German U-boat *UB 38* became a

[329] Ibid Article 1 (5).
[330] Ibid Article 1(4).
[331] Ronny Schallier, Janne Resby, Francois-Xavier Merlin, 'Tricolor Incident: Oil Pollution Monitoring and Modelling in Support of Net Environmental Benefit Analysis (NEBA)', Presentation no. 433, Interspill 2004, can be accessed at http://interspill.org/previous-events/2004/pdf/session4/433_SCHALLIER.pdf (accessed 22 September 2022), 3.
[332] *LEG 86/4/1* (n 227), para. 14.

navigational hazard 90 years after its sinking.[333] State practice in relation to historic hazardous shipwrecks will be analysed later in this thesis under Chapter 6.

Secondly, the Nairobi Convention focuses on wrecks that pose a danger to the marine environment. Incidents of wrecks that caused marine pollution include the *Torrey Canyon* as discussed above and the high-profile case of the *Prestige*. On 13th November 2002 the *Prestige* whilst loaded with 76,972 tonnes of heavy fuel oil began listing and leaking oil 30 km off Galicia, Spain. Whilst being towed away from the coast the vessel split in two, releasing some 63,000 tonnes of oil, severely polluting the coasts of France and Spain.[334]

It is clear from the definition of the term 'hazard' that the Nairobi Convention was intended to address only wrecks which pose a navigational or an environmental hazard. It fails to cover wrecks that become a hazard for other reasons. A wreck may be a hazard to fishing activities as it can entangle and damage their nets, oil rig operations, subsea pipeline operations and extensions or development of new ports, harbours and canals are all examples of when a wreck may become a hazard. In addition, arguably the Nairobi Convention would not apply in cases where the wreck is removed by the State as a matter of political sensitivity as was the case with the wreck of the *Sewol*.[335]

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[333] *Dromgoole and Forrest* (n 89) 108.
[334] *Colin De La Rue and Charles Anderson* (n 49), 76.
[335] Ju-min Park, 'South Korea sets plan to raise "corroded" Sewol ferry year after disaster' (Reuters, 22nd April 2015), https://www.reuters.com/article/southkorea-ferry/south-korea-sets-plan-to-raise-corroded-sewol-ferry-year-after-disaster-idUSL4N0XI1LL20150422 (accessed on 20 November 2022).

However, it could be argued that all shipwrecks pose an environmental threat and are a source of marine pollution and as such should be removed under the principles of the Nairobi Convention.[336] Wrecks of the world's major conflicts or a wreck that has been underwater for a period of time may contain highly explosive munitions, poisonous and toxic substances, oil and fuel as well as the contents of their bunkers.[337] With the inevitable corrosion and deterioration over many years toxic substances will leak and the munitions will become unstable. It is therefore easy to understand why underwater wrecks can be described as 'environmental time-bombs'.[338]

For example, the *SS Richard Montgomery* was an American cargo ship which ran aground in 1944 in the Thames Estuary whilst carrying 7000 tons of munitions.[339] Salvage operations were commenced which successfully removed approximately half of the cargo on board before the vessel was lost.[340] Today, the wreck continues to be a huge threat as a large amount of ammunition and 1,400 tons of explosives that remain within the wreck are still capable of detonating.[341] Experts have advised

[336] Michael Tsimplis, 'The Liabilities of the Vessel' in Yvonne Baatz (ed.), *Maritime Law* (Fifth edition, Informa Law from Routledge, 2020), 246.
[337] *Forrest* (n 61) 80.
[338] Ibid.
[339] Maritime & Coastguard Agency, Guidance SS Richard Montgomery: background information, 16 August 2022, https://www.gov.uk/government/publications/the-ss-richard-montgomery-information-and-survey-reports/ss-richard-montgomery-background-information (accessed 25 September 2022).
[340] Ibid.
[341] House of Commons Debate, 'Protection of Wrecks Bill', (02 March 1973) Vol 851 cc1848-79.

that it would be a greater danger to attempt to remove the remaining ammunition than to leave the wreck and its cargo undisturbed.[342]

More recently, on 20th October 2017 the Greek Minister of Shipping and Island Policy, Mr Kouroumblis, ordered that the shipwreck of the *Sea Diamond* be removed, as it is a pollutant to the marine environment.[343] The *Sea Diamond*, a cruise liner, ran aground on a reef just off the coast of Santorini on 5th April 2007. The vessel began taking on water, was towed off the rocks and subsequently sank a day later, a few hundred metres from the shore.[344] The order states that the existence of a wreck in the sea area is in itself a factor that affects the marine environment and is a potential source of pollution. This is regardless of whether the fuels and lubricants are pumped out. With the passage of time, corrosion and bad weather conditions, the remaining toxic substances within the wreck's infrastructure will gradually be released.[345]

It is important to highlight that heavy metals including lead, mercury, cadmium, zinc and copper can be found in many products on board a vessel. These heavy metals can be found in paints, coatings, insulations, batteries and electrical compounds.

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[342] Maritime & Coastguard Agency, Report on the wreck of the SS Richard Montgomery, November 2000,https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/851504/2000_survey_report_montgomery.pdf (accessed 22 September 2022); the wreck is designated as a prohibited area under the Protection of Wrecks Act 1973.

[343] Ministry of Shipping and Island Policy, 'Shipwreck Sea Diamond', 1000.0/75174/2017, Piraeus, 20th October 2017 (in Greek). http://www.hcg.gr/sites/default/files/article/attach/SKMBT_36171020172800_0.pdf (accessed 29 October 2021).

[344] E. Dimitrakakis, J. Hahladakis and E. Gidarakos, 'The "Sea Diamond" shipwreck: environmental impact assessment in the water column and sediments of the wreck area', 11 *International Journal of Environmental Science and Technology* 5, July 2014, 1424.

[345] *Ministry of Shipping and Island Policy* (n 343).

Mercury can be found in thermometers, electrical switches and light fittings. Whether or not small quantities of such pollutants can or may reasonably be expected to cause 'major harmful consequences to the marine environment', as required under Article 1(5) of the Nairobi Convention is a question that is debatable. It is clear however, that should such pollutants be present in large quantities on a wreck the effect to the marine environment will be devastating. The German submarine *U-864*, for example, which was sunk by a British submarine in 1945 approximately 2 nautical miles from the Norwegian Island of Fedje, was carrying 65 tonnes of mercury.[346] Clearly, such a wreck would be capable of severe pollution to the marine environment.

4.3.4. Geographical Scope of the Nairobi Convention

4.3.4.1. Application of the Nairobi Convention to the territorial sea

In 1996 the CMI became actively involved in the development of the Nairobi Convention.[347] In an effort to assist the IMO in preparing the international convention on wreck removal the CMI conducted a review of national laws.[348] The report submitted by the CMI noted that the majority of wreck removal cases would relate to wrecks located within the territorial seas.[349] It became apparent that national

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[346] Kuria Ndungu, Bjornar A. Beylich, Andre Staalstrom, Sigurd Oxnevad, John Berge, Hans Braaten, Morten Schaanning and Rune Bergstorm, 'Petroleum oil and mercury pollution from shipwrecks in Norwegian coastal waters', (2017) *Science of the Total Environment*, 624-633, 626.

[347] Comite Maritime International, CMI Yearbook 1996, 'CMI Study of the Law on Wreck Removal – Report of the Chairman of the International Sub-Committee' 191.

[348] Ibid; national laws analysed in 1974/1975 and 1996: Australia, Austria, Belgium, Canada, Chile, Cyprus, Denmark, Finland, France, Germany, Greece, India, Indonesia, Ireland, Iran, Italy, Japan, Liberia, Madagascar, Netherlands, Norway, Poland, Portugal, Russia, Sweden, Trinidad & Tobago, UK, USA, Yugoslavia.

[349] Ibid 191.

laws of countries relating to wreck removal had the same objective. There were, however, several significant and varying differences including but not limited to, the definition of a wreck, the intervention powers of the coastal State, whether or not a wreck must constitute a hazard before removal and if a State could claim costs incurred due to the wreck removal.[350] Therefore, in order to achieve uniformity a convention covering wrecks located in both territorial and extraterritorial waters would be beneficial. The purpose of extending the application of the international convention on wreck removal to the territorial sea was not only to unify national laws but also to bring consistency to the treatment of wrecks wherever they may be located.[351] In addition, States party to the convention would benefit from the compulsory insurance provisions in relation to wreck removal costs when the wreck is located in the territorial sea.[352]

The suggestion of extending the application of the convention to the territorial sea of a State led to major debates between concerned countries. There was fear that certain clauses would limit their freedom of action within their territorial waters which would undermine their sovereignty. Argentina, for example, stated that should the application of the Nairobi Convention extend to the territorial sea it would be inconsistent with international maritime law as codified in UNCLOS.[353] Specifically, the obligation under Article 9(1) of the Nairobi Convention to inform the State of the ship's registry and the owner as soon as the coastal State determines that a wreck is a

[350] Ibid 213.
[351] Comite Maritime International, CMI Yearbook 1996, 'CMI Study of the Law on Wreck Removal – Comparative Analysis of National Laws Relating to Wreck Removal' 209.
[352] *LEG 92/4/3* (n 308), 1.
[353] IMO Documents, 'Draft Convention on Wreck Removal' LEG 92/4/5 (29th September 2006), 2.

hazard and the requirement to consult the State of the ship's registry in relation to the wreck removal measures is incompatible with the sovereignty that a coastal State enjoys in their territorial sea.[354] In order to tackle this issue in 2007 several States proposed an alternative solution by excluding specific articles that limit a coastal State's sovereignty from the application in the territorial sea. [355] Article 4(4) of the final text excludes from the application in the territorial seas Article 2(4), Article 9 paragraphs 1, 5, 7, 8, 9, 10 and Article 15. [356]

The aforementioned Articles are excluded in order for the coastal States to maintain full sovereignty in their territorial waters and to ensure that there are no restrictions as to what course of action they may take. For example, Article 9(5) stipulates that the affected State has the power to intervene after the removal procedure has commenced, 'only to the extent necessary to ensure that the removal proceeds effectively in a manner that is consistent with considerations of safety and protection of the marine environment'.[357] This Article 9(5) was excluded as numerous States believed that this limited their sovereign rights.

In addition, Article 4(4)(b) of the Nairobi Convention amends the wording of Article 9(4) when applied in the territorial sea, it allows the ship owner to appoint a salvor or other person to remove the wreck, subject to the national laws of the affected State.[358] For example, the national law of the affected State may require the wreck

[354] Ibid 2.
[355] IMO Documents, 'Consideration of a draft convention on the removal of wrecks -Proposal to extend the scope of the draft convention', LEG/CONF. 16/12 (30th April 2017), 2.
[356] *Nairobi Convention* (n 29) Article 4(4).
[357] Ibid Article 9(5).
[358] Ibid Article 4(4)(b).

removal to be carried out by specific salvage companies. Prior to the wreck removal the affected State has the option to demand certain conditions, however, these must not extend beyond what is necessary to ensure that the removal is conducted with consideration to the safety and protection of the marine environment.[359] Arguably this could be seen as limiting to some extent their sovereignty.

It is important to mention that Norway, Italy and Denmark clarified in a document submitted to the IMO that the application of the convention to the territorial sea of a State party will not deprive that State from taking measures in its territorial sea beyond the scope of the Nairobi Convention.[360] For instance, the Nairobi Convention does not deny a State party the power of requiring a wreck to be removed if it does not pose a 'hazard' as required by the convention. However, where the coastal State takes measures in the territorial sea that go beyond the provisions of the convention in removing a wreck that does not pose a 'hazard', then the coastal State cannot rely on the compulsory insurance provision provided by the convention.[361]

The Nairobi Convention under Article 3(2) allows a State to opt in and extend the application of the Nairobi Convention to its territorial sea.[362] If a State decides to opt in and extend the Nairobi Convention to its territorial sea, then it must notify the IMO Secretary-General.[363] To date, 20 contracting States have made the necessary declaration that triggered their right under Article 3(2), these include Cyprus,

[359] Ibid.
[360] *LEG 92/4/3* (n 308) 2.
[361] Ibid 2.
[362] *Nairobi Convention* (n 29) Article 3(2).
[363] Ibid Article 3(2).

Denmark, Liberia, Malta, Panama and the UK.[364] If a State had notified the Secretary-General before the Nairobi Convention came into force, then its decision to opt-in was effective from the commencement of the Convention. If notification is given subsequently then a six month period is required before the territorial sea is covered.[365] Once the necessary notification has been made the application of the Convention extends to the territorial sea of the State except the provisions detailed under Article 4(4) of the Nairobi Convention as discussed above.

4.3.4.2. Application of the Nairobi Convention in the EEZ

The main objective of the Nairobi Convention was to cover hazards located beyond the territorial sea of a coastal State. The information gathered by the CMI review on national laws referred to above, indicated that most authorities acting under their national laws were empowered by them to take action against polluting wrecks located outside their territorial waters.[366] Very few countries, however, allowed appropriate action to be taken against wrecks that posed a danger to navigation outside their territorial waters, countries that did included the Netherlands and Denmark, but any action was restricted to shipping lanes which led to and from their ports.[367] As there was no international convention which empowered a coastal State to remove wrecks located beyond its territorial sea, such an order by a coastal State would fall outside their jurisdiction. It is clear that States under international law as alluded to previously have rights to protect their coastlines from pollution hazards

[364] *IMO* (n 66) 524.
[365] *Nairobi Convention* (n 29) Article 3(4).
[366] *Comite Maritime International* (n 347) 191.
[367] Ibid.

beyond the territorial sea.[368] Yet, no international treaty clearly prohibited or approved the removal of wrecks beyond the territorial seas.[369]

The Nairobi Convention, in accordance with Article 3(1), applies to wrecks which are located within the Convention Area.[370] The Convention Area is defined under the Nairobi Convention Article 1(1) as:

'the exclusive economic zone of a State Party, established in accordance with international law or, if a State Party has not established such a zone, an area beyond and adjacent to the territorial sea of that State determined by that State in accordance with international law and extending not more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured'.[371]

It further requires that if a State has not established an EEZ, then the Convention Area would be 'an area beyond and adjacent to the territorial sea of that State… and extending no more than 200 nautical miles from the baselines from which the breadth of its territorial sea is measured.'[372] This would be the equivalent area if the State had an established EEZ. Therefore, a State party to the Nairobi Convention is entitled to require a wreck located within its EEZ that poses a hazard to navigation or the marine environment to be removed by the owner.

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[368] *UNCLOS* (n 121) Article 221, Intervention Convention 1969.
[369] Comite Maritime International, CMI Yearbook 1996, 'CMI Study of the Law on Wreck Removal – Background Paper, Submitted to IMO by the Comite Maritime International', 208.
[370] *Nairobi Convention* (n 29) Article 3(1).
[371] Ibid Article 1(1).
[372] Ibid Article 1(1).

4.3.5. Financial Liability and Compensation Provisions

One of the most significant aspects of the Nairobi Convention is the creation of the financial liability and compensation provisions that can be found under Article 12 of the convention. Prior to the Nairobi Convention coming into force, not all disagreements during the negotiation phase between States could be resolved. One of the disagreements was regarding the provisions on financial liability and compensation and in 1999 it was suggested by the Netherlands that these provisions be removed from the draft convention.[373] This created discord between those States who considered that the Nairobi Convention should be used for financial security and those who were purely concerned with the jurisdictional power they would gain in their EEZ for dealing with wrecks.

The absence of any law that obliged a ship owner to obtain compulsory insurance or make him strictly liable for the costs of wreck removal frequently resulted in ship owners attempting to avoid responsibility for the subsequent costs of wreck removal. Incidents such as those of the *Torrey Canyon*, the *An Tai* and the *MV Lagik* illustrate the need for a liability and compensation provision in order for coastal States to have financial security.

The *An Tai* was a general cargo ship, which sank in 1997 whilst in Port Klang, Malaysia. The *An Tai* arrived in Port Klang from China in order to discharge cargo, however, her hull split causing the vessel to sink, resulting in severe pollution to the

[373] IMO Documents, 'Report of the correspondence group on wreck removal' LEG 80/5, (10th September 1999).

harbour whilst also creating a navigational hazard. The marine department ordered the vessel to be removed by the owners, the An Tai Navigation Enterprise based in Beijing, China. However, the owners failed to comply with the order stating that they did not have sufficient funds. The insurance company refused to cover the costs, citing that there were limitations on the cover provided. The Malaysian Government had no option but to remove the wreck itself, at a cost of approximately USD 4 million.[374] Similarly, in 2000 the container ship *MV Lagik* ran aground in the River Nene in the UK. The owners simply abandoned the vessel, therefore the burden of removing the wreck fell on the UK Government. The total cost was £1.25 million and every attempt made to recoup this amount failed.[375] Clearly, had there been laws which provided financial security for wreck removal costs, it would be plausible that these situations would not have arisen. In 2002, a revised draft was submitted by the Netherlands, which included the financial liability provisions.[376]

4.3.5.1. Nairobi Convention Provisions on Compulsory Insurance

The Nairobi Convention under Article 12 obliges ship owners of vessels of 300 gross tonnage and above to maintain insurance for wreck removal expenses up to the amount required under Article 6(1)(b) of the Convention on Limitation of Liability for Maritime Claims 1976, as amended (LLMC).[377] Warships and State-owned

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[374] IMO Documents, 'Experience of *An Tai* incident' LEG 83/5/2, (14th September 2001).
[375] United Kingdom Department for Transport, 'UK Implementation & Ratification of the Nairobi International Convention of the Removal of Wrecks 2007', available at: http://webarchive.nationalarchives.gov.uk/20091003113932/http://www.dft.gov.uk/consultations/archive/2008/removalofwrecks2007/webversion?page=3#a1009 (accessed 19 October 2019).
[376] IMO Documents, 'Draft Convention on Wreck Removal' LEG 84/4, (27th February 2002).
[377] Convention on Limitation of Liability for Maritime Claims (adopted 19 November 1976, entry into force 1 December 1986) 1456 UNTS 221; as amended by the 1996 Protocol (adopted 2 May 1996,

vessels on government non-commercial service are not required to maintain such insurance unless the flag State decides otherwise.[378] A State has the option to apply Article 18(1) of the LLMC, which permits a State to exclude the limitation of liability for wreck removal, leaving the ship owner fully liable.[379] This does not release the ship owner's obligation to have insurance under Article 12 of the Nairobi Convention.[380] Very importantly the Nairobi Convention allows direct action to be taken against the Protection and Indemnity Club (P&I Club). The key provision for this is Article 12(10) of the Nairobi Convention, which states that 'any claim for costs arising under this Convention may be brought directly against the insurer or other person providing financial security for the registered owner's liability.'[381] In such a case, the P&I Club would cover the costs that the ship owner would be legally liable for under the convention or national law if the wreck was located within the territorial sea.

These provisions on strict liability on the shipowner in relation to wreck removal and the obligation to maintain insurance for the costs associated with the removal have been characterised as the strength of the Nairobi Convention.[382] However, under Article 13 the convention provides a time limit in which an action for costs may be brought against the ship owner. The right to recover costs ceases to exist three years after the hazard is identified and under no circumstance will an action be brought

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entry into force 13 May 2004) RMC I.2.340 II.2.340; hereinafter *LLMC*; *Nairobi Convention* (n 29) Article 12.

[378] *Nairobi Convention* (n 29) Article 4 (2), (3).

[379] *LLMC* (n 377) Article 18(1).

[380] Ibid.

[381] *Nairobi Convention* (n 29) Article 12(10).

[382] *Dromgoole and Forrest* (n 89) 103.

beyond six years following the incident which resulted in the shipwreck.[383] It is not necessary, however, that the hazard will arise within this time frame, it can be the case that the hazard arises years after its sinking, which would imply that these provisions on strict liability and costs for removal would not apply.

4.4. Concluding Remarks

The Nairobi Convention is undoubtedly a significant addition to the existing international law. It has created international regulations that allow a coastal State to intervene and remove or have removed a wreck that poses an environmental or navigational threat. More importantly it has extended the rights granted to a coastal State under the convention to its EEZ. Even though the application of the Nairobi Convention in the EEZ only applies between State parties to the convention, it is still a major breakthrough for coastal States. A further significant aspect of the Nairobi Convention is the strict liability on ship owners and the compulsory insurance provisions that allow a coastal State to claim the costs it has incurred. However, the benefit of these provisions does not extend to historic wrecks. In addition, the optional application of the convention to the territorial sea is a major advantage for coastal States, as they would be entitled to apply the compulsory insurance provisions to modern wrecks.

Whilst the Nairobi Convention is a major step forward in the field of wreck removal, there are various questions that remain unanswered and some inconsistencies which must be addressed. One of the main shortfalls of the Nairobi Convention is that it

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[383] *Nairobi Convention* (n 29) Article 13.

does not include a process on how to deal with a wreck once it is removed. There is no reference to ship recycling, preservation and protection if the wreck is classified as an UCH nor does it empower a State to sell the wreck and claim the proceeds, in order to be compensated for any costs the State incurred which go beyond the costs covered by the LLMC limits for the wreck removal. These questions are outside of the remit of this thesis.

A further question that should be investigated is whether sovereign immunity of warships continues after they sink. Should a government ship or warship sink in the EEZ of a foreign State creating a navigational hazard to a major port then arguably under the Nairobi Convention as soon as that ship becomes a wreck, a coastal State has the right to take the necessary action to protect its own interests. This is because it is not clearly defined in the Nairobi Convention if the sovereign immunity granted to State ships and warships continues after they have sunk. This could create tension between the flag State and the coastal State if action is taken as the flag State claims sovereign immunity and expects that its sunken warships and State wrecks remain untouched without its prior approval. This may not have been the intention when the Nairobi Convention was drafted, however, by not referring to State wrecks or sunken warships it leaves this issue open to contention and will be analysed in Chapter 5.

A further point that will be addressed is the issue of hazardous wrecks that have historical or archaeological significance and are therefore protected as cultural heritage under the UNESCO Convention.

The UNESCO Convention was undoubtedly also a much needed and very important convention. With the advancements in technology and the increased utilisation of the ocean by mankind, UCH was under constant threat of unregulated human interference. The UNESCO Convention was created to provide further protection to UCH that was not adequately covered under UNCLOS. It is the first convention that specifically deals with UCH and it sets out to regulate jurisdiction in maritime zones beyond 12 nautical miles. It regulates activities on UCH by introducing a set of Rules in the Annex of the Convention that must be followed by State parties in order to adequately protect the UCH.

Whilst the intentions of this convention are commendable many countries have failed to become parties for various reasons. Salient points made by States that have failed to become parties to the convention include concerns of 'creeping jurisdiction' as the UNESCO Convention sets out to protect UCH beyond a States' territorial sea and arguably this would undermine the existing jurisdictional balance achieved by UNCLOS. In addition, States would have to make major amendments to their national laws in order to comply with the UNESCO Convention and its Annex. Another contentious point that States are concerned with is the 100 year requirement for UCH, the UNESCO Convention provides the same level of protection for everything that has been underwater for at least 100 years. This may include UCH that is beyond protection or of no significant value and may leave wrecks such as the *HMS Hood,* which was discussed earlier in this chapter, unprotected. A further concern held by States is that of the sovereign immunity of their sunken warships. As was the case with the Nairobi Convention, it is not clear whether the sovereign

immunity that warships and State vessels enjoy, continues after such vessels have sunk.

Although it is clear that the UNESCO Convention is a major step forward in protecting UCH, its significance is questionable when a protected wreck becomes an environmental threat. It is not clear which norm would take precedence in case of a conflict between the UNESCO Convention and the Nairobi Convention. The next chapter will examine and will highlight any possible inconsistencies that may occur between the conventions.

Chapter 5. Potential Inconsistencies between the Duty to Preserve UCH and the obligation to protect the Marine Environment

As already identified, a wreck that could become a potential hazard to navigation or the environment may also have other significant historical and cultural values, such as being the last resting place for people who have lost their lives when the ship foundered, it may have an archaeological significance or it may even be a component of the marine ecosystem.[384] In order to preserve these values in accordance with the UNESCO Convention it is best for the wreck to remain *in situ*.[385] However, wrecks that have been underwater for many years may start to deteriorate and with it, the threat of pollution increases. In addition, such wrecks may also become a navigational hazard due to the ever-increasing size of ships being built today. In accordance with the Nairobi Convention, States have the power to nullify such hazards in order to protect the marine environment. To date, 30 States have ratified both the Nairobi Convention and UNESCO Convention; therefore, it is possible that such a scenario may arise.[386]

[384] *Cottrell* (n 77) 667.
[385] *Dromgoole and Forrest* (n 89) 92.
[386] *See* Figure 3 and Annex III which outline which States are party to both conventions.

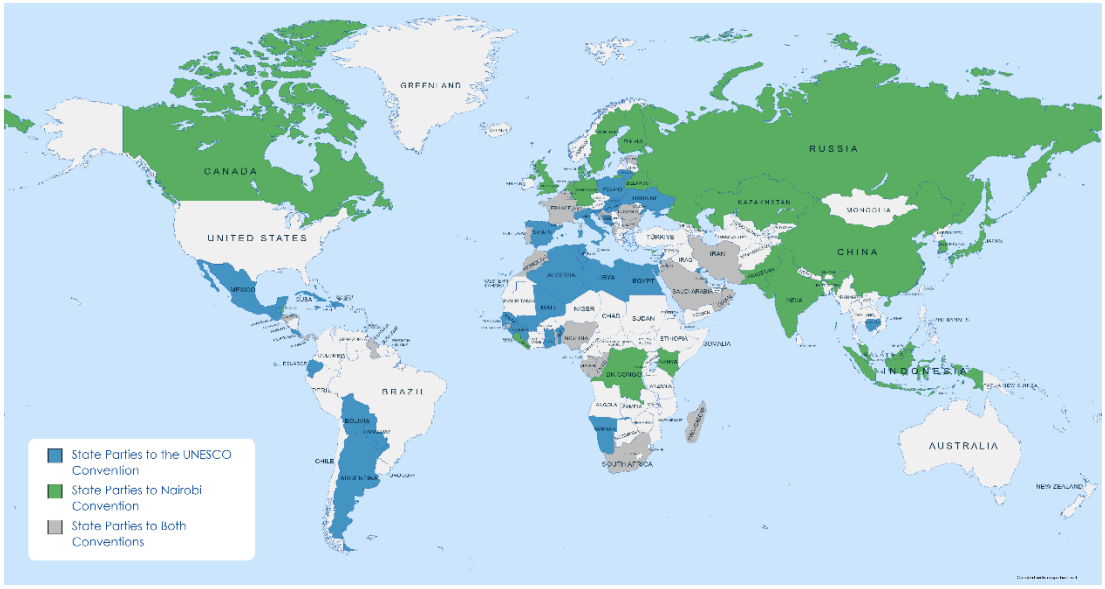

Figure 3: State Parties to the UNESCO Convention (Blue), State Parties to Nairobi Convention (Green), State Parties to Both Conventions (Grey), Source: Author's Own Figure based on Appendix I, II and III.

From the analysis made in Chapter 4, it can be argued that Article 192 of UNCLOS which obliges State Parties to protect and preserve the marine environment from any polluting source, could be seen to contradict the duty to protect objects of an archaeological and historical nature found at sea required by Article 303 when the polluting source is a historic wreck. The concerned State would be left with the dilemma between protecting the marine environment or preserving UCH.

To add to the confusion, neither the UNESCO Convention nor the Nairobi Convention have referenced this potential issue. The UNESCO Convention does not make reference to hazardous wrecks and how they should be dealt with, and the Nairobi Convention makes no reference to polluting wrecks that may also be protected as UCH. The aim of this chapter is to examine the possible conflicts that may arise in such instances where the Nairobi Convention would be applicable to a wreck that poses a hazard and at the same time is protected by the UNESCO

Convention. A good example would be the competing interests that could arise between a coastal State who is concerned with the marine environment and eliminating the hazard and a flag State of a polluting sunken warship claiming sovereign immunity who is concerned with preserving and protecting the UCH.

5.1. Can the Nairobi Convention apply to Historic Shipwrecks?

One of the most important principles of the law of treaties is that a treaty does not apply retrospectively. This means that it does not 'bind a party in relation to any act or fact which took place … before the date of the entry into force of the treaty.' [387] However, a treaty can 'apply to a pre-existing act, fact or situation which continues after [its] entry into force.'[388] For example, it could apply to a hazardous wreck, which became a maritime casualty prior to the Convention coming into force but still poses a threat, or where a wreck becomes hazardous after the convention entered into force.[389]

The Nairobi Convention does not explicitly state that the convention only applies to wrecks which have occurred after it came into force. However, some of the provisions illustrate that this was the intention. It is clear that strict liability on the ship owner and the obligation to have insurance cannot be applied to wrecks that sunk prior to the convention coming into force.[390] It would be highly unlikely to be able to identify the ship owners, who may have been a one ship company that

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[387] Vienna Convention on the Law of Treaties (adopted on 23rd May 1969 in Vienna, entered into force 27th January 1980) 1155 UNTS 331, 8 ILM 679; hereinafter *Vienna Convention*, Article 28.
[388] Anthony Aust, *Modern Treaty Law and Practice*, (Cambridge University Press, 2000) 142.
[389] *Dromgoole and Forrest* (n 89) 105.
[390] *Nairobi Convention* (n 29) Article 12.

dissolved immediately after the ship sinking. Needless to say, that even if the ship owner is located it would be almost certainly impossible for them to obtain insurance for a ship that is already a wreck. As mentioned above, Article 13 of the Nairobi Convention states that the right to recover costs ceases to exist three years after the hazard is identified and under no circumstance will an action be brought beyond six years following the incident which resulted in the shipwreck.[391] Therefore, it is clear that this provision was not intended to apply to historic wrecks that have been underwater for many years.

In addition, the reporting requirement under Article 5 of the Nairobi Convention could arguably only apply to contemporary wrecks.[392] Article 5 (1) requires the master and the operator of a ship that is involved in a maritime casualty which results in a wreck to report the incident to the affected State.[393] This clearly refers to modern vessels, it would be practically impossible to impose a duty on the master or operator of a long lost wreck to report on the condition of the wreck, any hazardous and noxious substances and the amount and types of oil that are located on board.[394]

Further, some parts of Article 9 which relate to imposing a duty on the ship owner to remove the wreck would not apply to pre-existing wrecks, such as, Article 9(1) which requires the affected State to inform the ship's registry and registered owner once it determines that a wreck is hazardous.[395] This could prove difficult when

[391] Ibid Article 13.
[392] Ibid Article 5.
[393] Ibid Article 5(1), Affected State is defined under Article 1(10) as: 'the State in whose Convention area the wreck is located.'
[394] Ibis Article 5(1), (2).
[395] Ibid Article 9(1).

dealing with wrecks that have been underwater for many years, identifying the owner could prove problematic and therefore the affected State would be unable to inform the owner that the wreck has been declared hazardous. Further if the owner cannot be identified then the duty imposed on them to remove their hazardous wreck would be unenforceable.[396] It is evident from the drafting of certain Articles that to a large extent there was no intention from the drafters to use the Nairobi Convention to deal with archaeological shipwrecks.[397]

However, the Nairobi Convention was not created merely for imposing liability to recover costs and a requirement to have insurance cover for wreck removal on the ship owner, but was also created to extend the rights and powers of the coastal State in its EEZ in respect to hazardous wrecks.[398] Therefore, Articles 7, 8 and certain provisions of Article 9 of the Nairobi Convention that provide powers to affected States to deal with the locating, marking, and removing of a wreck respectively would be applicable to modern as well as pre-existing wrecks.[399] The possibility of not being able to identify and contact a ship owner was anticipated under Article 9(7) of the Nairobi Convention, which empowers a coastal State to remove the wreck when no contact is possible using the most practical and efficient method available whilst taking into consideration safety and the protection of the marine environment.[400] The failure of this Article to require the affected State to take into

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[396] Ibid Article 9(2).

[397] Sarah Fiona Gahlen, 'The Wreck Removal Convention in Force', (2015) 21 *Journal of International Maritime Law*, 111.

[398] *Dromgoole and Forrest* (n 89) 94. It should be kept in mind that for the coastal State to take measures in the EEZ, both the coastal and flag States should be party to the Convention.

[399] Ibid 113.

[400] *Nairobi Convention* (n 29) Article 9(7).

consideration the protection of UCH as well as the protection of the marine environment when removing the wreck, arguably leaves historic polluting shipwrecks vulnerable to improper handling by the affected State. As will be examined later on in this chapter the UNESCO Convention required that activities directed at such wrecks should be handled in accordance with the Annex of the UNESCO Convention.[401]

Therefore, even though some of the Articles contained in the Nairobi Convention are inadequate and cannot apply to pre-existing historic wrecks, this does not mean that the affected coastal State cannot take advantage of the powers granted to it under the Nairobi Convention when a pre-existing wreck poses a hazard to the marine environment. However, these powers could prove controversial when the polluting wreck is also protected by the UNESCO Convention or is a sunken warship under the sovereign immunity of the flag State.

5.2. Sunken Warships and Sovereign Immunity

Wrecks from the two World Wars are conveniently disregarded by most countries, until they start to unexpectedly pollute the surrounding area.[402] Sunken warships and other State owned or operated vessels that were lost during war or while performing various State duties constitute a large number of the UCH. As can be seen in *Figure 4* below potentially polluting wrecks are located in close proximity to coasts around

[401] *UNESCO Convention* (n 19) Annex.

[402] James Delgado and Ole Varmer, The Public Importance of World War I Shipwrecks: Why a State Should Care and the Challenges of Protection', https://www.gc.noaa.gov/public-importance-ww1-shipwrecks.pdf (accessed 20 September 2022), 114. A good example is the *SS Jacob Luckenbach* which was largely forgotten until the Californian coast was mysteriously polluted.

the world. Most of these wrecks are from WWII and have therefore been underwater for approximately 80 years. In fact, a survey carried out in 2005 revealed that from the 8,569 wrecks worldwide that pose an environmental threat, 75 per cent of the wrecks were maritime casualties from WWII.[403] These wrecks were built from steel and corrosion over time is unavoidable, therefore, they have correctly been described as 'spills waiting to happen'.[404] Even though these wrecks do not currently meet the 100 year threshold of the UNESCO Convention, many are protected under domestic legislation and States that have claimed their sovereign immunity. Inevitably, in the coming years these wrecks will also fall within the remit of the UNESCO Convention.

The question of interference with sunken warships and State wrecks is one of political sensitivity. Such wrecks often represent war graves for the people who lost their lives whilst serving their country. Therefore, the primary concern of the flag State is to make sure that such sites are appropriately treated and respected.[405] Further, some warships may have been carrying commercially valuable cargo, sensitive information or equipment which States may wish to keep confidential.[406]

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[403]Jacqueline Michel, Trevor Gilbert, Jon Waldron, Charles Blocksidge, Dagmar Etkin and Robert Urban, Potentially Polluting Wrecks in Marine Waters: an issue paper prepared for the 2005 International Oil Spill Conference, (May 2005) *International Oil Spill Conference Proceedings*, 18.

[404] Mick Hamer, 'Why wartime wrecks are slicking time bombs', 1 September 2010, NewScientist, Isuue 2776, https://www.newscientist.com/article/mg20727761-600-why-wartime-wrecks-are-slicking-time-bombs/ (accessed 25 September 2022).

[405] *Dromgoole* (n 25)134.

[406] *For example, the Glomar Explorer case,* see Jason R. Harris, Protecting Sunken Warships as Objects Entitled to Sovereign Immunity, (2002) 33 *University of Miami Inter-American Law Rev*iew 101 and Frederic A. Eustis, III, The Glomar Explorer Incident: Implications for the Law of Salvage, (1975) 16 *Virginia Journal of International Law* 177, 179 n. 18.

Maritime States who have or had substantial naval presence are eager to ensure that no one may interfere with their wrecks. To enforce this case, States make two claims: 1) that title to the wreck continues until expressly abandoned; 2) that the wrecks are protected by sovereign immunity and are therefore, subject to the jurisdiction of that State.

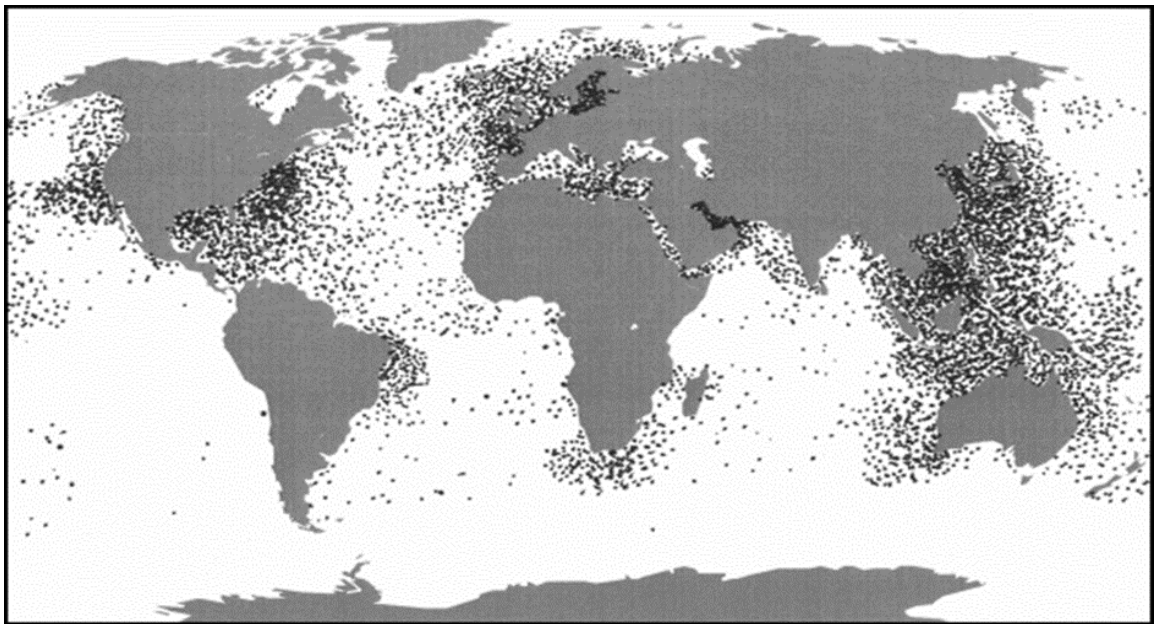

Figure 4: Approximate distribution of potentially polluting wrecks. Source: 2005 International Oil Spill Conference.

5.2.1. Definition of Warship

5.2.1.1. Position under the Nairobi Convention

The Nairobi Convention fails to provide a definition of the term 'warship'. Therefore, the definition of the term 'warship' is in accordance with the definition

provided by UNCLOS.[407] The term 'warship' is defined under Article 29 of UNCLOS as '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.'[408] Therefore, in accordance with Article 4(2) of the Nairobi Convention a warship that meets the above definition and is on a non-commercial service is excluded from the application of the Nairobi Convention.[409] This would mean, that warships are not required, for example, to comply with the compulsory insurance provision required under Article 12.[410]

One can argue that the definition of warship does not include decommissioned warships as the warship must be 'under the command of an officer duly commissioned by the government of the State' and as such decommissioned warships are not excluded under Article 4(2) of the Nairobi Convention. Therefore, a decommissioned warship, which would revert to being just a ship, would be required to have the necessary insurance under Article 12 if its flag State is party to the convention. In addition, coastal States can take action against a sunken decommissioned warship if it poses a navigational or environmental threat within

[407] This is because of the Nairobi Convention's preamble stating that the Nairobi Convention should be implemented in accordance with the provisions of UNCLOS and Customary International Law; *Nairobi Convention* (n 29).
[408] *UNCLOS* (n 121) Article 29.
[409] *Nairobi Convention* (n 29) Article 4(2) provides: 'This Convention shall not apply to any warship or other ship owned or operated by a State and used, for the time being, only on Government non-commercial service, unless that State decides otherwise.'
[410] Ibid Article 12 provides: 'The registered owner of a ship of 300 gross tonnage and above and flying the flag of a State Party shall be required to maintain insurance or other financial security, such as a guarantee of a bank or similar institution, to cover liability under this Convention'.

their EEZ. For example, the United States submarine USS Bugara (SS-331) that was decommissioned and lost whilst being towed on 1st October 1970 would not be excluded by the Nairobi Convention as it was decommissioned. The US Navy in this case has retained title and ownership of the wreck. It is located within US territorial waters and as such the US can protect the wreck under its domestic laws. It has done so by listing the wreck under the Sunken Military Craft Act. If the wreck was located outside US territorial waters, as the international treaty law stands today, it would not be excluded from the application of the Nairobi Convention as it was decommissioned.[411]

The question that arises is whether a sunken warship and a State wreck are excluded from the application of the Nairobi Convention under Article 4(2). The definition of 'warship' as discussed prior clearly cannot be met if the warship sinks as it is no longer under the command of an officer duly commissioned by the government and manned by a crew. As such one could argue that as soon as the warship sinks it is unable to fulfil the requirements of the definition and therefore, the Nairobi Convention would be applicable to sunken warships as they are no longer 'warships' afforded protection.

As discussed previously the Nairobi Convention provides a separate definition for the term 'ship' and the term 'wreck'. Therefore, in order for a ship to become a wreck certain requirements must be met or certain incidents must occur. Article 4(2)

[411] Office of National Marine Sanctuaries National Oceanic and Atmospheric Administration, 'U.S. Navy Submarine USS Bugara (SS-331), https://nmssanctuaries.blob.core.windows.net/sanctuaries-prod/media/shipwrecks/bugara/uss_bugara_fact_sheet.pdf (accessed 10 September 2022).

excludes the application of the Nairobi Convention from any warship or other ship, which is owned or operated by a State on a non-commercial service. If the intention was to exclude the application of warships which have become wrecks, then that should have been referred to in Article 4(2). With the absence of any reference to sunken warships or the term wreck, it leaves Article 4(2) open to interpretations.

It can therefore be argued that while the Nairobi Convention excludes from its application warships and State owned or operated vessels, its failure to refer to the term 'wrecks' effectively empowers a coastal State to take action against a hazardous wreck even if such a wreck is State owned, this because a ship and a wreck have different definitions. A flag State, should therefore, not rely on the exclusion granted to its warships under Article 4(2) as it is not clear if the exclusion continues to apply once such a warship sinks. Even though arguably the Nairobi Convention failed to provide a clear exclusion of sunken warships and State wrecks, the importance of sovereign immunity and the rights that flag States may have under customary international law will be further examined.

5.2.1.2. Position under the UNESCO Convention

In a corresponding way the UNESCO Convention also failed to provide a definition for the term 'warship'. Therefore, the applicable definition would also be the definition provided by Article 29 of UNCLOS discussed above.[412] However, a key difference between the Nairobi Convention and the UNESCO Convention is the inclusion of Article 1(8). Article 1(8) of the UNESCO Convention defines the term

[412] *UNCLOS* (n 121) Article 29.

'State vessels and aircraft' as 'warships and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage.'[413] In contrast to the Nairobi Convention, it is clear from this definition that when reference is made to 'State vessels and aircraft' the convention is referring to sunken warships and other State wrecks, this is clear due to the use of words 'at the time of sinking' and the requirement to meet the definition of UCH. To illustrate this point, Article 10(7) of the UNESCO Convention states that subject to certain provisions, no activity shall be directed at 'State vessels and aircraft' in the EEZ and continental shelf of party States without the prior authorisation of the flag State.[414] It is clear from the definition of 'State vessels and aircraft' that the intention of Article 10(7) is for no activity to be directed at sunken warships. This in itself is arguably an acknowledgement that the sovereign immunity afforded to warships continues even after they have sunk.

A further clear acknowledgement that sovereign immunity granted to warships continues after they have sunk is under Article 2(8) of the UNESCO Convention which states that:

'Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as

[413] *UNESCO Convention* (n 19) Article 1(8).
[414] Ibid Article 10(7).

modifying 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.'[415]

Finally, 'State vessels and aircraft' located within the Area are afforded total protection under Article 12(7) which asserts that no State party can take or authorise activities directed at such vessels located within the Area without the prior consent of the flag State.[416] Therefore, one could only take measures against a sunken warship or State wreck located within the Area with the prior approval of the flag State.

However, some States including the UK, France, the Russian Federation and Sweden expressed their concern regarding the sovereign immunity of their sunken warships under the UNESCO Convention.[417] They argued that Article 7(3) of the UNESCO Convention which deals with UCH in internal waters, archipelagic waters and the territorial sea does not oblige a coastal State to inform the flag State of the discovery of any of their sunken warships or State wrecks.[418]

More specifically, Article 7(3) provides that:

'Within their archipelagic waters and territorial sea, in the exercise of their sovereignty and in recognition of general practice among States, State Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, should inform the flag State party to this Convention and, if applicable, other States

[415] Ibid Article 2(8).
[416] Ibid Article 12(7).
[417] *United Nations Educational Scientific and Cultural Organization* (n 253) 559-560.
[418] Ibid.

with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.'[419]

In order to address this concern, on the 26th October 2001, a few days before the vote for the final text, the Russian Federation and the UK, endorsed by the United States of America, unsuccessfully proposed that the words 'should inform the flag State Party' in Article 7(3) should be replaced with the words 'shall consult the flag State Party'.[420] Further, they suggested the inclusion of the following sentence: 'such vessels and aircraft shall not be recovered without the collaboration of the flag State, unless the vessels and aircraft have been expressly abandoned in accordance with the laws of that State.'[421]As the proposed amendments were rejected a flag State party is arguably not guaranteed to be informed of any discovery.

In addition, as touched upon previously, while it is clear that under Article 10(7) no activity shall be directed towards sunken warships without the prior authorisation of the flag State in the EEZ and continental shelf of a State party, it is subject to two provisions. The first provision allows the Coordinating State to take necessary measures to protect UCH that is in immediate danger within its EEZ and continental shelf.[422] Therefore, if immediate action is required the prior authorisation from the

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[419] *UNESCO Convention* (n 19) Article 7(3)

[420] United Nations Educational Scientific and Cultural Organization, *Draft Resolution Submitted by Russian Federation and United Kingdom- Draft Convention on the Protection of the Underwater Cultural Heritage*, 31 C/COM.IV/DR.5, (Paris, 26 October 2001).

[421] Ibid 2.

[422] *UNESCO Convention* (n 19) Article 10(3)(b) states that: Where there is a discovery of underwater cultural heritage or it is intended that activity shall be directed at underwater cultural heritage in a State Party's exclusive economic zone or on its continental shelf, that State Party shall coordinate such consultations as "Coordinating State", unless it expressly declares that it does not wish to do so,

flag State is not obligatory.[423] The second provision entitles a State party 'to prohibit or authorize any activity directed' at UCH within its EEZ and continental shelf in order to prevent its sovereign rights or jurisdiction from being compromised.[424] Once again, this also allows measures to be taken without the prior approval of the flag State. Both provisions clearly go against the principle of sovereign immunity claimed by the flag States. In such instances, the flag State could use Article 2(8) mentioned above to challenge the right of the State party to take measures against their 'State vessel or aircraft'.[425] However, understandably, States have raised their concerns regarding the sovereign rights afforded to their sunken warships. These States are of the opinion that they have exclusive sovereignty over their sunken warships and that they can only be interfered with if the flag State has granted permission.[426]

The UNESCO Convention has failed to convince States that they would maintain complete sovereignty of their sunken warships and State wrecks.[427] This is considered a major disincentive which has been highlighted by many States as the obstacle in adopting the convention.[428] For example, the UK's most significant concern was the treatment of sunken warships and state owned or operated vessels

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in which case the States Parties which have declared an interest under Article 9, paragraph 5, shall appoint a Coordinating State.'

[423] Ibid Article 10(7).

[424] Ibid Article 10(2).

[425] Ibid Article 2(8).

[426] *Dromgoole* (n 25) 72.

[427] *United Nations Educational Scientific and Cultural Organization* (n 253) 559.

[428] States that have highlighted their concern in respect to the sovereign immunity of their sunken warships include the US, France, Germany, Spain, Netherlands and Russia.

on non-commercial service. The UK strongly believes that the sovereign immunity afforded to their vessels when afloat continues to exist even after they have sunk.[429]

The explanation given by the UK for abstaining during the vote was the following:

'The United Kingdom considers that the current text erodes the fundamental principles of customary international law, codified in UNCLOS, of Sovereign Immunity which is retained by a State's warships and vessels and aircraft used for non-commercial service until expressly abandoned by that State. The text purports to alter the fine balance between the equal, but conflicting rights of Coastal and Flag States, carefully negotiated in UNCLOS, in a way that is unacceptable to the United Kingdom.'[430]

Sweden also abstained, citing in particular 'the lack of consensus on warships and on coastal State jurisdiction on the continental shelf and the exclusive economic zone'.[431] Colombia supported the UNESCO Convention but requested extra time to look into the issues of sovereignty and jurisdiction. Finally, the United States of America as observer, stated that if it had a vote, it would have voted against the UNESCO Convention as it disagreed with the provisions on jurisdiction, the

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[429] Michael V. Williams, UNESCO Convention on the Protection of the Underwater Cultural Heritage: An Analysis of the United Kingdom's Standpoint, in 'The UNESCO Convention for the Protection of the Underwater Cultural Heritage: Proceedings of the Burlington House seminar, October 2005', (2006) *Nautical Archaeology Society,10,* 4.

[430] Foreign and Commonwealth Office, 'UNESCO Convention on Underwater Cultural Heritage: Explanation of Vote', 31 October 2001. However, a review carried out in 2014 argues that 'were the UK to ratify the Convention, the impact would be a strengthening, rather than weakening, of its position with respect to its identified sunken State vessels around the world.' See: UK UNESCO 2001 Convention Review Group, 2014, The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001: An Impact Review for the United Kingdom, 51.

[431] *United Nations Educational Scientific and Cultural Organization* (n 253) 559 para.15.30.

reporting scheme, the sovereignty of warships and the compatibility of the Convention with UNCLOS.[432]

5.2.2. The sovereign immunity of a warship and State owned or operated vessels

Sovereign immunity is a long-established legal concept that stems back to the notion that sovereigns and their property are immune from legal actions brought against them.[433] The application of this concept to State vessels originates from the fact that traditionally such vessels were owned by the sovereign and therefore were immune from the jurisdiction of all other States, even if located in another State's territorial sea.[434] Legally, the concept of sovereign immunity on State vessels can be traced back to the 19th century, when the US Supreme Court in the case of *Schooner Exchange v McFaddon* confirmed the existence of the notion of sovereign immunity.[435] In this case, the merchant vessel *Exchange*, owned by two Americans, was seized by France during Napoleon Bonaparte's reign in December 1810 when she was sailing from the US to Spain. The ship was then commissioned as a warship under the French navy and was named Balaou. When the vessel subsequently docked in Philadelphia, the two American ex-owners brought an *in-rem* action in US courts to repossess the French warship. The court granted the French warship absolute sovereign immunity, and stated:

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[432] Ibid 560, It is important to note that the majority of States that voted against the UNESCO Convention or abstained voiced their satisfaction with the Annex of the Convention and their intention to apply the rules of the annex even if they have not ratified the Convention.
[433] *Williams* (n 429) 5.
[434] Ibid 5.
[435] The *Schooner Exchange v. McFaddon*, 11 U.S. 116, 7 Cranch 116 (1812).

'The Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the authority of the country.'[436]

Sovereign immunity of navigating warships and State owned vessels is a widely accepted principle of international law and it can be found in various international treaties.[437] Under Articles 95 and 96 of UNCLOS warships and other State owned or operated vessels have complete immunity from the jurisdiction of any state other than the flag state while on the high seas.[438] More specifically, Articles 95 and 96 of UNCLOS state that warships and other vessels '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'.[439] However, within the territorial waters of a coastal State a warship and other vessels on government non-commercial service enjoy sovereign immunity with certain

[436] Ibid 147.
[437] Article 22 of the 1958 Convention on the Territorial Sea and the Contiguous Zone, (adopted 29 April 1958 in Geneva, Switzerland, entry into force 10 September 1964) 516 UNTS 205; Article 32 *UNCLOS* (n 121), Article 16 of the 2004 UN Convention on Jurisdictional Immunities of States and their Property, Article 3 of the International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels 1926 (adopted 10 April 1926, and Additional Protocol, adopted 24 May 1934 in Brussels, Belgium) 176 LNTS 199, hereinafter *Brussels Convention*.
[438] *UNCLOS* (n 121) Articles 95 and 96; The high seas under Article 86 of UNCLOS include 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.
[439] *UNCLOS* (n 121) Articles 95 and 96.

preconditions.[440] If the warship does not comply with the laws and regulations of the coastal State and disregards requests for compliance, the coastal State can demand that such a warship leaves their territorial sea immediately.[441] In addition, the flag State of a warship or State owned or operated vessel on a non-commercial service that causes loss or damage to the coastal State by not complying with its laws and regulations in relation to passage through its territorial sea shall be liable for any damage caused.[442] Furthermore, warships are also immune from being seized or arrested by any foreign State irrespective of where the warship is located, whether within a States territory or on the high seas.[443] The flag State of the warship also has complete control over all passengers and crew and is responsible for their actions whilst on board the warship or State vessel.[444]

Even though it is clear that navigating warships enjoy sovereign immunity, when such vessels sink the international law is far from clear and in need of clarification. If in fact a wreck can no longer be classed as a ship, then it is difficult to argue that sovereign immunity continues after the warship sinks. Therefore, a sunken warship would not be able to rely on the sovereign immunity granted to navigable warships and their legal status is debatable.

Both the Nairobi Convention and UNCLOS completely fail to clarify if sovereign immunity is to continue after the warship sinks. Whilst the UNESCO Convention

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[440] Ibid Article 32.
[441] Ibid Article 30.
[442] Ibid Article 31.
[443] *Brussels Convention* (n 437) Article 3; A.R. Thomas and James C. Duncan (eds.), *Annotated Supplement to The Commander's Handbook on the Law of Naval Operations* (Vol. 73, US Naval War College International Law Studies, 1999) 110.
[444] Ibid.

implies in some instances that no activity shall be directed at sunken warships that meet the definition of UCH, it does not give exclusive sovereign immunity as claimed by the flag States.[445] If sovereign immunity was to continue after the vessel sinks that should have been expressly stated within all three conventions. The fundamental issue of whether a sunken warship retains sovereign immunity is still open to dispute.

Leading academics on the topic such as Anastasia Strati argue that wrecks retain their status as ships even after they have sunk. This argument would infer that all wrecks whether State owned or not would remain sovereign to their flag States on the high seas.[446] However, numerous other academics are of the opinion that immunity does not continue after a warship has sunk, simply because a warship or a State vessel is no longer a ship when it becomes incapable of navigation.[447] Lucius Caflisch, for example, is of the opinion that wrecks 'no longer qualify as vessels submitted to the exclusive jurisdiction of their flag State'.[448] Willem Riphagen has stated that sunken ships 'cannot simply retain indefinitely the status under international law of a ship.'[449] He goes on to explain that from a functional point of view a sunken ship is not a ship until it has been revived as such.[450]

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[445] *UNESCO Convention* (n 19) Articles 2(8), 10(7), 12(7).
[446] *Strati* (n 20) 220.
[447] Lucius Caflisch, 'Submarine Antiquities and the International Law of the Sea', (1982) 13 Netherlands Yearbook of International Law 3, 22.
[448] Ibid 25.
[449] Willem Riphagen, 'Some Reflections on "Functional sovereignty"' (1975) *Netherlands Yearbook of International Law* 121, 128.
[450] Ibid 128.

The point of view that sovereign immunity does not continue after a warship has sunk is reinforced by Article 29 of UNCLOS. More specifically, when a warship has sunk, it cannot continue to meet the definition of a warship as required under Article 29.[451] As mentioned previously, Article 29 requires the warship to be under the command of an officer and manned by a crew.

However, a different supposition may suggest that regardless of whether or not a wreck falls within the definition of a ship the wreck may still be property of the State and therefore still enjoy sovereign immunity.[452] Time creates a disputable factor. Can a long lost wreck that is unserviceable, contains no government sensitive cargo or information continue to be granted sovereign immunity? This was one of the questions posed by Forrest. [453] The issue of sovereign immunity and the issue surrounding the title and ownership of a wreck have often been intertwined. However, Forrest has suggested, that the two issues, while related to some extent, are also somewhat distinct.[454] It has been asserted that if ownership of a sunken warship and State owned wreck is maintained by the flag State then sovereign immunity is a given as it continues to be State property.[455] However, it could be the case that the sunken warship or State wreck was not owned at the time it was lost but was

[451] *UNCLOS* (n 121) Article 29
[452]*Dromgoole* (n 25) 135.
[453]Craig Forrest, 'An International Perspective on Sunken State Vessels as Underwater Cultural Heritage', (2003) 34 *Ocean Development & International Law*, 45.
[454] Ibid 41, see also *Williams* (n 429).
[455] Wolff Heintschel von Heinegg, Belligerent Obligations under Article 18(1) of the Second Geneva Convention: The impact of Sovereign Immunity, Booty of War, and the Obligation to Respect and Protect War Graves, (2018) 94 *International Law Studies* 127, 130.

operated by the flag State on a governmental non-commercial service.[456] In such cases the sovereign immunity would not be granted automatically as it is not State owned property. The definition of the term warship however, discussed above, does not require the warship to be owned by the flag State, therefore, States argue that their vessels that were lost during governmental non-commercial operations enjoy the same sovereign immunity to the flag State much like the State owned wrecks.[457]

Therefore, this gives rise to two questions, firstly, does a flag State maintain ownership of sunken warships and State owned wrecks? And secondly, does sovereign immunity continue after a warship sinks? These questions will be analysed further.

5.2.3. Does a flag State maintain ownership of sunken warships and State owned wrecks?

Many States, including the UK and the US, are of the opinion that their sunken warships and State owned wrecks remain under the ownership of the flag State until title is officially relinquished or abandoned, no matter what the reason for its loss, regardless of whether it was an accident or by enemy action during times of conflict.[458] Flag States argue that an owner maintains ownership regardless of how many years have passed and where the wreck is located. This was illustrated in the case of the *La Belle*, a French navy auxiliary vessel that was lost during bad weather

[456] For example, the UK leased the HMS Clyde but did not own the warship. Tim Webb, Guns for Hire? No, but There Are Warships for Rent, Guardian (29 March 2008), https://www.theguardian.com/business/2008/mar/30/military (accessed 18 September 2022)
[457] Heintschel von Heinegg (n 455) 130.
[458] US Navy, US Marine Corps and US Coast Guard, The Commander's Handbook on the Law of Naval Operations (2017), NWP 1- 14M/MCTP 11-10B/COMDTPUB P5800.7A, 3-7.

in 1686 just off the coast of what is now Texas, US.[459] The wreck was located in 1995 by a team of archaeologists and an agreement was reached between France and the US granting the Texas Historical Commission the right to protect and preserve the wreck. The importance of this agreement is that it recognises under Article 1 that France has not abandoned or transferred title and that it continued to retain the title to the wreck of the *La Belle*.[460] This affirms the position held by States that ownership of a wreck is not lost by the passage of time or its location. In this instance 317 years from the date of loss to the date of the agreement was not enough for France to lose the title of the wreck. Similarly, the fact it was not located within its territory and was located in US waters was not a deterrent in maintaining ownership.

A further example includes the case of *Salvage Association of London v S.A. Salvage Syndicate Ltd*, the *SS Thermopylae*, a British steamship, was wrecked on 11th September 1899 in Table Bay, South Africa when she run aground during a voyage from Melbourne, Australia to London, UK.[461] The cargo which was on board the *SS Thermopylae* was abandoned by the owners to the underwriters. The underwriters, who after the abandonment became the subrogated owners of the cargo, did not take any measures to remove the cargo from the wreck for seven years. The defendants, who had a salvage licence, recovered objects from the site. It was held by De Villiers C.J. that the cargo was not abandoned by the underwriters stating that:

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[459] J. Barto Arnold, The Texas Historical Commission's Underwater Archaeological Survey of 1995 and the Preliminary Report on the Belle, La Salle's Shipwreck of 1686, (1996) 30 *Historical Archaeology* 4, 66-87, 66.

[460] Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of La Belle (Washington, 31 March 2003), Article 1.

[461] *Salvage Association of London v S.A. Salvage Syndicate Ltd* (1906) 23 SC 169.

‘a person cannot be held to have abandoned his property unless his intention so to abandon it is clearly proved… A person whose property has gone down in a shipwreck cannot be presumed to have abandoned it because for some years he has taken no steps to raise it…Anyhow, in my opinion clear proof of abandonment must be given, and in the present case there is not in my opinion, such clear proof of abandonment.’[462]

The seven years that lapsed in this instance where not sufficient to prove abandonment by the owners. The burden of proof of abandonment rests with the claimant. However, it is improbable that the claimant would be able to prove abandonment merely by the passage of time.

Further, in a formal statement made by Japan it acknowledged that ‘according to international law, sunken State vessels, such as warships and vessels on government service, regardless of location or the time elapsed remain the property of the State owning them at the time of their sinking unless it explicitly and formally relinquishes its ownership. Such sunken vessels should be respected as maritime graves. They should not be salvaged without the express consent of the Japanese Government.’[463] The issue of maritime graves will be discussed later on in this thesis, the importance of this statement in the present context is that it confirms that ownerships should be maintained by the flag State until expressly abandoned irrespective of the location of the wreck and time that has elapsed.

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[462] Ibid 171.

[463] Department of State, ‘Office of Ocean Affairs; Protection of Sunken Warships, Military Aircraft and Other Sunken Government Property’, Public Notice 4614, US Federal Register, Vol. 69, No. 24, 5 February 2004, 5647.

Similarly, in a formal statement made by William J. Clinton, the 42nd president of the US, titled 'United States Policy for the Protection of Sunken Warships' he affirmed the position that 'the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed. The United States recognises the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State. Further, the United States recognises that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea.'[464]

In addition, the US has created the Sunken Military Craft Act 2004, which stipulates that any sunken warships, sunken State vessels or aircraft, whether US or foreign, located within US jurisdiction maintain their title if they were entitled to it at the time they sank. Therefore, unless the flag State expressly abandons it, title cannot be lost because of the time that has elapsed. [465] In the case of *Sea Hunt v Unidentified Shipwrecked Vessel*, the US court recognised the sovereign rights of Spain over the shipwrecks of *Juno* and *La Galga*.[466] The two Spanish vessels were both lost off the coast of Virginia in 1750 and 1802 respectively. In the late 1990's Sea Hunt Inc., an

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[464] Administration of William J. Clinton, Statement on United States Policy for the Protection of Sunken Warships, 19 January 2001. The statement further acknowledged that due to 'recent advances in science and technology, many of these sunken Government vessels, aircraft, and spacecraft have become accessible to salvors, treasure hunters, and others. The unauthorized disturbance or recovery of these sunken State craft and any remains of their crews and passengers is a growing concern both within the United States and internationally. In addition to deserving treatment as gravesites, these sunken State craft may contain objects of a sensitive national security, archaeological or historical nature. They often also contain unexploded ordnance that could pose a danger to human health and the marine environment if disturbed, or other substances, including fuel oil and other hazardous liquids, that likewise pose a serious threat to human health and the marine environment if released.'

[465] Sunken Military Craft Act 2004 10 U.S.C 113.

[466] *Sea Hunt, Inc. v Unidentified Shipwrecked Vessel or Vessels*, 47 F.Supp. 2d 678 (E. D. Va. 1999).

American salvage company claimed that they had discovered what was thought to be the wreckage of the vessels. Spain intervened claiming immunity; the US District Court of Virginia held that the shipwrecks were immune, since there was no evidence of abandonment by Spain.

An example where the flag State expressly transferred title of a State owned wreck is that of the *Grace Dieu* the biggest ship to be built in England at the time of her launch in 1416.[467] The *Grace Dieu* was Henry V's flagship and as such the rightful owner of the royal warship was the Crown. On 30th January 1970 the MoD acting on behalf of the Crown transferred the ownership of the wreck to the University of Southampton for £5, her care lies with its Department of Archaeology. The timing of the acquisition by the University of Southampton and the introduction of the Protection of Wrecks Act 1973 contributed to the *Grace Dieu* becoming one of the first sites to be designated with historical and archaeological importance.

A further example is that of the German U-boat 895 which sank in the Malacca Strait in 1944. The High Court of Singapore held that the submarine remained under the ownership of Germany as it was not captured before sinking.[468]

From the examples highlighted above, it can be concluded that there is consistent State practice which shows that ownership remains with the flag State unless expressly abandoned. States through bilateral and multilateral agreements as well as

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[467] Norman Palmer and Ewan McKendrick, *Interests in Goods*, (Second Edition, 1998)152.
[468] Preliminary Report of the Institut de Droit International, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law*, Rapporteur: M. Natalino Ronzitti, can be found in *Yearbook of Institute of International Law*, (2011) Rhodes Session, Volume 74, 147, hereinafter *Rhodes Session.*

through governmental official statements and case law attest that under customary international law they do not lose title in their sunken warships and State owned wrecks wherever they are located and irrespective of how much time has passed.

5.2.4. Sovereign Immunity of Sunken warships under Customary International law

It is evident from international practice that not only is the ownership of sunken warships and State owned vessels customary international law but that also sovereign immunity over their sunken warships and State wrecks is also customary international law. The notion of customary international law will be fully analysed in Chapter 6, but in short, two requirements must be met to prove the existence of customary international law. Firstly, there must be consistent State practice and secondly evidence that the practice is accepted as law.[469]

In the case of *Nuestra Señora de las Mercedes*,[470] Odyssey Marine Exploration (Odyssey), an American salvage company in 2007 located what was thought to be the shipwreck of the Spanish warship *Nuestra Señora de las Mercedes*, which was sunk by a British frigate off the Strait of Gibraltar in 1804 carrying a cargo of bullion with an estimated value today of USD500 million.[471] As the wreck was located on the high seas Odyssey sought ownership rights over the wreck and its cargo by collecting artefacts from the wreck and transferring them to US territory, however,

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[469] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment) [1969] ICJ Rep 3 [44], also see Jörg Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems' (2004) 15 EJIL 523, 524.

[470] *Odyssey Marine Exploration, Inc. v Unidentified Shipwrecked Vessel* 657 F. 3d at 115 (2011).

[471] Jie Huang, 'Legal Battles Over Underwater Historic Shipwrecks in High Seas: The Case of Odyssey', (2012) 3 *Law of the Sea Reports* 1, 1.

Spain argued that the US Court did not have jurisdiction over the sunken warship and its cargo as the wreck had sovereign immunity. The Court recognised the sovereign rights of Spain and ordered the bullion to be returned to Spain.[472] Furthermore, it also held that the cargo of *Nuestra Señora de las Mercedes* was not severable from the wreck. This implies that 'the protections awarded to a sunken sovereign vessel also extend to the cargo on board that vessel.'[473]

The UK's MoD has acknowledged through an official publication entitled 'Protection and Management of Historic Military Wrecks outside UK Territorial Waters' the existence of customary international law when it comes to the sovereign immunity of their sunken warships.[474] The UK further clarified that it is of the view that unless expressly abandoned by the flag State sovereign immunity is maintained wherever the sunken warship or State wreck is located and that the flag States' prior approval is required for any activities directed at such wrecks.[475] This is clear evidence that the UK feels that it is obliged or has a right to act in a certain way in relation to sunken warships and State wrecks.

Numerous other States have made formal statements to this effect, for example, France affirmed that 'in accordance with UNCLOS and Customary Law, every State craft (e.g., warship, naval auxiliary and other vessel, aircraft or spacecraft owned or operated by a State) enjoys sovereign immunities regardless of its location and the

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[472] Jie Huang, 'Odyssey's Treasure Ship: Salvor, Owner, or Sovereign Immunity', (2013) 44 *Ocean Development & International Law*, 170, 171.
[473] *Odyssey Marine Exploration, Inc. v Unidentified Shipwrecked Vessel* (n 470) at 1181.
[474] Ministry of Defence, Department of Culture, Media &Sport, Protection and Management of Historic Military Wrecks outside UK Territorial Waters, April 2014, 7.
[475] Ibid 7.

period elapsed since it was reduced to wreckage.'[476] It further states that the title of ownership is intangible and inalienable and that no action shall be taken on a French sunken craft without its prior consent.[477]

Other examples that prove the emergence of customary international law include the 'Exchange of Notes Constituting an Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Italy Regarding the Salvage of *HMS Spartan*' in which Italy acknowledged that the *HMS Spartan*, which sank off the coast of Anzio in western Italy, was sovereign to the UK and plans for its disposal had to be agreed by the UK.[478] Similarly, in 2007 Spain acknowledged UK sovereignty over *HMS Sussex*.[479] South Africa recognised UK's title regarding the wreck of *HMS Birkenhead*. Canada recognised Britain's sovereign immunity over the wrecks of *HMS Erebus* and *HMS Terror*, lost on an expedition in 1847.[480] In 1989 France recognised the sovereign immunity of the US with regard to the *CSS Alabama*,[481] which sank off Cherbourg in 1864 and in 2003 the US reciprocated with the French wreck *La Belle.*[482]

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[476] *US Federal Register* (n 463) 5647.
[477] Ibid 5647.
[478] 6 November 1952, 158 UNTS 432.
[479] Note by the Spanish Ministry of Foreign Affairs and Cooperation of 23 March 2007.
[480] Memorandum of Understanding between the Governments of Great Britain and Canada pertaining to the shipwrecks *HMS Erebus* and *HMS Terror* (8 August 1997), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/458500/MOU_FOI_0286-15.pdf (accessed 10 November 2022).
[481] Agreement between the Government of the United States of America and the Government of the French Republic Concerning the Wreck of the *CSS Alabama* (Paris, 3 October 1989).
[482] Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of La Belle (Washington, 31 March 2003).

At this point, it is also worth highlighting the recent case of *Argentum Exploration Limited v The Silver.*[483] This case involved the cargo of 2,364 bars of silver that were lost in 1942 when the *SS Tilawa,* a privately owned merchant vessel, en route to Durban, South Africa was sunk in the Indian Ocean by the Japanese submarine I-29. At that time, it was considered unsalvageable due to the inadequate technical capabilities, however in 2017 Argentum, a UK salvage company, salvaged the silver and transferred it to Southampton where it was handed over to the Receiver of Wreck.[484] The silver was owned by the Republic of South Africa (RSA) and was being transported on the *SS Tilawa* under a contract of carriage for the production of South African coinage.[485] The *SS Tilawa* was carrying a total of 6,472 tons of cargo and 954 passengers and crew of which 280 tragically lost their lives when the vessel was sunk.[486]

In 2018, whilst the silver was in custody in Southampton, the RSA claimed ownership of the silver which resulted in Argentum commencing *in rem* proceedings seeking a salvage award. The RSA argued that being the owner of the silver which was intended to be used for a non-commercial purpose it was immune from the *in rem* action due to sovereign immunity. The Court of Appeal was tasked with determining whether the cargo of silver and the *SS Tilawa* were 'in use, or intended for use, for commercial purposes' in the context of section 10(4)(a) of the State

[483] *Argentum Exploration Ltd v The Silver and All Persons Claiming to Be Interested In And/or To Have Rights In Respect Of, the Silver* [2022] EWCA Civ 1318 (11 October 2022).
[484] Ibid.
[485] Ibid.
[486] Ibid.

Immunity Act 1978.[487] The majority of the judges of the Court of Appeal concluded that the silver at the time when the vessel sank was in use for commercial purposes due to the fact that the RSA had entered into a contract of carriage with a merchant vessel on a commercial voyage. Therefore, in accordance with section 10(4)(a) of the State Immunity Act 1978 the silver would not be entitled to sovereign immunity. Section 10 was incorporated into the 1978 Act in order for the UK to ratify the 1926 International Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels (Brussels Convention).[488] Article 3 of the Brussels Convention provides that sovereign immunity is granted to vessels only when they are 'used at the time a cause of action arises exclusively on Governmental and non-commercial service'.[489] In supporting the judgment Lord Justice Popplewell stated that: '[a] state which contracts to buy and transport in a merchant ship any form of military equipment or necessaries, whether they be boots, armaments or rations, is engaged in activity which is not sovereign but commercial, irrespective of the ultimate purpose of that activity". He then goes on to clarify that '[w]here a state uses its own warship to carry military equipment or armaments, or requisitions a ship to do so, the activity is sovereign; but even in such cases, section 10(4)(a) removes the immunity if the intended purpose is non-sovereign, as it would be, for example,

[487] State Immunity Act 1978, section 10(4)(a) states: A State is not immune as respects— (a)an action in rem against a cargo belonging to that State if both the cargo and the ship carrying it were, at the time when the cause of action arose, in use or intended for use for commercial purposes; or(b)an action in personam for enforcing a claim in connection with such a cargo if the ship carrying it was then in use or intended for use as aforesaid.

[488] *Brussels Convention* (n 437).

[489] Ibid Article 3.

if the state were intending to sell on the cargo at a profit, or where a cargo of grain for commercial sale were carried on a state owned vessel'.[490]

However, Lady Justice Elisabeth Laing in her dissenting judgment stated that she did not agree with the interpretation given by Lord Justice Popplewell and Lady Justice Andrews.[491] More specifically Lady Justice Laing did not agree that the silver was in use by RSA for commercial purposes at the time the ship sank. She further explained that '[o]n the contrary, it was not in use for any purpose and it was intended for use for a non-commercial purpose.'[492] In her opinion, the relevant Article under the Brussels Convention was Article 3.3 which clarifies that State owned cargo, in this case the silver, being carried on board a merchant vessel, the *SS Tilawa,* for Governmental and non-commercial purposes, the silver that was being transferred to be minted into coinage, is entitled to sovereignty.[493] Therefore, the question to be answered is whether the silver was being carried to be used for a non-commercial purpose and in Lady Justice Laing's opinion minting the silver into coinage was 'substantially for a Governmental and non-commercial purpose'. Thereby, in her opinion the silver pursuant to section 10(4)(a) is immune from the action *in rem*.

Whether the RSA decide to appeal this decision to the UK Supreme Court given the dissenting opinion of Lady Justice Laing will be of great interest. However, in the context of this thesis it confirms that ownership is not lost by the passage of time and that subject to the cargo, or the wreck being used at the time a cause of action arises

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[490] *Argentum Exploration Ltd v The Silver* (n 483) paragraph 98.
[491] Ibid paragraph 128.
[492] Ibid 128.
[493] *Brussels Convention* (n 437) Article 3(3).

exclusively on Governmental and non-commercial service then sovereign immunity is maintained.

From the above examples and the absence of any counter examples, it can be taken that there is a general uniform approach by States, which has created a settled rule of customary international law. This is also the opinion of the author Mariano J. Aznar Gomez who declared that these State practices have created a well-established rule of international customary law.[494]

5.2.5. 2015 Resolution of the Institut de Droit International

The Institut de Droit International (IDI) came to realise that the international law governing sunken warships was extremely complicated and in serious need of clarifications.[495] The purpose of the IDI is to promote the progress of international law.[496] In order to achieve this the institute adopts resolutions of a 'normative character' with the aim to clarify the existing law and to provide an opinion on how the law should be developed.[497] In an attempt to bring some clarity in respect to the issue of sunken warships, at its 77th Session on 29th August 2015 in Tallinn, Estonia it adopted a resolution which touches upon most issues that could affect sunken

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[494] Mariano J. Aznar-Gomez, 'Legal Status of Sunken Warships "Revisited"', (2003) 9 *Spanish Yearbook of International Law* 61.

[495] Rens Steenhard, The Emerging Legal Regime of Wrecks of Warships, 22 August 2017 https://peacepalacelibrary.nl/blog/2017/emerging-legal-regime-wrecks-warships (accessed 29 September 2022).

[496] Institute de Droit International, https://www.idi-iil.org/en/ (accessed 28 September 2022); The Institute of International Law was founded on 8 September 1873 in Belgium, its purpose is to promote the progress of international law.

[497] Sarah Dromgoole, 'The Legal Regime of Wrecks of Warships and other State-Owned Ships in International Law: The 2015 resolution of the Institut De Droit International', (2016) *The Italian Yearbook of International Law*, 179.

warships.[498] The resolution titled 'The Legal Regime of Wrecks of Warships and Other State-Owned Ships in International Law' (Resolution) highlights that its purpose is to clarify the international law on this topic, whilst taking into account the relevant international conventions and the customary international law enshrined in UNCLOS.[499]

Arguably, the most important provisions of the Resolution are Articles 3 and 4 which confirm that immunity and ownership of sunken warships remain with the flag State.[500] More specifically, Article 3 states that 'without prejudice to other provisions of this Resolution, sunken State ships are immune from the jurisdiction of any State other than the flag State.'[501] This can be seen to address the gaps created by all preceding international conventions and confirms that the sovereign immunity granted to warships and State vessels continues even after they have sunk. By incorporating this article, the IDI confirms that there is adequate consistent State practice, with evidence that States recognise an obligation or right to act in a specific

[498] Institut de Droit International, *The Legal Regime of Wrecks of Warships and Other State-owned Ships in International Law*, Rapporteur: M. Natalino Ronzitti (9th Commission, Resolution, Tallinn, Estonia Session, 29 August 2015), hereinafter *Resolution*.

[499] Ibid 1, the listed relevant international conventions include: the UNESCO Convention, the Nairobi Convention, the Convention on the Means of Protecting and Preventing the Illicit Transfer of Ownership of Cultural Property (1970), the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995) and the United Nations Convention on Jurisdictional Immunities of States and their Property (2004).

[500] Ibid Article 3,4.

[501] Ibid Article 3. Sunken State ship is defined under Article 1(2) as: '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.'

way that reaffirms customary international law in relation to sovereign immunity of sunken warships.[502]

However, it is important to highlight that even though Article 3 confirms that immunity continues once a warship sinks it is 'without prejudice to other provisions of this Resolution.'[503] More specifically, this is relevant to Article 7 which deals with the sovereignty of a coastal State.[504] Under Article 7 coastal States have the exclusive sovereignty to regulate activities on wrecks within its territorial waters, however, this in turn is without prejudice to Article 3.[505] Therefore, this arguably indicates that the coastal State has the right to regulate the activity on a sunken warship within its territorial waters, however, this would be subject to obtaining prior consent from the flag State. Similarly, the flag state would first have to obtain permission from the coastal State if it wishes to commence operations on its sunken warship.[506]

Further, Article 4 of the Resolution provides that '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.'[507] This Article confirms that title of the sunken warship does not cease when the vessel sinks and that in order for title to be lost there must be an express abandonment or transfer of title. Prior to the Resolution, customary international law with regards to the

[502]For examples of State practice see sub-chapter 5.1.4 of this thesis and the *Rhodes Session* (n 468) 141-151.
[503] *Resolution* (n 498) Article 3.
[504] Ibid Article 7.
[505] Ibid Article 7.
[506] Ibid Article 9.
[507] Ibid Article 4.

ownership of sunken warships could be seen to be incertitude, Article 4 endorses and strengthens the claim of customary law and confirms that ownership of Sunken warships remains with the flag State.[508] This was the case with the wrecks of the *HMS Erebus* and the *HMS Terror*, both vessels were owned by the Royal Navy when they sank in 1848 just off the coast of Canada.[509] The UK did not oppose these vessels being protected as national historical sites under the terms of Canada's national legislation.[510] However, at the same time the UK and Canada entered into a bilateral agreement. This Memorandum of Understanding (MoU) confirmed that the UK assigned custody and control of the two wrecks to Canada but clearly stated that the UK 'does not waive ownership or sovereign immunity with respect to the wrecks or their contents while they are on the seabed.'[511] In April 2018, a deed of gift was executed in which the UK 'irrevocably gifts, assigns and transfers … the right, title and interest' of the two vessels to the Government of Canada, subject to five provisions which were agreed in a separate MoU.[512] These provisions include a provision on human remains and how they should be treated, obligations on research and recovery such as incorporating the Annex to the UNESCO Convention, provisions on alienation and regulations as to the potential sale, gift, disposal or loan

[508] *Dromgoole* (n 497) 190.
[509] *Rhodes Session* (n 468) 147.
[510] Historic Sites and Monuments Act (R.S.C., 1985, c. H-4).
[511] Memorandum of Understanding Between Great Britain and Canada Pertaining to the Shipwrecks HMS Erebus and HMS Terror, 5 and 8 August 1997, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/458500/MOU_FOI_0286-15.pdf (accessed 28 September 2022).
[512] Deed of Gift made on 26 April 2018 Between the Secretary of State for Defence of the United Kingdom of Great Britain and Northern Ireland and the Parks Canada Agency. Also see: Nigel Bankes, Her Majesty's Ships Erebus and Terror and the Intersection of Legal Norms, *The Northern Review* 50 (2020), 47-81.

of the wrecks.[513] This case exemplifies Article 4 of the Resolution, it confirms that ownership would remain with the UK until it made an express statement transferring or abandoning the wrecks. In this instance there was a clear transfer of title to the Government of Canada through the deed of gift and MoU.

In short, it is fair to conclude that the Resolution has provided a balanced reading of the rights and powers that a coastal State has within its sovereign waters on the one hand and the sovereign immunity and ownership of sunken warships claimed by the flag State on the other hand. It has also strengthened the existence of customary international law in respect of the sovereign immunity and ownership of sunken warships and State wrecks.

5.2.6. Wrecks as Maritime Gravesites

A further concern shared by flag States is the treatment of their sunken warships when they also represent a war grave.[514] Flag States desire that such sites are treated with respect and disturbed only when absolutely essential. As suggested by Roach 'sunken military craft and artefacts containing crew remains are entitled to special respect as war graves and must not be disturbed without the explicit permission of the sovereign flag State.'[515] However, international treaties have failed to provide both a definition for the concept of war graves and how they should be regulated.

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[513] Bankes (n 512) 62.
[514] *Dromgoole* (n 497) 122.
[515] J. Ashley Roach, 'Warships, Sunken', in Frauke Lachenmann and Rudiger Wolfrum, *The Law of Armed Conflict and The Use of Force: The Max Planck Encyclopedia of Public International Law*, (2017) 1374, para. 25.

In this context, the UNESCO Convention is the only international treaty that makes express reference to human remains. Human remains are included within the definition of UCH therefore, if they have been underwater for 100 years they should be dealt with in accordance with the UNESCO Convention.[516] Article 2 (9) provides that 'State Parties shall ensure that proper respect is given to all human remains located in maritime waters'[517], and under Rule 5 'activities directed at underwater cultural heritage shall avoid the unnecessary disturbance of human remains or venerated sites.'[518] However, a potential contentious issue is the 100 year requirement of the UNESCO Convention suggesting that human remains that have been underwater for less than 100 years are not afforded the same protection.

Furthermore, many of the maritime gravesites, especially wrecks from the two world wars, could also prove to be a hazard to the marine environment. The Nairobi Convention has failed to make reference to wrecks that are gravesites but at the same time pose a hazard to the marine environment. When a sunken warship or State wreck is a war grave then arguably neither the UNESCO Convention nor the Nairobi Convention are relevant due to the silence on this issue, as these wrecks are afforded sovereign immunity under customary international law.

There is an abundance of State practice and bilateral agreements suggesting a broad acceptance that human remains should be treated with proper respect.[519] A good example is the Italian submarine *Sciré*, which was lost just outside Haifa, Israel

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[516] *UNESCO Convention* (n 19) Article 1(1)(i).
[517] Ibid Article 2(9).
[518] Ibid Rule 5.
[519] *Dromgoole* (n 497) 195.

during WWII. Following an attempt by Israel to recover the wreck, Italy objected claiming sovereign immunity and ownership of the wreck and argued that it was the final resting place of the people who lost their lives on it. An agreement was reached between Israel and Italy in order to protect the human remains.[520]

An example of national legislation is the Protection of Military Remains Act 1986 which was introduced as a result of numerous incidents involving UK military wrecks which contained human remains.[521] The catalyst behind the creation of this Act was the wreck of *HMS Hampshire* which sank in World War I off the Orkney Islands. The MoD was powerless to stop a German team, who had been refused permission to dive on the site. This team unlawfully inflicted damage to the wreck and raised objects including personal belongings of the sailors who perished when the ship went down.[522]

Bilateral or multilateral agreements are not limited to sunken warships or State wrecks that may contain the remains of service personnel that were lost during time of conflict. Two of the most prominent memorial sites relate to passenger vessels lost during peace. These are the agreements between the UK, US, Canada and France in respect to the vessel *RMS Titanic* and the agreement between Estonia, Finland and Sweden in respect to the *MS Estonia*.[523]

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[520] *Rhodes Session* (n 468) 147.
[521] Sarah Dromgoole, *The Protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, (Second Edition, Martinus Nijhoff Publishers,2006) 329.
[522] Ibid 329.
[523] Agreement concerning the Shipwrecked Vessel RMS Titanic, Treaty Series No. 8 (2019) Article 4, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/853164/TS_8.2019_Agreement_concerning_Shipwrecked_Vessel_RMS_Titanic.pdf (accessed 20

5.2.7. Concluding Remarks

It is clear that the subject of sunken warships and State wrecks is of great political sensitivity and of significant importance to flag States. Both the Nairobi Convention and the UNESCO Convention fail to clarify if sovereign immunity is maintained once a warship or State vessel sinks. This has been highlighted as a deterrent by many States that have not ratified the conventions. This thesis argues that customary international law as identified in this chapter fills the gap and aims to clarify the position. It can be said that under customary international law the sovereign immunity of sunken warships and State wrecks is maintained. Further, it is widely accepted that war graves should be respected and should not be desecrated in any way.

On the basis that customary international law exists and therefore title and sovereign immunity is maintained by the flag State in respect to sunken warships and State wrecks then this would mean that these wrecks would be excluded from the application of the Nairobi Convention and therefore, the coastal State would be left vulnerable to pollution or dangerous ordnance emissions, if it does not first obtain the approval of the flag State. Similarly, a coastal State would first have to obtain the flag States' permission before taking any actions on a sunken warship classed as UCH.

September 2022); 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).

Arguably both the Nairobi Convention and the UNESCO Convention by failing to clearly exclude from their application sunken warships and State wrecks are in variance with customary international law which as identified provides that the sovereign immunity granted to warships continues after they have sunk.

5.3. Law of Salvage

A further contentious issue is the role of salvage and its arguably conflicting application within the Nairobi Convention and the UNESCO Convention. The term 'salvage' can generally be described as 'a reward for saving property at sea.'[524] In the case of *The Sabine* in 1879 the US Supreme Court provided that 'salvage is the compensation allowed to persons by whose voluntary assistance a ship at sea or her cargo or both have been saved in whole or in part from impending sea peril, or recovering such property from actual peril or loss, as in cases of shipwreck, derelict or recapture.' [525] It suggests that three elements must be met in order to make a successful salvage claim, these are: 1) the existence of a marine peril, 2) voluntary assistance and 3) successful outcome in the salvage operation also known as 'no cure no pay'.[526]

Today, the relevant international convention in force is the 1989 International Convention on Salvage (ICS).[527] It defines a salvage operation as 'any act or activity

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[524] G. H. Robinson, Admiralty Law of Salvage, (1938) 23 *Cornell Law Review* 229, 229.
[525] *The Sabine*, 101 U.S. 384, 384 (1879).
[526] *Robinson* (n 524) 230.
[527] International Convention on Salvage (London, 28 April 1989, entered into force 14 July 1996) 1953 UNTS 193; hereinafter *ICS*. As of 27th September 2022, the number of contracting States is 75. The ICS replaced the 1910 Brussels Convention on Salvage which incorporated the 'no cure, no pay' principle referred to above, it aims to regulate the private law relationship between the salvor and the

undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever.'[528] The salvor is entitled to claim a reward under the convention if the salvage operation has had a useful result.[529] The definition of a vessel is provided under Article 1(b) which states that a vessel is a ship or craft, or any structure capable of navigation.[530]

It can therefore be argued that from the above definitions of 'vessel' and 'salvage operation', the ICS was not drafted with the intention to deal with the salvage of shipwrecks as was provided in the case of *The Sabine*. This is because the definition of 'vessel' requires the ship to be navigable and the 'salvaging operation' is aimed at vessels in danger. A shipwreck is no longer a vessel in danger and therefore, would not fall within the remits of the convention. However, Article 30(1) of the ICS gives State parties the right to exclude the provisions of the convention to 'maritime cultural property of prehistoric, archaeological or historic interest' situated on the seabed. [531] This implies that the ICS covers shipwrecks, even shipwrecks with a

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party they enter into a contract with for the salvage operations – it does not cover potential issues of public law; see Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea, done at Brussels, 23 September 1910, Treaty Series No. 4 (1913), Cd. 6677.

[528] *ICS* (n 527) Article 1(a).

[529] Ibid Article 12; Article 13 clarifies the criteria for fixing the reward which is calculated on the basis of various factors including the value of the property that was saved, the level of success and the time and expenses incurred by the salvor. Further, under Article 13 the ICS makes provision for an enhanced salvage award taking into account the skill and efforts of the salvors in preventing or minimizing damage to the environment; see IMO, International Convention on Salvage, https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Salvage.aspx (accessed 20 September 2022).

[530] Ibid Article 1(b).

[531] Ibid Article 30(1)(d); As at 27th September 2022, 26 States made a reservation and have excluded the application of the convention to property of a cultural, historic or archaeological nature.

cultural, archeological or historical link unless expressly excluded by the State party.[532]

5.3.1. Salvage and Protection of UCH

It is widely acknowledged that salvage operations are unlikely to be consistent with protecting and preserving UCH.[533] This is because salvors are driven by the economic value of UCH which on many occasions is to the detriment of its archaeological or historical value. By removing the UCH for commercial purposes without appropriate regulations and guidance from archaeologists, it could result in the loss of very important historical and archaeological data as well as the violation of maritime gravesites.[534]

This was the case with three Dutch warships, the *HNLMS De Ruyter*, *HNLMS Java* and *HNLMS Kortenaer*, which were lost in 1942 during the Battle of the Java Sea off the coast of Indonesia.[535] The Netherlands rightly held the opinion that ownership of their sunken warships and therefore sovereignty is not lost, even if the wreck has

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[532] The question of whether the ICS applies to wrecks is open to dispute. According to Gaskell 'the understanding of the 1989 Diplomatic Conference was that sunken property could be salved'; see Nicholas Gaskell, The 1989 Salvage Convention and the Lloyd's Open Form (LOF) Salvage Agreement 1990, (1991) 16 *Tulane Maritime Law Journal* 1, 37.

[533]See Antony Firth, Managing Shipwrecks, (2018) Fjordr Limited for Honor Frost Foundation 25, https://honorfrostfoundation.org/wpcontent/uploads/2019/07/BRIJ5800-Multiwreck-A4-Report-WEB-0419-UPDATE.pdf (accessed 20 September 2022); Anne M Cottrell, 'The Law of the Sea and International Marine Archaeology: Abandoning Admiralty Law to Protect Historic Shipwrecks' (1993) 17 Fordham International Law Journal 667.

[534] Craig Forrest, 'Has the Application of Salvage Law to Underwater Cultural Heritage Become a Thing of the Past?' (2003) 34 *Journal of Maritime Law and Commerce* 309.

[535] M.R. Manders, R.W. de Hoop, S. Adhityatama, D.S. Bismoko, P.Syofiadisna and D. Haryanto, 'Battle of the Java Sea, One Event, Multiple Sites, Values and Views', (2021) 16 *Journal of Maritime Archaeology* 39, 39.

been underwater for 80 years.[536] As discussed earlier in this chapter, ownership and sovereign immunity of sunken warships is recognised under customary international law. However, Indonesia took the position that under UNCLOS and due to the location of the wrecks they should fall under Indonesian domestic legislation.[537] These wrecks were of significant historical importance and became war graves due to the tragic death of 915 crew members when the vessels were lost.[538] The wrecks were located intact in 2002 by a group of amateur divers.[539] However, by 2016 during an expedition to commemorate the 75th anniversary of the battle, the wrecks of *HNLMS De Ruyter and HNLMS Java* had been totally removed, and large pieces were missing from the *HNLMS Kortenaer*.[540] It has been rightly accredited as 'the world's biggest grave robbery'.[541] The Netherlands were of the opinion that the wrecks were illegally salvaged for the value of their steel which was considered a source of income by the salvors.[542] In fact, Indonesian welders that were tasked with cutting the steel of old wrecks and subsequently selling it for £10.50 per tonne have reported finding human remains.[543] This shows a total lack of respect towards the sailors that perished on these ships and it led to diplomatic tensions between the

[536] Ibid 45.
[537] Ibid.
[538] Ibid 39.
[539] Oliver Holmes, Mystery as wrecks of three Dutch WWII ships vanish from Java Seabed, 16 November 2016, The Guardian.
[540] *Manders et al* (n 516) 42; In fact the expedition also identified that other warships lost during the Battle of the Java Sea had gone missing, these included the *USS Perch*, *HMS Exeter* which had been completely removed and some human remains were observed on the seabed, *HMS Encounter* and *HMS Electra*.
[541] Kate Lamb, 'Lost bones, a mass grave and war wrecks plundered off Indonesia' The Guardian (London, 28 February 2018) https://www.theguardian.com/world/2018/feb/28/bones-mass-grave-british-war-wrecks-java-indonesia (accessed 20 September 2022)
[542] *Manders et al* (n 516) 51.
[543] *Lamb* (n 541).

Netherlands and Indonesia. In 2017 an agreement was reached between the two governments to investigate what happened to the wrecks and to formulate a solution for the future.[544] The findings of the investigation indicated that the sunken warships were in fact illegally salvaged for the value of their scrap metal.[545] In order to avoid similar situations in the future, a MOU was signed between the Indonesian Ministry of Culture and the Dutch National Cultural Heritage Agency for the cooperation in managing and protecting UCH.[546] To this end and to facilitate future cooperation, the wreck sites have been declared 'historic shipwrecks' on the national maps of Indonesia, signifying that no interference is permitted. In 2019, to enhance the cooperation a joint venture was undertaken to determine the exact extent of the salvage devastation, all actions taken were carried out in accordance with the Annex of the UNESCO Convention.[547]

The importance of this case is that it highlighted the complexities that can occur when the competing interests of UCH and salvage are not working towards a

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[544] Ministry of Education, Culture and Science, Cultural Heritage Agency, Report of the Dutch Shipwrecks in the Java Sea, https://english.cultureelerfgoed.nl/topics/maritimeheritage/publications/publications/2017/01/01/report-of-the-dutch-shipwrecks-in-the-java-sea (accessed 20 September 2022).

[545] RCE, Report of the Joint Expert Meeting on the Appreciation (track II) of the Dutch Shipwrecks in the Java Sea, (2018) https://english.cultureelerfgoed.nl/topics/maritimeheritage/publications/publications/2017/01/01/report-of-the-dutch-shipwrecks-in-the-java-sea (accessed 20 September 2022); the Indonesian Government confirmed that they did not issue any salvage permit for the three wrecks in questions or for any other sites in the vicinity.

[546]Ministry of Education, Culture and Science, Cultural Heritage Agency, Dutch Heritage Services and Indonesia sign cooperation agreement on maritime heritage, https://english.cultureelerfgoed.nl/topics/maritime-heritage/international-projects/indonesia/cooperation-agreement (accessed 20 September 2022)

[547] Martijn R. Manders, Robert W. de Hoop and Shinatria Adhityatama, Field Assessment Java Sea: Survey of three Dutch WWII Naval Wreck Sites in the Java Sea, https://english.cultureelerfgoed.nl/topics/maritimeheritage/publications/publications/2017/01/01/report-of-the-dutch-shipwrecks-in-the-java-sea (accessed 20 September 2022).

common goal. However, the cooperation between the two governments has emphasised the significance and has arguably created the foundation for further cooperations in protecting and managing UCH.[548]

A further case that highlights the controversy on this subject is the wreck of the Spanish galleon *San Jose* which was lost off the coast of what is now Colombia in 1708 taking the lives of 600 sailors. [549] The wreck was carrying a cargo of silver, gold and jewels with an estimated value today of approximately USD 17billion.[550] In 1980 Colombia entered into an agreement with Glocca Mora Company (GMC) which authorised them to search for shipwrecks off Colombia's coast.[551] GMC claimed to have found what it thought to be the wreck of the *San Jose* in 1981 and Colombia agreed to award GMC with 35 per cent of the value of the artefacts recovered from the site. Three years later GMC transferred its rights to an American salvage company called Sea Search Armada (SSA).[552] However, Colombia refused to permit SSA to commence salvage operations and passed a law granting Colombia all rights to the treasure. SSA filed a lawsuit against Colombia challenging the new law passed by its Parliament and claimed that it was entitled to a 35 per cent share of

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[548] Further examples of cooperation between States can be found in: Cultural Heritage Agency, Ministry of Education, Culture and Science, International Programme for Maritime Heritage: Report 2017-2019.

[549] Anna Petrig and Maria Stemmler, Article 16 UNESCO Convention and the Protection of Underwater Cultural Heritage, 2020, 69 International and Comparative Law Quarterly 397, 397.

[550] Jason Daley, 'Holy Grail' of Spanish Treasure Galleons Found off Colombia, Smithsonian, 25 May 2018, https://www.smithsonianmag.com/smart-news/holy-grail-spanish-treasure-galleons-found-colombia-180969171/ (accessed 22 September 2022).

[551] Megan Gates, Who Owns the San Jose Galleon?, July 2019, https://www.asisonline.org/security-management-magazine/articles/2019/07/who-owns-the-san-jose-galleon/ (accessed 22 September 2022).

[552] Ibid.

the value of any cargo that they would retrieve from the wreck.[553] The Circuit Court of Baranquilla ruled in favour of SSA and held that SSA and Colombia were entitled to equal shares of the value of the treasure recovered from the wreck.[554] The Colombian government dismissed the judgment arguing that the wreck was in fact located in 2015 by the independent non-profit organization Woods Hole Oceanographic Institution and within Colombia's Continental Shelf.[555]

By 2018, Colombia revealed that it was planning to recover objects from the *San Jose* and invited salvage companies to register their interest.[556] The potential involvement of a salvage company that would be entitled to a reward raised concerns for the adequate protection and preservation of UCH.[557] The reward offered to interested salvage companies would be 50 per cent of the value of the recoveries that are not considered cultural heritage.[558] UNESCO did not shy away and issued a Resolution and a letter to the Colombian Government expressing their strong concerns and advised that their current plan of salvaging the *San Jose* would be considered commercial exploitation which is prohibited by the UNESCO

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[553] Ibid.
[554] *Sea Search Armada v The Republic of Colombia*, 821 F. Supp. 2d 268 (D.D.C. 2011), Civil Action No. 10-2083 (JEB).
[555] *Gates* (n 551).
[556] Tom Metcalfe, Colombia moves to salvage immense treasure from sunken Spanish galleon, 23 February 2023, https://www.livescience.com/treasured-shipwreck-off-colombia-has-rival-claims (accessed 22 September 2022).
[557] Olga Lucia Martinez Ante, Asi se va a Rescatar el 'Tesoro' del Galeon San Jose, 25 April 2018, https://www.eltiempo.com/cultura/arte-y-teatro/como-se-ve-el-galeon-san-jose-y-como-sera-rescatado-209298 (accessed 22 September 2022) As suggested in this article the salvage company involved would be entitled to an award of 50 per cent of the value of the recoveries that are not considered national heritage.
[558] Ibid.

Convention.[559] In addition, Spain has also claimed it has rights over the wreck arguing that it has not abandoned the ownership of the *San Jose* and that it was a State vessel when it sunk, therefore, it is entitled to sovereign immunity.[560] In 2019, the Colombian Government stated that it would no longer use the valuable artefacts to finance the salvage operation stating that 'every one of the pieces that are rescued are of enormous and incomparable cultural value and historical for Colombia and for the world'.[561] It is expected, however, that if Colombia shows any sign of recovering the wreck or cargo of the *San Jose* then Spain will intervene claiming sovereign immunity. It would prove beneficial if the States of Colombia and Spain come to a similar agreement of cooperation for the protection and preservation of UCH as that concluded between Indonesia and the Netherlands mentioned above. The involvement of UNESCO in the case of the *San Jose* highlights the incompatibility between commercial exploitation and the protection of UCH.[562]

5.3.1.1. Position under International Conventions

The position under international conventions is somewhat complex and confusing. As previously mentioned, Article 303 of UNCLOS deals with the responsibility imposed on State parties to protect objects of an archaeological and historical

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[559] United Nations Educational Scientific and Cultural Organization, Convention on the Protection of the Underwater Cultural Heritage, Ninth Meeting of the Scientific and Technical Advisory Body, 24 April 2018, UCH/18/9.STAB10, Resolution 4/STAB9.

[560] *Metcalfe* (n 556).

[561] Richard Emblin, Galleon San Jose's treasure will not finance salvage, claims VP Ramirez, 10 October 2019, https://thecitypaperbogota.com/news/galleon-san-joses-treasure-will-not-finance-salvage-claims-vp-ramirez/ (accessed 22 September 2022).

[562] On this topic see Tatiana Villegas Zamora, The impact of Commercial Exploitation on the Preservation of Underwater Cultural Heritage, (2008) LX (60) *Museum International: Underwater Cultural Heritage* 4/20, 18-30.

nature.[563] However, Article 303(3) clarifies that in protecting UCH the article does not affect the rights of identifiable owners in respect of the law of salvage, thereby suggesting that the law of salvage could be applied when dealing with objects of an archaeological or historical nature. The ICS under Article 30(1)(d) entitles State parties to exclude UCH from the application of the law of salvage, arguably indicating a potential incompatibility between the law of salvage and the protection of UCH.[564] Finally, in contrast to UNCLOS, the UNESCO Convention denies the use of salvage to activities directed at UCH, unless *in situ* preservation is not possible and certain conditions are met.[565]

The subject of salvage and its significance to UCH was debated extensively during the negotiation stage of the UNESCO Convention. There was an ambivalence between participating delegates that have a different approach towards cultural heritage and salvage law.[566] Most civil law States such as Italy were categorically against the use of salvage law being applicable to UCH, whilst most of the common law States such as the US were in favour of salvage law applying to UCH.[567]

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[563] *UNCLOS* (n 121) Article 303.

[564] *ICS* (n 527) Article 30(1)(d); the IMO as observer during the UNESCO Convention negotiations explained that 'the Salvage Convention is a private law Convention and its objectives are very different from those of this draft, which deals with international public law. The Salvage Convention should not, therefore, apply to historic wrecks', United Nations Educational Scientific and Cultural Organization, Report of the meeting of Governmental Experts on the Draft Convention of the Underwater Cultural Heritage, CLT-98/CONF.202/7, (Paris, 29 June – 2 July 1998), 51.

[565] *UNESCO Convention* (n 19) Article 4.

[566] Roberta Garabello, 'The Negotiating History of the Convention on the Protection of the Underwater Cultural Heritage' in Roberta Garabello and Tullio Scovazzi (eds), *The Protection of Underwater Cultural Heritage: Before and After the 2001 UNESCO Convention* (Martinus Nijhoff Publishers 2003), 123-125.

[567] Ibid 124-126; it is worth mentioning that the US delegation was largely lobbied by the salvors' community, see Ben Juvelier, 'Salvaging' History: Underwater Cultural Heritage and Commercial Salvage, (2018) 32 *American University International Law Review* 5, Article 2, 1033.

Notably, a number of experts expressed the opinion that 'the recovery of archaeological material should not be governed by its commercial value.'[568] One delegate argued that 'the concept of being financially rewarded was fundamentally antithetical to archaeological and scientific research.'[569] Similarly in a statement made during the 1994 negotiations on the Draft Convention, participating delegates stated that 'the heritage may be in greater danger from salvage operations than from being allowed to remain where it is. The major problem is that salvage is motivated by economic considerations; the salvor is often seeking the items of value as fast as possible rather than undertaking the painstaking excavation and treatment of all aspects of the site that is necessary to preserve its historic value.'[570]

Contrary to this, in 2001, Mr Patrick Griggs, in his capacity as president of the *CMI* requested that the opinion of the *CMI* be brought to the attention of the delegates attending the UNESCO General Conference. The opinion of the *CMI* was that the law of salvage is not incompatible with the protection and preservation of UCH. More specifically, in their view 'there is no reason why the law of salvage should be deemed a threat to the protection and preservation of underwater cultural heritage.'[571] Due to the conflicting opinions and intricate issue of salvage, it was

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[568] United Nations Educational Scientific and Cultural Organization, *Report of the Meeting of Experts for the Protection of Underwater Cultural Heritage*, CLT-96/CONF.605/6, 11, (May 22-24, 1996); also see David J Bederman, 'The UNESCO Draft Convention on Underwater Cultural Heritage: A critique and Counter-Proposal',(1999) 20 *Journal of Maritime Law and Commerce* 2; Ole Varmer, 'The Case Against the 'Salvage' of the Cultural Heritage, (1999) 30 *Journal of Maritime Law and Commerce* 2.

[569] Ibid 11.

[570] O'Keefe P.J., Nafziger J., The Draft Convention on the Protection of the Underwater Cultural Heritage, (1994) 25 *Ocean Development & International Law* 4, 391-418, 408.

[571] Comite Maritime International, Yearbook 2001 Annuaire, 'Salvage: Letter of the President of the CMI to the Director General of UNESCO', 620.

very difficult to find the common ground that has resulted in a 'crucial compromise'.[572]

The 'crucial compromise' resulted in two relevant provisions being incorporated into the convention; Article 4 which specifically deals with salvage and Article 2(7) which addresses the non-commercialisation of UCH.[573] Article 4 was drafted in such a way as to balance the two conflicting opinions. It essentially provides that UCH will not be subject to the law of salvage unless three conditions are met: 1) that any activity towards UCH will be authorised by the competent authorities, 2) that any activity will be in full conformity with the UNESCO Convention and 3) that any recovery will ensure it achieves the maximum protection of UCH.[574] Further, under Article 2(7) the convention completely excludes the commercial exploitation of UCH.[575] It can be argued that these provisions are contradictory, on the one hand salvage is permitted subject to certain conditions yet on the other hand the convention backtracks and excludes commercial exploitation which is common within the law of salvage.[576] It can therefore be said that the UNESCO Convention makes a distinction between salvage and commercial exploitation, which would arguably undermine the traditional concept of salvage.[577] However, this would mean that if an UCH site has to be removed for its maximum protection the relevant authorities of the concerned State or the owner would be entitled to contract with a

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[572] Guido Carducci, 'The crucial Compromise on Salvage Law and the Law of Finds' in *Garabello and Scovazzi*, (n 99), 198.
[573] *UNESCO Convention* (n 19) Article 4, Article 2(7).
[574] Ibid Article 4.
[575] Ibid Article 2(7), Annex Rule 2.
[576] *Juvelier* (n 567) 1033.
[577] Patrick J O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage*, (Second edition, Institute of Art and Law 2014) 50.

salvage company on the basis that all measures under the UNESCO Convention and its Annex are followed and importantly that the UCH is not commercially exploited.[578]

Another potential conflict may arise between States that have adopted both the UNESCO Convention and the ICS. Notwithstanding the fact that States are given the power to exclude the application of the ICS to UCH, if a State fails to make such a reservation, then the law of salvage and the ICS will be applicable to UCH. If that State subsequently adopts the UNESCO Convention, then it may be obliged to apply the law of salvage in specific circumstances which would conflict with certain provisions of the UNESCO Convention.[579]

5.3.2. Salvage and the Nairobi Convention

In contrast to the complex application of salvage law on UCH, salvage is embraced under the Nairobi Convention and is commonly used as the default mechanism for dealing with hazardous wrecks. Unlike the UNESCO convention, it does not require specific conditions for the salvage to apply when a wreck is hazardous. Article 9(4) of the Nairobi Convention which deals with the measures to facilitate the removal of wrecks provides that '[t]he registered owner may contract with any salvor or other person to remove the wreck determined to constitute a hazard on behalf of the owner. Before such removal commences, the Affected State may lay down

[578] This was the case in removing the Princes Channel wreck; Wessex archaeology, Wreck in the Thames Princes Channel, https://www.wessexarch.co.uk/our-work/wreck-thames-princes-channel (accessed 20 September 2022).
[579] Comite Maritime International, Yearbook 2004 Annuaire, Salvage: A Provisional Report by the Comite Maritime International to IMO, 422, 438.

conditions for such removal only to the extent necessary to ensure that the removal proceeds in a manner that is consistent with considerations of safety and protection of the marine environment.'[580] Therefore, in a situation where the hazard is emanating from a historic wreck that is protected under the UNESCO Convention it would be in conflict with the conditions required under Article 4 of the UNESCO Convention. This because the owner of the wreck is required to contract with a salvor for the removal of the hazardous wreck, but the affected State is entitled to lay down conditions only to the extent necessary for the safety and protection of the marine environment. However, under Article 4 of the UNESCO Convention, salvage can only be used on UCH if it is authorized by the relevant authorities, and any removal must be fully compliant with the convention. Further any recovery emanating from the wreck must be adequately protected as defined in the convention.

If one of the concerned States, the flag State or the coastal State, is not party to the UNESCO Convention, then this arguably enables the removal of a historic wreck in the EEZ with little regard being taken towards its historical and archaeological significance.[581] States would still have the duty to protect UCH under Article 303(1) of UNCLOS,[582] however, as already examined UNCLOS did not adequately provide how to fulfil this duty, therefore, it would be open to each States' individual discretion.

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[580] *Nairobi Convention* (n 29) Article 9(4).
[581] *Dromgoole and Forrest* (n 89) 119.
[582] *UNCLOS* (n 121) Article 303(1).

A further potential conflict that may arise when the Nairobi Convention is to be applied to a historic wreck protected under the UNESCO Convention is when the ICS is also applicable. As previously mentioned, the Nairobi Convention embraces salvage and therefore, the two conventions, namely the ICS and the Nairobi Convention, could be applied in concordance.[583] However, if a State has not made an Article 30(1)(d) reservation that would exclude the application of the ICS to UCH, this would mean that salvors are 'entitled to avail themselves of the rights and remedies provided for in the convention', including the reward which would claimed by the salvor and calculated in accordance with Article 13 of the ICS.[584] This would be in conflict with the UNESCO Convention's prohibition on commercial exploitation of UCH.[585] A potential solution for this would be to amend the currently available salvage contracts such as the Lloyd's Open Form (LOF) and BIMCO Wreckhire, to incorporate the UNESCO Convention requirements.[586]

5.4. Rules of the Annex to the UNESCO Convention

A further matter that could prove to be inconsistent with the Nairobi Convention is the application of the Annex of the UNESCO Convention. The Rules of the Annex to the UNESCO Convention govern the measures that must be followed when activities are directed at UCH.[587] It has been described as the most valuable

[583] *Dromgoole and Forrest* (n 89) 120.
[584] *ICS* (n 527) Article 5(2) and Article 13.
[585] *UNESCO Convention* (n 19) Article 2(7).
[586] *Dromgoole and Forrest* (n 89) 120; examples of current salvage contracts include the Baltic and International Maritime Council's 'Wreckhire' and 'Wreckstage'.
[587] Ibid Rules concerning activities directed at underwater cultural heritage.

achievement of the UNESCO Convention, receiving unanimous support from all delegates at the time of adoption.[588]

However, Rule 1 requires that in protecting UCH, *in situ* preservation will be considered as the first option and any activity directed to UCH will only be permitted for the contribution to the protection or knowledge or enhancement of UCH.[589] Therefore, the UNESCO Convention does not authorise activities towards UCH for the protection of the marine environment, arguably coming into conflict with the purpose of the Nairobi Convention.

Further, under Rule 4 of the Rules '[a]ctivities directed at underwater cultural heritage must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remains.'[590] It can therefore be argued that Rule 4 suggests that recovery or excavation of UCH is only permitted 'for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage'.[591] This would once again come in direct conflict with the Nairobi Convention if a coastal State requires the wreck to be removed or interfered with for the protection of the marine environment or safety to navigation.

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[588] *Vadi* (n 17) 865-866.
[589] *UNESCO Convention* (n 19) Annex Rule 1.
[590] Ibid Annex Rule 4.
[591] Ibid.

5.5. Concluding Remarks

To summarise, if the two treaties namely the UNESCO Convention and the Nairobi Convention are applied independently, then each may achieve its purpose without coming into conflict. However, it is possible that a wreck of historical or archaeological significance may at the same time pose a hazard to the marine environment. Although a wreck may develop into a hazard for the marine environment, that should have no bearing on its historical and archaeological significance. As previously analysed in this chapter in a situation where both conventions are applicable to the same wreck conflicts may arise. A good illustration of this ambivalence would be the *in situ* preservation required by the UNESCO Convention and the requirement by a coastal State to remove the hazard under the Nairobi Convention.[592] Further, this chapter identified the complex relationship between the law of salvage and hazardous historic wrecks and highlighted the potential conflict that may arise with the application of salvage on UCH. A further inconsistency that may arise is in applying the Rules of the UNESCO Convention which only authorises interference with UCH for the purpose of its maximum protection and preservation.

In addition, this chapter has identified a significant deficiency in both the Nairobi Convention and the UNESCO Convention by not clarifying if the exclusions of

[592] *Nairobi Convention* (n 29) Article 1(7); Removal is defined under Article 1(7) of the Nairobi Convention as 'any form of prevention, mitigation or elimination of the hazard created by a wreck.' Therefore, a State may require he whole wreck to be removed or removal can be anything from transferring the wreck to another location or removing the hazardous cargo whilst leaving the wreck undisturbed. These solutions would be the most attractive when dealing with shipwrecks of cultural significance.

warships and State vessels continue after they sink. The analysis made in this chapter leads to the conclusion that the sovereign immunity of warships and State vessels is maintained even after they sink. Even though conflicts may exist between the two conventions, States should be encouraged to cooperate and if necessary, find a compromise that would be most beneficial to all parties and at the same time offer protection to any hazardous historic shipwreck. State practice may appear to bring some clarity to international law and an answer to the dilemma faced by States when dealing with a hazardous historic shipwreck.

Chapter 6. Emergence of New Customary International Law

As seen throughout this thesis, treaty law does not explicitly make reference to how a wreck that is protected by the UNESCO Convention but at the same time poses a hazard to the environment should be dealt with. When faced with such situations it is worth looking into State practice and the possibility of the emergence of a new customary international law.

Wreck removal can be seen to be in direct contrast to UCH, the Nairobi Convention and the UNESCO Convention both fail to address how and if UCH has to be protected when a historic wreck poses a navigational or environmental threat. This leaves us with the question of which norm should take precedence. Looking into State practice, it could be argued that a customary international law is emerging whereby when a wreck that is protected by the UNESCO Convention poses a navigational or environmental threat the States tend to try to eliminate the threat whilst also protecting and preserving the UCH *in situ* and with minimal interference as required by the UNESCO Convention. However, if total removal is required it seems that when States take into account the historical and archaeological significance and take all measures for its protection and preservation then it is generally accepted by the international community.

Customary international law is vital towards the aim of this thesis; therefore, it is important to clearly identify when State practice becomes accepted as customary international law. As briefly mentioned previously, it is unwritten law that through State practice and *opinio juris* becomes accepted as law. International custom is listed in the Statute of the International Court of Justice (ICJ) amongst the sources that the ICJ should use when deciding disputes submitted to it. Article 38(1)(b) states that the court shall apply amongst others 'international custom, as evidence of a general practice accepted as law'.[593] This sentence represents the two constituent elements of customary international law, namely: general practice (the objective element) and its acceptance as law, also known as *opinio juris* (the subjective element). [594] Although the principle of customary international law is simple, in practice it is very difficult to establish that the two constituent elements have been met and therefore, the acceptance of a new customary international law is almost always controversial.[595]

In order to identify whether a new customary international law is formed, one must carefully consider the evidence that exists and look into whether States recognise an obligation or right to act in a specific way. The mere frequency of consistent State practice is not enough, whilst a belief that something is law without State practice is purely aspiration, therefore, it is essential that both constituent elements are satisfied. This was confirmed in the case of the *North Sea Continental Shelf* where the ICJ

[593] Statute of the International Court of Justice (adopted in San Francisco on 26th June 1945, entry into force 24th October 1945), 15 UNCIO 255, Article 38(1)(b).
[594] United Nations, *Yearbook of the International Law Commission, Official Records of the General Assembly: Draft conclusions on identification of customary international law, with commentaries*, 2018, Seventieth Session, (A/73/10), vol. II, Part Two, 138.
[595] *Kammerhofer* (n 469), 524.

stated that '[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.[596] The existence of only one of the constituent elements would not be sufficient for the formation of a new customary international law.

In the dissenting opinion of Judge Tanaka in the case of the *North Sea Continental Shelf*, he acknowledged that satisfying the two constituent elements is a very difficult and delicate matter.[597] He argues that the only way to satisfy the element of *opinio juris* is through the existence of State practice and the obligation of this practice felt in the international community. Seeking evidence as to the subjective motives of each example of State practice is an impossible achievement.[598] Ideally, States would clarify which practices they consider customary international law through some form of official statement, however, State assertions of *opinio juris* are not always readily apparent.

In order to avoid uncertainty, various forms of evidence accepted as *opinio juris* were outlined by the ILC at its seventieth session. These include but are not limited to 'public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international

[596] *North Sea Continental Shelf Cases* (n 469).
[597] *North Sea Continental Shelf Cases* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Dissenting Opinion of Judge Tanaka) [1969] ICJ Rep 3 [176], 'The repetition, the number of examples of State practice, the duration of time required for the generation of customary law cannot be mathematically and uniformly decided. Each fact requires to be evaluated relatively according to the different occasions and circumstances.'
[598] Ibid 176.

organization or at an intergovernmental conference'.[599] A further form of evidence identified is the failure of a State to react and therefore accept a specific State practice. In other words, if a State had the opportunity to react but instead tolerated the practice, that would be considered appropriate evidence of *opinio juris*.[600]

It could be the case that the two constituent elements be found in the same materials. For example, a decision made by a court, may serve as State practice as well as evidence as to *opinio juris*. Similarly, an official publication made by a State outlining State practice may at the same time also demonstrate the fact that it is obliged to act in that specific way and could therefore be seen as evidence of acceptance as law. However, when identifying a potential new customary international law, it is important that the elements are examined individually.[601]

Therefore, in order to prove the emergence of a new customary international law, the two constituent elements, namely State practice and its acceptance as law, must be proved independently. For the purpose of this thesis and in order to fulfil the first element, the aim will be to identify State practice where States have elected to remove the hazard itself whilst leaving the wreck undisturbed, as mentioned previously, the Nairobi Convention is concerned with removing the hazard and it does not necessarily require the removal of the wreck itself. When it comes to satisfying the second element, the aim will be to establish the acceptance of the State practice as law through the forms of evidence mentioned above.

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[599] *United Nations Yearbook of the International Law Commission* (n 594) 143.
[600] Ibid 143.
[601] Ibid.

6.1. State practice and *Opinio Juris*

6.1.1. SS Jacob Luckenback

During the early 1990's the coast of San Francisco was polluted by oil from an unidentified source. Following an initial investigation, the pollution was blamed on ships passing through the area. Oil continued to appear from time to time throughout the 1990s. In 2001, following a larger contamination which killed approximately 50,000 seabirds and polluted 100,000 square kilometres of the Californian coast the United States Coast Guard established a task force to identify the source.[602] Attention was turned to wrecks located in the surrounding area, and with the help of satellite imagery and oil fingerprinting the source was identified as the wreck of *SS Jacob Luckenback.* On 14th July 1953, the *SS Jacob Luckenbach*, whilst carrying military supplies for the Korean War and approximately 457,000 gallons of bunker oil, collided with the *Hawaiian Pilot* during poor conditions with low visibility and sank 17 miles off San Francisco Bay.[603] The wreck is protected under the National Historic Preservation Act 1966 and the National Marine Sanctuary Act due to its historical importance.[604] Therefore, the relevant authorities were faced with having to protect and preserve the wreck as provided for under national legislation whilst

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[602] National Oceanic & Atmospheric Administration, Screening Level Risk Assessment Package Jacob Luckenbach, (2013) https://nmssanctuaries.blob.core.windows.net/sanctuariesprod/media/archive/protect/ppw/pdfs/jacob_luckenbach.pdf (accessed 25 September 2022) 6.

[603] California Department of Fish and Wildlife, 'Jacob Luckenbach', can be accessed at https://www.wildlife.ca.gov/OSPR/NRDA/Jacob-Luckenbach (accessed 26 October 2021).

[604] National Historic Preservation Act 1966, Section 106 requires federal agencies to take into account the effects of their proposed actions on historic properties. The National Marine Sanctuaries Act empowers the Secretary of Commerce to designate and protect areas with special national significance due to their conservation, recreational, ecological, historical, scientific, cultural, archaeological, educational or aesthetic qualities as national marine sanctuaries.

still having to remove the oil that was polluting the marine environment. In order to comply with the national legislation, the removal operations had to follow specific steps as required by the acts in order to preserve and protect the historic wreck.[605] The total clean-up operation recovered approximately 85,000 gallons of oil and cost over USD 20 million, which was paid by the Oil Spill Liability Trust Fund (OSLTF). The OSLTF is managed by the United States Coast Guard's National Pollution Funds Center.[606]

6.1.2. USS Mississinewa

A further example is the wreck of the *USS Mississinewa*, which is of historic importance but has not yet met the 100 year threshold required by the UNESCO Convention. The *USS Mississinewa* was an oil tanker tasked with transporting fuel oil for the US Pacific Fleet which was anchored just off the coast of Micronesia. On 20th November 1944 she sank following an attack with a Japanese torpedo. The ship at the time was laden with millions of gallons of oil and went down with the tragic loss of 63 sailors. In August 2001, 57 years later, a typhoon hit the area causing oil to escape.[607] Following a further discharge in December 2001, it was decided that offloading the oil was essential in order to eliminate the continued threat posed by

[605] National Oceanic & Atmospheric Administration, The Shipwreck Jacob Luckenbach, https://sanctuaries.noaa.gov/maritime/expeditions/luckenbach.html (accessed 26 September 2022).

[606]Luckenbach Trustee Council, 'S.S. Jacob Luckenbach and Associated Mystery Oil Spills- Damage Assessment and Restoration Plan/Environmental Assessment' 1 November 2006, Prepared by California Department of Fish and Game, National Oceanic and Atmospheric Administration, United States Fish and Wildlife Service, National Park Service, http://www.gc.noaa.gov/gc-rp/luckenbach_final_darp.pdf (accessed 20 October 2022) i.

[607] Richard T. Buckingham, The Pollution Threat Posed by Sunken Naval Wrecks: A Realistic Perspective and a Responsible Approach,(2004) Volume 28, Number 3, 17, https://www.ingentaconnect.com/content/mts/mtsj/2004/00000038/00000003/art00006?crawler=true (accessed 10 September 2022).

the potential release of the remaining oil which would have a devastating effect on the surrounding area. In 2003, after careful examination and planning approximately 1.8 million gallons which represented 99% of the oil remaining on board was pumped out of the wreck, leaving the wreck intact.[608] This case led to the creation of the Pacific Ocean Pollution Prevention Programme (PACPOL), a regional programme that aims to prevent and diminish the potential devastating effects on the marine environment in the Pacific Islands region from oil spills arising from WWII wrecks. Most importantly and helpful towards the argument of this thesis, PACPOL recognises the significance of WWII wrecks and ensures that any measures taken to protect the marine environment will respect the sites as war memorials and gravesites.[609]

6.1.3. HMS Royal Oak

An equally important example of State practice is the case of the *HMS Royal Oak*. In 1996, a pollutant was found in the waters of Scapa Flow in the Orkney Islands, this particular pollutant was found to originate from the wreck of *HMS Royal Oak*, which was lost in October 1939 when she was attacked by the German navy.[610] From the 833 officers and crew on board only 375 survived making it one of the UK's largest official war graves that is classified under the Protection of Military Remains Act

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[608] Naval Sea Systems Command, U.S. Navy Salvage Report USS Mississinewa Oil Removal Operations (May 2004) https://www.navsea.navy.mil/Portals/103/Documents/SUPSALV/SalvageReports/Mississinewa%20Oil%20Removal%20Operations.pdf (accessed 20 November 2022).

[609] UNESCO Office Apia, *Safeguarding underwater cultural heritage in the Pacific: report on good practice in the protection and management of World War II-related underwater cultural heritage*, SM/C4/17/003-300, 5.

[610] *Michel et al* (n 403) 18.

1986.[611] The wreck was found to be leaking 1.5 tons of oil per week, endangering the marine environment and the local economy which relied heavily on the fish farms located in close proximity to the wreck.[612] By 2000 the *HMS Royal Oak* was accountable for 96 per cent of oil that was polluting the UK waters.[613] It was essential that measures had to be taken to confine the leak, however, the MoD was initially reluctant to disturb the war grave.[614] The Defence Minister, Dr. Lewis Moonie, who was responsible for both environmental issues and war graves stated that it 'is abhorrent that human remains in war graves are disturbed unless there is overriding imperatives of marine or environmental safety'.[615]

In the case of the *HMS Royal Oak*, which was recognised by the UK as a significant war grave, the UK initially tried various non-intrusive methods to contain the source of the pollution. These methods included the use of 500 sandbags that were placed over the areas that were seeping oil, the placing of a stainless-steel canopy over the wreck at a cost of USD 300,000 and they further attempted to place an oil absorbent boom over the wreck.[616] It is evident from the measures undertaken by the UK that it places an enormous significance and sanctity on UCH and war graves. As the above remedial activities failed and the danger to the marine environment persisted

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[611] The Protection of Military Remains Act 1986 (Designation of Vessels and Controlled Sites) Order 2017. The Protection of Military Remains Act 1986 allows protection from unauthorised interference to be afforded to wrecks that were in military service when lost. Statutory Instrument 2002 No. 1761 designated HMS Royal Oak as a protected site within the meaning of the Act.

[612] *Michel et al* (n 403) 18

[613] Ibid 19.

[614] Ian Oxley, Scapa Flow and the protection and management of Scotland's historic military shipwrecks (2002) 76 *Antiquity* 862.

[615] UK Parliament, Hansard, HMS Prince of Wales and HMS Repulse, Volume 355: debated on Wednesday 1stNovember2000,https://hansard.parliament.uk/commons/2000-11-01/debates/06555543-8656-47bb-a7d4-11fced884b61/HmsPrinceOfWalesAndHmsRepulse (accessed 20 September 2022)

[616] *Michel et al* (n 403) 19.

in 2001 the MoD commenced a multi-million dollar 'hot tapping' operation to remove the oil.[617] The hot tapping operation requires minimal invasion and it is considered to be the best possible option in order to eliminate the hazard that is endangering the marine environment whilst at the same time preserve the historic wreck *in situ*. It is also important to highlight that the *HMS Royal Oak* is considered to be a navigational hazard and is marked with a permanent buoy to identify its location.[618]

Further, the statement of the Defence Minister, Dr Lewis Moonie, suggests that the duty to protect the marine environment should override the duty to protect and preserve UCH when the marine environment is in danger of severe pollution. However, it is evident that interference with such wrecks is used as a last resort. This was also highlighted in a parliamentary debate on wreck management in which Mr Caplin, who was a Member of Parliament, highlighted the importance 'to work closely with industry to identify non-intrusive technological solutions' for removing oil from historic wrecks.[619]

6.1.4. German U-boat UB 38

As already identified, wrecks of cultural significance may prove to be a hazard to navigation years after they have sunk, this was the case when the wreck of WWI German U-boat *UB 38* became a navigational hazard in the Dover Strait 90 years

[617] Ibid 19; Hot tapping involves piercing the tanks that contain oil and fitting a valve that pumps the oil out into storage barges.
[618] *Michel et al* (n 403) 18.
[619] UK Parliament, Wreck Management, Volume 421: debated on Wednesday 19 May 2004, https://hansard.parliament.uk/commons/2004-05-19/debates/f3ce5587-f625-4643-b2d9-af16f99c1dae/WreckManagement (accessed 13 October 2022).

after its sinking.[620] Due to the ever-increasing size of modern ships and their deeper draught, the U-Boat had to be transferred to deeper waters in 2008. The salvage company, Titan, was tasked with relocating the wreck whilst showing the correct amount of reverence to the 27 submariners that lost their lives.[621] In order for this to be achieved, there was a close cooperation between the German government, Trinity House and the salvors in order to ensure that the relevant measures and protocols were maintained in order to protect and preserve the historical significance as well as respect that should be given to the human remains.

6.1.5. Princes Channel Wreck

A similar situation arose in 2003 when a shipwreck was located in the Princes Channel.[622] The Port of London Authority was investigating the possibility of dredging to deepen the Princes Channel for the navigational safety of the ever-increasing size of vessels calling at the port. The wreck identified was dated to 1574 therefore, a joint investigation was commenced between the Port of London Authority and Wessex Archaeology to look into the possibility of excavating and recovering the wreck.[623] The investigation took 10 months and included a detailed hydrographic survey and divers attending the site to determine the nature of the wreck. A decision was made, and the wreck was finally recovered on the grounds of safety to navigation. The involvement of Wessex Archaeology ensured that its

[620] *Dromgoole and Forrest* (n 89) 108.
[621] Crowley, 'Titan Salvage Works Jointly to Successfully Relocate the Sunken World War I German Submarine UB38', http://www.crowley.com/news-and-media/press-releases/titan-salvage-works-jointly-to-successfully-relocate-the-sunken-world-war-i-german-submarine-ub38/ (accessed 7 May 2019).
[622] Wessex Archaeology (n 578).
[623] Ibid.

historical importance was preserved by maintaining protocols for its adequate protection and preservation.[624]

6.1.6. Concluding Remarks

Recognising the historical and cultural importance of wrecks does not supersede the peril of environmental threats or the action needed to eliminate such threats. In many documented cases as outlined above where action to eliminate an environmental threat was deemed necessary, the requisite amount of attention was given to the cultural, historical or archaeological values as well as the respectful treatment demanded for maritime gravesites.[625] All examples mentioned in this chapter show a consistent State practice and it is evident that States feel an obligation to act in a certain way in order to protect and preserve UCH as far as possible when faced with a historically important hazardous wreck. Proving the existence of *opinio juris* is always a challenge, in other words proving acceptance of the State practice as law. However, as identified earlier in this chapter *opinio juris* can be established using a number of different forms of evidence including, public statements, government legal opinions and diplomatic correspondence. Further, when States tolerate a specific practice, this could also be considered appropriate evidence of *opinio juris.* The State practice identified in this chapter is backed by government statements and publications as outlined above. States are accepting actions being taken on UCH in order to protect the marine environment on the basis that appropriate measures are also being taken to protect the UCH. Given the disparity in international treaty law

[624] Ibid.
[625] *Delgado and Varmer* (n 402) 115.

on how to adequately protect the marine environment whilst at the same time preserving UCH, and the improbability of any convention gaining a uniform global endorsement, there are grounds to argue tentatively that the above State practice has started to develop a new rule of customary international law. Without a doubt there is a long way ahead before it is widely accepted as a new rule of customary international law.

Chapter 7. Conclusion

The focus of this thesis was the potential contradiction that may arise between a States' obligation to protect and preserve the marine environment and its duty to protect submerged wrecks of a historical or archaeological significance. The aim was to examine the current international conventions that govern the protection of UCH and the removal of potentially polluting and hazardous wrecks and identify which norm would take precedence in a situation where a State has both the obligation to protect the marine environment and a duty to preserve UCH.

The three relevant international conventions that have been the focal point of this thesis namely, UNCLOS, the UNESCO Convention and the Nairobi Convention were all created to address global concerns surrounding the world's oceans. In order to achieve the aim of the thesis, the three conventions as well as State practice and customary international law were analysed in order to reach a conclusion. As identified, UNCLOS was created to bring clarity to the nature, definition and extent of international jurisdiction in the various maritime zones and has been characterised as the 'constitution for the oceans'. Even though it is considered to be the most extensive and detailed treaty in international law, given the number of topics that made their way into the convention it was impossible to successfully cover every eventuality in detail and it was inevitable that legal disparities and ambiguities would arise. More specifically and as outlined in this thesis, UNCLOS failed to cover the topic of wrecks, while UCH received little attention as it was considered to be a relatively new field of research. However, today there is a far greater emphasis by the international community in the cultural and environmental aspects of wrecks and

in particular, the importance of safeguarding the marine environment as well as the protection of wrecks that constitute cultural heritage and/or maritime gravesites. This omission by UNCLOS led the way for the creation of both the UNESCO Convention and the Nairobi Convention. The main objective of the UNESCO Convention concentrates on adequate jurisdictional mechanisms to protect and preserve UCH, whilst the Nairobi Convention brings a uniform approach in maritime law to tackle the issue of wreck removal.

Each convention has its own merits and can adequately be applied to any given situation within its scope. However, the analysis conducted in chapter 4 identified that conflicting interests may arise in a situation where a historic wreck also poses an environmental threat. Article 192 of UNCLOS which requires State Parties to protect the marine environment could contradict the duty to protect UCH required under Article 303 when the polluting source is a historic wreck. The concerned State would therefore be faced with a dilemma between protecting the environment or preserving UCH. The Nairobi Convention and UNESCO Convention do not clarify this issue as neither address hazardous historic wrecks. Whilst the Nairobi Convention is dealing with an issue which is clearly of high importance, the historical and archaeological values protected under the UNESCO Convention should not be jeopardised. However, as the understanding increases that wrecks are an integral part of our heritage coincidently the likelihood that they may cause a significant environmental hazard also increases. This topic has been identified in this thesis as one of the shortfalls of the conventions, as they do not clearly address how historic shipwrecks that pose a hazard are to be dealt with creating a potential gap.

The thesis also delved into the issue of sovereign immunity afforded to sunken warships and State owned wrecks as neither convention expressly excluded from their application such wrecks. As demonstrated in chapter 5, that there is sufficient and consistent State practice and *opinio juris* to conclude that sovereign immunity and ownership is maintained when a warship or State vessel sinks. States through bilateral and multilateral agreements as well as through governmental official statements and case law attest that under customary international law they do not lose title of their sunken warships and State owned wrecks wherever they are located and irrespective of how much time has passed. It follows that should a hazard emanate from a sunken warship or State wreck under customary international law these wrecks are sovereign to their flag States, and therefore, the coastal State would not be able to rely on the Nairobi Convention until it obtains the prior approval of the flag State.

Chapter 5 of this thesis also identified the complex relationship between the law of salvage and hazardous historic wrecks and highlighted the potential conflict that may arise with the application of salvage on UCH. Salvage is embraced under the Nairobi Convention, whilst salvage operations are unlikely to be consistent with protecting and preserving UCH without appropriate regulations and guidance from archaeologists. A further inconsistency that may arise is in applying the Rules of the UNESCO Convention which only authorises interference with UCH for the purpose of its maximum protection and preservation, thereby implying that if UCH is removed for any other purpose, it would be contrary to the Rules of the UNESCO Convention.

Given the wide range of issues surrounding these wrecks it is not surprising that international law is ambiguous and open to differing interpretations. It is indisputable that the international law on hazardous historic wrecks is complex and in need of clarification. It is unlikely that any convention in the foreseeable future will be globally endorsed and therefore, it is very likely that further bilateral or multilateral treaties and new rules of customary international law will be formed.

Having identified the potential gap and the contrasts between wreck removal and the protection of UCH, the thesis finally examined State practice to determine whether a new rule of customary international law is being formed whereby when a wreck that is considered UCH poses a navigational or environmental threat the States endeavour to eliminate the threat whilst at the same time protect and preserve the UCH *in situ* using minimal interference. Whilst all examples outlined in chapter 6 depict consistent State practice there are grounds to argue tentatively that a new rule of customary international law is being formed. Further evidence of State practice and *opinio juris* will be needed before this rule of customary international law is widely accepted.

Chapter 8. Appendix

Appendix I – State Parties to the UNESCO Convention

State Parties to the UNESCO Convention as of 27 September 2022			
1	Albania	37	Kuwait
2	Algeria	38	Lebanon
3	Antigua and Barbuda	39	Libya
4	Argentina	40	Lithuania
5	Bahrain	41	Madagascar
6	Barbados	42	Mali
7	Belgium	43	Malta
8	Benin	44	Mexico
9	Bolivia	45	Micronesia
10	Bosnia and Herzegovina	46	Montenegro
11	Bulgaria	47	Morocco
12	Cabo Verde	48	Namibia
13	Cambodia	49	Nigeria
14	Costa Rica	50	Niue
15	Croatia	51	Oman
16	Cuba	52	Palestine
17	Democratic Republic of Congo	53	Panama
18	Dominican Republic	54	Paraguay
19	Ecuador	55	Poland
20	Egypt	56	Portugal
21	Estonia	57	Romania
22	France	58	Saint Kittis and Nevis
23	Gabon	59	Saint Lucia
24	Ghana	60	Saint Vincent and the Grenadines
25	Grenada	61	Saudi Arabia
26	Guatemala	62	Senegal
27	Guinea	63	Slovakia
28	Guinea-Bissau	64	Slovenia
29	Guyana	65	South Africa
30	Haiti	66	Spain
31	Honduras	67	Switzerland
32	Hungary	68	Togo
33	Iran (Islamic Republic of)	69	Trinidad and Tobago
34	Italy	70	Tunisia
35	Jamaica	71	Ukraine
36	Jordan		

Appendix II – State Parties to Nairobi Convention

State Parties to the Nairobi Convention as of 27 September 2022			
1	Albania	33	Luxembourg
2	Antigua and Barbuda	34	Madagascar
3	Bahamas	35	Malaysia
4	Belarus	36	Malta
5	Belgium	37	Marshall Islands
6	Belize	38	Morocco
7	Bulgaria	39	Nauru
8	Canada	40	Netherlands
9	China	41	Nigeria
10	Comoros	42	Niue
11	Congo	43	Oman
12	Cook Islands	44	Pakistan
13	Croatia	45	Palau
14	Cyprus	46	Panama
15	Republic of Korea	47	Portugal
16	Denmark	48	Romania
17	Estonia	49	Russian Federation
18	Finland	50	Saint Kittis and Nevis
19	France	51	Saint Lucia
20	Gabon	52	Saint Vincent and the Grenadines
21	Germany	53	San Marino
22	Guinea-Bissau	54	Sao Tome and Principe
23	Guyana	55	Saudi Arabia
24	Honduras	56	Sierra Leone
25	India	57	Singapore
26	Indonesia	58	South Africa
27	Iran (Islamic Republic of)	59	Sweden
28	Japan	60	Switzerland
29	Jordan	61	Togo
30	Kazakhstan	62	Tonga
31	Kenya	63	Tuvalu
32	Liberia	64	United Kingdom

Appendix III – State Parties to both the Nairobi Convention and the UNESCO Convention

State Parties to both the Nairobi Convention and the UNESCO Convention as of 27 September 2022			
1	Albania	16	Malta
2	Antigua and Barbuda	17	Morocco
3	Belgium	18	Nigeria
4	Bulgaria	19	Niue
5	Congo	20	Oman
6	Croatia	21	Panama
7	Estonia	22	Portugal
8	France	23	Romania
9	Gabon	24	Saint Kitts and Nevis
10	Guinea-Bissau	25	Saint Lucia
11	Guyana	26	Saint Vincent and the Grenadines
12	Honduras	27	Saudi Arabia
13	Iran (Islamic Republic of)	28	South Africa
14	Jordan	29	Switzerland
15	Madagascar	30	Togo

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